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LOUIS C. HAACK, APPELLEE, V. MIDWEST LIFE INSURANCE COMPANY OF LINCOLN, APPELLANT.

FILED JULY 14, 1936. No. 29640.

1. **Insurance: PROOF OF LOSS: LACHES.** When a delay of over six months in sending to an insurance company proof of the loss of the sight of an eye is excused on the ground that the insured was in hope he would partially regain such eyesight, he has not acted with diligence in the matter, and is guilty of laches.
2. ———: ———: **BURDEN OF PROOF.** The burden of furnishing proof of circumstances which excuse such delay in giving notice of the accident rests on the insured.

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

J. W. Kinsinger and *H. C. Henderson,* for appellant.

Baylor & Tou Velle and *George Healey, contra.*

Heard before GOSS, C. J., ROSE, GOOD, DAY, PAINE and CARTER, JJ., and YEAGER, District Judge.

PAINE, J.

This is a suit upon an accident policy for the loss of an eye. Defendant's motion for directed verdict was overruled, and a verdict returned for $890.04, with $250 attorney fees. Defendant appeals.

Plaintiff sued on an accident policy of $2,500 issued by defendant, for which the premium was $1.32 a month, and which provided for one-third of the face of the policy for the loss of an eye. Plaintiff ran the shoe shop in the basement of Magee's store in Lincoln, and while operating a sand emery wheel on a lathe on August 10, 1933, dirt and sand flew up in his face, and some of it lodged in his left eye. He tried to remove it, but the pain continued, and a day or so later he consulted Dr. Miller, who got out a particle of foreign matter. The pain grew worse, spread to his forehead, and on September 11 he went to an eye specialist, but there was no improvement in its condition, and in October he went to see Dr. Teal, an oculist. The left eye was bloodshot, and he could see very little out of it.

Ten days before Thanksgiving Dr. Teal performed an operation to relieve the pain. His original bruise to the eyeball had started a disease called glaucoma, which is an inflammation inside the eyeball, which becomes very painful by increasing the tension. Within three weeks after the operation the pain returned, and from the latter part of October, 1933, plaintiff has had no sight in his eye.

The plaintiff also carried a policy in the Central States Life Insurance Company, of St. Louis, which provided $100 for loss of an eye, and on December 14, 1933, plaintiff filled out proof for loss of his eye from glaucoma, which blank was sent for by J. T. Toohey, agent of the company, and the $100 check from this company was dated January 3, 1934, and cashed by the plaintiff within a few days thereafter.

The oculist called by the defendant testified that the loss of sight of the left eye, from which he was suffering at the time of the trial, was permanent and irrecoverable, and was the result of the accident of August 10, 1933.

The defense is based on the provision of section 44-604, Comp. St. 1929, and upon a paragraph of the policy itself, which provides: "4. Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury."

It becomes very important to know what notice the plaintiff gave to the defendant company. The evidence shows that somewhere around the 15th of February, 1934, plaintiff called at defendant's office in Lincoln and asked for a claim blank, stating that he wished to make out a claim for loss of eyesight. The blank was given him. A friend of his, Mr. Toohey, the insurance agent already referred to, helped him fill it out, after which he signed it, and that day or the next day mailed it to the company, and it appears in evidence as exhibit 5, and is stamped with the receiving stamp, "Received Feb. 17, 1934, Midwest Life Ins. Co., Lincoln, Nebr." This was the first time that plaintiff ever communicated with the defendant in any way with regard to the accident or loss of vision.

The only excuse offered by the plaintiff for not giving notice months earlier is found in his answer to question 730, on redirect examination by Mr. Healey, as to why he did not inform them prior to that date, and his answer was: "Well, I was in hopes that my eye—that I would regain my eyesight some."

The plaintiff claimed no lack of knowledge of the policy or its contents, or that he did not know at all times that the difficulty he was having with his eye followed from the accident of August 10, 1933. The plaintiff was at his bench working regularly, except for an occasional half-day off and the days he spent in the hospital before Thanksgiving. He was not mentally or physically incapacitated in any way from giving notice, but, with no excuse except that set out above, he failed to notify the company for six months and seven days after the accident, and for two months and three days after he had sent in a claim to another company for loss of his eye.

With these simple facts before us, let us examine a few of the cases in point. It is said in *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673, 87 N. W. 546: "The question of the sufficiency of the excuse offered, and the reasonableness of the time in which the act is performed, to be determined according to the nature and circumstances of each individual case; the beneficiary in all cases being required to act with diligence, and without laches on his part." Provisions as to the time in which notice is required to be given are not necessarily and in every instance to be literally complied with in order to prevent a forfeiture of the policy. In this case the accident occurred October 17, 1895, by falling off a windmill tower, which produced concussion of the brain, and the insured was totally deranged as a result thereof, and his wife by a mere accident found the policy, and notified the company on November 25, 1895, one month and eight days after the accident. Recovery was allowed in this case.

In *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285, 125 N. W. 535, it was held that, where a person was

injured so seriously as to render him unconscious and cloud his mind, his failure to furnish proofs was excusable. The facts show that the insured was injured October 16, 1903, and was unconscious for 15 days, during which time his friends notified the company of the accident, but the company refused payment because of failure to give affirmative proofs in writing within 30 days of all minor details, including affidavit of attending physician. The judgment was affirmed.

In *Kaneft v. Mutual Benefit Health & Accident Ass'n*, 102 Neb. 87, 166 N. W. 121, it appears that Mr. Kaneft struck his shin on the running-board of his automobile, causing an abrasion of the skin, on May 5, 1915, but went on about his business and sent no notice to the company, but blood poison developed, and he was taken to a hospital May 23, and died a few days later, and it was held that the time within which notice must be given does not begin to run until the injured party has reason to believe that his injury will constitute a claim.

There is an abundance of cases where the insured gave notice just as soon as he had ground to believe a claim would arise, such as suits by the insured against his insurance carrier, as illustrated by *George v. Aetna Casualty & Surety Co.*, 121 Neb. 647, 238 N. W. 36, and *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213, 147 N. W. 465, and while these and several similar cases are cited by the plaintiff, they are not applicable to the case at bar.

However, we have a recent case of *Campbell v. Columbia Casualty Co.*, 125 Neb. 1, 248 N. W. 690. Plaintiff slipped in pushing his automobile and fell, striking his sacrum on the curb, on January 18, 1931, and was totally disabled from that day to August 3, 1931, and partially disabled until November 2, 1931. He was in a hospital four weeks, and had two operations. Judge Rose, in writing the opinion, discusses the statute, section 44-604, Comp. St. 1929, and says that failure to give notice shall not invalidate claim if it shall be shown not to have been reasonably possible

to give such notice, which means that the stipulated notice, unless it is waived, is a condition precedent to the validity of a claim for accident insurance. The policy is not forfeited by want of notice, but a claim for accident insurance is invalidated if the statutory and contractual notice is not given. This accident happened January 18, 1931; notice was not given until June 13, 1931. There was no offer to prove a fact showing that earlier notice was not reasonably possible, or that he gave notice as soon as was reasonably possible. Judge Redick, after the evidence had been taken, dismissed the jury, and upon motion of defendant dismissed the action for want of timely notice required by the policy. Judge Rose said there is no error in the record, and it is strictly in point with this case.

Chief Justice Cardozo, speaking for the court, said in *Rushing v. Commercial Casualty Ins. Co.*, 251 N. Y. 302, 167 N. E. 450, where the required notice was delayed for a period of 22 days, that in such a case the burden of furnishing proof of circumstances which excuse the delay, and show it to have been reasonable, rests on the assured.

Other opinions supporting our discussion are *Ross v. First American Ins. Co.*, 125 Neb. 329, 250 N. W. 75; *Business Men's Assurance Co. v. Selvidge*, 187 Ark. 1040, 63 S. W. (2d) 640; *Wheeler v. London Guarantee & Accident Co.*, 180 La. 366, 156 So. 420.

We have reached the conclusion that plaintiff failed to give notice in accordance with the liberal terms of the statute, section 44-604, Comp. St. 1929, or the notice as provided in the terms of his policy. Plaintiff failed to sustain the burden of proving that he gave notice as soon as it was reasonably possible for him to give it, but the facts show that, while he finally gave a notice to another company, he delayed more than two months longer before giving the defendant notice.

In our opinion, the trial court should have sustained defendant's motion for a directed verdict, and the judgment is reversed and the case dismissed.

REVERSED AND DISMISSED.

GEORGE F. CLARK, APPELLANT, V. MEEKER DITCH COMPANY ET AL., APPELLEES.

FILED JULY 14, 1936. No. 29679.

1. Waters: EASEMENTS. Slight temporary deviations from year to year, in the course of a lateral irrigation ditch across a field, do not affect an easement therein, where the lateral has followed substantially the same course for more than the statutory period of ten years.
2. ———: ———. An agreement by the parties for an easement for a joint lateral across their lands is supported by their mutual covenants, which in themselves are a sufficient consideration.

APPEAL from the district court for Garden county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Halligan, Beatty & Halligan and *Lowell C. Davis*, for appellant.

Hoagland, Carr & Hoagland and *F. A. Dutton, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and KROGER, District Judge.

PAINE, J.

Plaintiff brought an action to enjoin the defendants from trespassing upon his land to put a lateral irrigation ditch across it, and for damages therefor. The trial court denied injunction and dismissed plaintiff's action, but decreed that defendant Sadie McCormick had an easement right to a lateral, and enjoined plaintiff from obstructing or interfering with her joint use thereof. Plaintiff appeals.

As the pleadings set out the facts, and the testimony of the witnesses of each party largely supported their allegations, we will set out a brief summary of the pleadings, which were 27 pages in length. George F. Clark filed his petition, and alleged that he is the owner of the northwest quarter of section 36, township 16, range 42, Garden county, Nebraska; that the defendant Meeker Ditch Company owns and operates certain irrigation canals and ditches in said county, and that the three men named as defendants are the board of directors of said ditch company; that the

last-named defendant, Sadie McCormick, is the owner of the southwest quarter of said section 36, adjoining his land on the south. The plaintiff alleges that these defendants are trespassing upon his property by constructing a lateral across his land to the quarter-section lying south thereof and owned by said Sadie McCormick. Plaintiff alleges that no right of way has ever been condemned for said lateral, nor has any right of way been purchased across his land, but unless restrained by the court the defendants will trespass as aforesaid. Plaintiff alleges he has no adequate remedy at law, and is entitled to the injunction prayed for, and asks damages of $200.

The defendant Meeker Ditch Company and its three directors filed an answer, setting out that the three named are its board of trustees. The answer admits that they are the board of directors of said company and that Sadie McCormick owns the southwest quarter of said section, and denies all other allegations in said petition.

For a further answer, the defendant Meeker Ditch Company alleges that the fee title of plaintiff's land, being the northwest quarter of section 36, is in the state of Nebraska, the same being school land, and that it is subject to the provisions of section 46-607, Comp. St. 1929, which gives such ditch company the right to occupy state lands and highways without compensation; that the Meeker Ditch Company was organized to take over the Graff & Meeker Irrigation Canal. The nine incorporators thereof included George F. Clark, the plaintiff, Cal McCormick, deceased, the husband of the defendant Sadie McCormick, and John J. Halligan, who owned land across the road to the west of the land in controversy. The purpose of the incorporation of the Meeker Ditch Company was to take over the Graff & Meeker Irrigation Canal, the nine incorporators being the owners of water rights out of and from said canal, and the purpose was to operate said canal at cost for the mutual benefit of all parties concerned, and not for profit. Said ditch company assumed the obligations as stated in the water deeds issued to the owners of water

rights by the original company. Said company delivered water from its canal at its headgates, and controlled and directed the supply of water, but said company never at any time owned or constructed any laterals, and never agreed to or did deliver any water to any place save at the headgates along its canal.

The Meeker Ditch Company also alleges that, at the time of the organization of said company, Cal McCormick was the owner and holder of a contract for the purchase from the state of the southwest quarter of section 36, and was also the owner of the southwest quarter of section 25, lying immediately north of the school section 36, and that George F. Clark was the owner of a contract of purchase from the state of the northwest quarter of said section. That water for the irrigation of the said three tracts of land was appropriated for irrigation, under the laws of the state of Nebraska, under an appropriation dated April 2, 1894, and known as docket No. 788, the same being water diverted from Blue creek through the Graff Canal, being the same canal referred to as the Graff & Meeker Irrigation Canal, and being the same canal now owned and operated by the Meeker Ditch Company, which main canal crosses the southwest quarter of section 25 from west to east, and delivered water for the irrigation of all three tracts of land herein described at a lateral box, or headgate, located on the southwest quarter of section 25, the lateral running first across part of section 25, of McCormick, then across the northwest quarter of section 36, of Clark, and then into the southwest quarter of section 36, of McCormick, and that said three tracts of land have been irrigated by water from said lateral since the construction of the main canal in 1894, without objection or interruption up to the year 1933. That upon the opening of the irrigation season of 1934, the ditch-tender of the Meeker Ditch Company, on request of Sadie McCormick, or her tenant, delivered and turned water for irrigation thereof into the lateral box on the southwest quarter of section 25, but Clark objected to the use of the lateral across his land. The directors en-

deavored to get some kind of an agreement between the plaintiff and Sadie McCormick whereby any difficulty would be avoided and the use of the water be not interrupted, but Clark and the officers of the organization went along the line of said lateral with employees of said ditch company at her request to see that no unnecessary damage was done by plowing out said lateral, which these defendants are informed was wrongfully and unlawfully filled in and interfered with by the plaintiff.

Sadie McCormick, for her answer, denies all of the allegations of plaintiff's petition and some of the allegations in the answer of the Meeker Ditch Company. She alleges that she has an easement and right to use the lateral across the northwest quarter of said section 36, in that the Meeker Ditch Company issued a water deed and agreed to carry water in its canals to the lands of this defendant, and that said water deed has been in existence for more than 20 years, and she alleges that the Meeker Ditch Company has during all of said time cleaned the ditch, and that plaintiff has permitted the Meeker Ditch Company and its employees, and this answering defendant and her employees, to go upon his land for the purpose of cleaning said ditch and making the ditch capable of transporting water to her land. She further alleges in her answer that the plaintiff, in consideration of becoming a party to the Meeker Ditch Company, agreed to receive water for the benefit of his land, and did waive any claim, loss, or damage by reason of laterals, and that said plaintiff, by virtue of this agreement, has used the water which ran across her land and her assignor's, to wit, the southwest quarter of section 25, under a mutual agreement of said parties to have the use of laterals and canals across each other's lands, which has continued for more than 20 years, without any objection, and that the plaintiff received, for the use of the lateral across his land, the use of the lateral across this defendant's land to the north of his land, and he is now estopped to claim that no right existed in the defendant to the use of said land.

Said Sadie McCormick further alleges that the Meeker Ditch Company did construct subsidiary canals and laterals, and did deliver the water through said laterals to her land, and did clean and keep said laterals in working order through their agents, and prays that the plaintiff's petition be dismissed at the cost of the plaintiff.

To these two answers replies were filed by the plaintiff, in which he denies allegations of the Meeker Ditch Company, and charges that the rebuilding of said lateral each year washed the lands of the plaintiff excessively, and it became impossible, without causing irreparable injury, to construct said lateral in the manner previously constructed, and he notified the parties that it would be impossible to accommodate Sadie McCormick any further, and that, in an effort to compromise, he offered to assist in constructing a fill for the purpose of conveying water to the lands by another route. The said plaintiff, in his reply to the answer of Sadie McCormick, denies that she has any easement across his land; denies that any water deed was ever entered into whereby she was to take her water across his land. Plaintiff further alleges that in years past on many occasions, for the accommodation of Cal McCormick and Sadie McCormick, and their tenant, he has permitted them to irrigate the west part of the southwest quarter from the individual lateral belonging to the plaintiff, but the use of said lateral was at all times subject to the control of the plaintiff, and at no time did they ever assert any right, title, or interest in such lateral.

After trial in the district court, in which the evidence of a number of witnesses was taken, and the arguments of the counsel, the trial judge entered judgment, finding generally in favor of each of the defendants and against the plaintiff, but finding that Sadie McCormick has acquired an easement and right to irrigation water carried to her southwest quarter of section 36 through the joint lateral. The court enjoined plaintiff from obstructing or preventing the use of said lateral, as Sadie McCormick or her grantees have acquired a prescriptive right to the use of

said lateral as now located. The district judge thereupon denied the injunction and dismissed plaintiff's petition, and enjoined the plaintiff from interfering with or obstructing the said Sadie McCormick in the use of said joint lateral.

It will be impossible to review all of the oral evidence taken at the trial, but we will comment upon a few points.

The defendants' exhibit No. 1 is the original water agreement signed by the plaintiff, Clark, and the president of the Graff & Meeker Irrigation Company on July 27, 1899. Paragraph 4 of this water agreement provided that the water should be delivered by the company into lateral ditches, and the manner of regulating the supply in such ditches should be at all times under the control of its board of trustees. In the eighth paragraph it was provided that, in case of any dispute between the different holders of water rights, such dispute should be referred to the superintendent or board of trustees, and their decision should be final. In the ninth paragraph the plaintiff waived any claim for loss or damage from leakage of any lateral.

Exhibit 6, attached to the bill of exceptions, is the water deed issued by the same company to Calhoun McCormick, and is dated June 22, 1910. The consideration was $480 for his land lying in sections 25 and 36, and the conditions and terms are much the same as the plaintiff's water deed just referred to.

The plaintiff testifies that the defendant should take water from a lateral along the east line of the northwest quarter of section 36, instead of demanding the right to use the old lateral which ran near the center of said tract of land, but this lateral along the east line was not constructed until many years after the other had been used. For many years the sod was growing in this lateral in dispute, and its banks were well defined, and then in 1933 tractors and plows were run across the lateral and broke down its sides and made it shallow in spots, and naturally it did spread out to quite a width as a result of driving implements over it, which the plaintiff claimed the right to do.

The evidence of the plaintiff shows that at times the course of the lateral in dispute was shifted slightly from year to year, according to the use made of the ground, but this shifting is very similar to that in the case of *Moll v. Hagerbaumer*, 98 Neb. 555, 153 N. W. 560, which concerned a private way across a tract of land in Dodge county, which had been used for more than 40 years. This court said that temporary deviations from a well-defined track do not necessarily affect an easement by adverse user where the travel has followed substantially the same course for more than the statutory period of ten years.

"The law does not, however, make it indispensable that the mode or manner of use should have been precisely the same through the period of prescription. On the contrary, immaterial changes or variations in the use do not destroy its identity." 9 R. C. L. 775, sec. 35, citing many opinions. See, also, *Brand v. Lienkaemper*, 72 Wash. 547, 130 Pac. 1147; *Wendler v. Woodard*, 93 Wash. 684, 161 Pac. 1043.

The trial judge decreed that the defendant, Sadie McCormick, has acquired an easement right to have irrigation water carried to her land through the lateral used jointly with the plaintiff, being the lateral across the west side of the northwest quarter of said section, and that she has been receiving water for her land as said lateral is now located, and the plaintiff is enjoined from interfering or obstructing the said defendant, Sadie McCormick, in the use of said joint lateral.

The evidence discloses that the original ditch company ran the main canal east and west through McCormick's southwest quarter of section 25, and that the lateral in dispute was built by the agreement of the respective landowners across this tract in section 25 for 30 rods, then across plaintiff's land in the northwest quarter of section 36, then carried further south to irrigate the defendant's land in the southwest quarter of section 36. This agreement was approved by the ditch company, and the parties in written water deeds agreed that, in case of any dispute, the decision of the directors of the ditch company should

be binding upon them. Some years later on, the ditch company officers have several times cleaned out this joint lateral. This lateral involved in this dispute is not to be confused with one put in many years later along the east side of the northwest quarter of section 36.

The owners of these various tracts of land entered into a covenant concerning this lateral in dispute, and agreed that it was to be built across their lands. This constituted an agreement for an easement, and such mutual covenants were sufficient consideration for the respective grants.

It is equally clear that the grants were not personal rights, but that the mutual agreements were covenants which were to run with the tracts of land.

It is also contended by plaintiff that the only rights the defendant had in this old lateral across plaintiff's land were permissive rights granted by the plaintiff. However, in our opinion, neither the evidence nor the law supports such a contention. The rights of the defendant, Sadie McCormick, were granted by specific agreement for a joint use of this lateral in section 25 over the McCormick land and in section 36 over the plaintiff Clark's land. The judgment of the trial court, continuing the joint use of this lateral as at first established, is right, and is hereby

AFFIRMED.

ARTHUR H. JONES, APPELLEE, V. MOTOR SECURITIES COMPANY ET AL., APPELLANTS.

FILED JULY 14, 1936. No. 29568.

Affirmance. On examination *de novo*, evidence in record held to sustain findings and decree of trial court.

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

Beghtol, Foe & Rankin and *J. E. Ray*, for appellants.

Stiner & Boslaugh and *Lester R. Stiner, contra.*

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

This is a suit in equity instituted in the district court for Adams county, by Arthur H. Jones, plaintiff, appellee, against Motor Securities Company, Robert O. Graham and Frank P. Uerling, defendants, appellants, for an accounting; Motor Securities Company, a corporation, was engaged in dealing in finance paper evidencing indebtedness secured by liens on automobiles. The outstanding stock of such company was owned by the plaintiff and the individual defendants; plaintiff Jones, 175 shares, defendant Graham, 225 shares, and defendant Uerling, 100 shares. From a decree in favor of plaintiff, defendants appeal.

The rights of the parties in this proceeding rest, to a considerable extent, upon the construction and effect of certain findings and the judgment entered thereon on April 15, 1933, in a prior action between the same parties.

By the decree in the instant case it was found and determined that plaintiff Jones was entitled to receive sums aggregating $16,450 as stock reduction payments, about which there appear no contention in this court. Such decree also found and determined that defendants Graham and Uerling had wrongfully diverted and paid to themselves as back salary for 1931 and 1932 the sum of $9,375, which should be restored; that they had received excessive payments as salary from January, 1933, Graham to August 15, 1933, and Uerling to March 31, 1934, aggregating $1,731, which should be restored; and that legal expenses were paid by the defendants from the corporate assets aggregating $1,175, which were excluded by the decree of April 15, 1933, which should be restored; said three items aggregating $12,281. The court found said sum of $12,281, plus $2,669.58 cash assets of company, aggregating $14,950.58, was for distribution; to plaintiff, $5,232.71, defendant Graham, $6,727.75, and defendant Uerling, $2,990.12.

With reference to the item of $9,375: The judgment in

a former case, No. 9114, of district court for Adams county, involving same parties, entered on April 15, 1933, is founded upon a number of findings of fact, with the ultimate finding that the plaintiff in that case, Jones, was entitled to recover $12,490, for which a judgment was rendered.

On May 1, 1933, the directors of Motor Securities Company held a meeting, there being present Robert O. Graham, Margaret L. Graham and Frank P. Uerling, at which they adopted a resolution as follows:

"Resolved, that inasmuch as the district court for Adams county, Nebraska, has fixed the salaries of the executive officers of the company for 1931 and 1932 in a decree rendered April 15, 1933, and has further made certain findings as to dividends; and

"Whereas, it is the desire of the directors to follow the direction of said decree as long as the same remains in effect;

"Now, therefore, be it resolved, that the salaries of the executive officers, to wit, R. O. Graham and F. P. Uerling, be fixed for the year 1933 as provided in said decree, to wit, R. O. Graham, Seven Thousand Four Hundred Twenty-five Dollars ($7,425) per year; F. P. Uerling, Five Thousand Two Hundred Dollars ($5,200) per year. The officers are directed to pay to R. O. Graham and F. P. Uerling any sums due them for 1931 and 1932 for salaries as fixed by said court and not heretofore paid them."

Pursuant to the foregoing resolution, there was paid to defendant Graham, as balance 1931 salary, $1,200, as balance 1932 salary, $4,800, and to the defendant Uerling, as balance 1931 salary, $675, and as balance 1932 salary, $2,700; these sums aggregating $9,375, the first sum the court ordered restored. It is contended by the defendants that these payments were made pursuant to decree of April 15, 1933, and said resolution above set out; that they were for back pay, plus a 35 per cent. dividend, minus what Uerling and Graham had already drawn as salary.

In answer to such contention, the appellee urges, first,

that the decree of April 15, 1933, Case No. 9114, does not fix the salaries for the years 1931 and 1932; and, second, if the decree should bear such construction, such issue was not presented by the pleadings and the decree to that extent would be invalid. The resolution of the board of directors heretofore set out recites that the court "has fixed the salaries of the executive officers of the company for 1931 and 1932 in a decree rendered April 15, 1933." Is that conclusion correct? Particular reference is made in appellants' brief to paragraphs 4, 5, 6, 7, 8, 11 and 16 of the findings of the court in such former decree. By paragraphs 4, 5 and 6 of such findings the court sets out the method found to have been adopted and used in the distribution of the earnings of Motor Securities Company during 1929 and prior years. By paragraph 7 of the findings the method adopted for the distribution of the earnings for 1930 is set forth with a showing of the amount paid the defendants, and the payment to the plaintiff of the amount due him after suits were instituted by him to recover the same; and further recites: "There is this left for further consideration, the acts of the parties, more particularly in the conduct of their business for the years 1931 and 1932." Paragraph 8 recites jurisdiction of the court, and that it will determine as completely as may be the rights and liabilities of the parties concerning the subject-matter. By paragraph 9 it is found that at the annual stockholders' meeting in January, 1931, the actual owners of the common stock were Jones, Graham and Uerling. "The stock placed in the name of defendant John D. Carey was in truth and still is the stock of defendant Graham, and Carey's ownership and standing as a stockholder and officer were at all times ostensible only and for the purpose of assisting in the exclusion of the plaintiff, Jones." Paragraph 10 recites "that in said stockholders' meeting and in the subsequent conduct of the business the plaintiff, Jones, was by the individual defendants wrongfully excluded from the participation therein to which he was entitled." Paragraph 11 states "that the method adopted and used prior to the

years 1931 and 1932 for the distribution of profits or accumulations other than the regular 6 per cent. dividends to the holders of common stock has not been lawfully changed and the individual defendants have continued to use the same for distribution to themselves but have excluded the plaintiff therefrom." Paragraph 12 states "that the plaintiff is entitled to distribution and payment thereof to him on the same basis for the years 1931 and 1932." Paragraphs 13, 14 and 15 refer to matters not involved in this appeal; while by paragraph 16, the court finds: "That under the schedule in force in the years 1931 and 1932 the actual annual salary proportion to defendant Graham is $7,425, and to defendant Uerling is $5,200. The excess over such sums, respectively, is distribution of profits or surplus."

Then by paragraph 17, the court makes the ultimate finding that the plaintiff Jones should be paid, primarily from the funds of the Motor Securities Company, his proper distribution of the profits or accumulations for the years 1931 and 1932, aggregating, with interest, the sum of $12,490. On these findings the following judgment was entered:

"It is therefore now considered and decreed by the court that within 20 days the plaintiff Arthur H. Jones have, receive and recover from the defendants Motor Securities Company, Robert O. Graham and Frank P. Uerling, as aforesaid, the said sum of $12,490, with interest at 7 per cent. per annum thereof from this date.

"That the defendants Robert O. Graham and Frank P. Uerling within 20 days pay and restore to the Motor Securities Company the said sum of $5,000 with 7 per cent. from this date and receive from the corporate defendant the evidence of indebtedness of the James Chevrolet Company and proper assignment without recourse thereof.

"That defendants Robert O. Graham and Frank P. Uerling pay the costs of this case."

It will be noted that the court does not carry the findings into the judgment separately; the findings prior to para-

graph 17 merely leading up to the ultimate finding contained in paragraph 17 on which judgment was entered. The judgment does not purport to fix or determine any salaries, nor provide for the payment to or recovery of any back salary by any officer, and no reference is made thereto in any way; nor would the findings of the court justify such a judgment. As relating to the years 1931 and 1932, the findings of the court are set forth in the quotations from paragraphs 11, 12 and 16, just set out; with the ultimate finding for the recovery by plaintiff of the $12,490. This falls far short of a finding and judgment or decree for back salary due to the defendants Graham and Uerling, or that they were entitled to receive any further sum on account of salaries for 1931 and 1932. That judgment speaks for itself. Before the court in the instant case could find that anything further was due Graham and Uerling on account of salaries, it would be necessary to go back of the findings and judgment in Case No. 9114, and look into the evidence in that case, which cannot be done in this action. The construction placed by the board of directors upon the findings and judgment of April 15, 1933, in Case No. 9114, shown by the resolution of the board, is clearly erroneous. Having reached the conclusion that the judgment of the district court entered in the former case, No. 9114, did not fix the salaries of executive officers of the Motor Securities Company for the years 1931 and 1932 or authorize the payment to them of any back salaries for those years, it becomes unnecessary to consider whether such issue was presented by the pleadings in that case.

As to the item of $1,731: At the regular meeting of the board of directors held January 3, 1933, the salary of Robert O. Graham, president, was fixed at $575 a month, and the salary of Frank P. Uerling, secretary, at $335 a month. After decree in the former case, No. 9114, was entered on April 15, 1933, the board of directors, on May 1, 1933, adopted the resolution heretofore set out.

After the adoption of that resolution salaries were paid to Graham at $618.75 a month dating back to January 1,

1933, and continuing to August 15, 1933, or for seven and one-half months; and to Uerling at $433.33 a month dating back to January 1, 1933, and continuing to April 1, 1934, or for fifteen months. Graham thus received $43.75 a month as salary in excess of the rate fixed by the board of directors January 3, 1933, for the period of seven and one-half months, and Uerling received $98.33 as salary in excess of the rate fixed by such board on January 3, 1933, for the period of fifteen months.

The resolution of the board of directors under date of May 1, 1933, fixing salaries of executive officers of the company, purports to have been made in carrying out an order of the court in decree of April 15, 1933; that is, it assumes that for the years 1931 and 1932 the salaries were fixed by the decree in the former case; and appears to conclude such officers should be allowed the same salaries for the year 1933. In this the board of directors were acting on a wrong premise. We have already found that such decree did not fix the salaries for such officers for the years 1931 and 1932. No mention is made therein of salaries for the year 1933. Appellants in their brief state: "It is true that in January the directors fixed the salaries of these men at a somewhat lower amount, but it is within the discretion of the directors to revise and modify their findings." And the suggestion is made that the increased salaries were justified by the fact that the officers were engaged in a difficult service liquidating a company whose business, due to the attitude of a dissatisfied minority stockholder, and because of the depression, was growing less and less. According to record the earnings decreased from $31,529.56 in 1931 to $10,621.85 in 1933, during which year it ceased to do any finance business; and after June of that year, the only business requiring attention was the collection of finance paper. With knowledge of the decreasing business of the company, the directors, in January, 1933, fixed salaries at $575 and $335; then, after the judgment in the former case, entered on April 15, 1933, the board, assuming to act by virtue of that judgment, increased the salaries

dating back to January 1, 1933. We conclude that the decree did not justify the action of the board of directors, and that under the conditions existing the increase in amount of salaries was not warranted.

As to the item of $1,150: In the former decree, finding number 19 provides: "That the defendants Graham and Uerling shall be taxed with the costs of the case, and as between the parties no expense on account of this litigation shall be charged to the corporate defendant or paid from its funds."

The judgment entered on that finding provides: "That defendants Robert O. Graham and Frank P. Uerling pay the costs of this case." Defendant Uerling, called as a witness by plaintiff, testified: "Q. Mr. Uerling, in this former accounting case of Jones v. Graham was there any part of the expense of that lawsuit paid by the corporation and not reimbursed, court costs, attorney fees and otherwise? A. Yes, sir. Do you want the amounts? Q. Yes. A. February 7, 1931, $500; August 1, 1932, $125; June 9, 1933, $150; August 12, 1933, $250; December 12, 1932, $125; September 27, 1933, $25. Q. That was all? A. Yes, sir." On cross-examination by his own counsel: "Q. Mr. Uerling, these amounts you just read, who were they paid to? A. Part of that was paid to Beghtol & Foe and part of it to J. E. Ray. Q. You were asked if those were paid on account of the former accounting case and you said they were. What case did you mean; two cases have been tried before, both for an accounting? A. Well, the first item of $500, February 7, 1931, was a retainer fee. Q. What for? A. Paid by the company to have an attorney to consult with in matters of law. Q. That was paid to me? A. Yes, sir. Q. What was the next item paid for? A. For that $1,500 case. Q. Did the company pay out any fees to Mr. Ray or myself because of this one case tried here in which the court said the company should not pay the attorneys' fees, but that you and Mr. Graham should pay them? A. No, sir."

It was stipulated that former Case No. 9114 was com-

menced January 17, 1931. The $1,500 case, No. 9526, was commenced August 18, 1932. No other witness testified as to these items and no other evidence was submitted thereon. The parties to whom the payments were made were present and might have testified. The first item of $500 was paid 21 days after the commencement of Case No. 9114. The $1,500 suit, No. 9526, was commenced August 18, 1932. On redirect examination: "Q. What items or item was paid on account of $1,500 lawsuit, if any, as distinguished from the accounting case of Jones v. Graham, Uerling, Carey and the Motor Securities Company? A. All the other items outside of the $500." This, if correct, left $675 paid for attorneys' fees in the $1,500 case, the first item of $125 being paid by defendants prior to the commencement of that action against them. Considering the interest of the witness as a party adverse to the plaintiff and the circumstances disclosed by the record, the evidence of the witness Uerling, on his direct examination, is the more satisfactory. We conclude that this item of $1,150 should be restored by defendants.

Finally it is contended that the court erred in finding that the defendant Uerling must liquidate the corporation without compensation. The trial court found:

"6. * * * That the assets have been converted into cash which was accomplished by April 4, 1934, only distribution remains necessary, and the compensation hereinbefore allowed to defendants is sufficient to cover all services in connection therewith or subsequent to the dates of August 15, 1935, for defendant Graham, and March 31, 1934, for defendant Uerling."

"8. That there remains otherwise on hand with the defendants and assets of the defendant company the sum of $2,669.58, cash, in addition to which the defendants Graham and Uerling shall restore and pay said sums of $9,375, $1,731 and $1,175, thus making undistributed assets in the sum of $14,950.58, distributable and payable as follows: To plaintiff $5,232.71; to defendant Graham (which includes also representation of the stock some time held in

the name of Margaret L. Graham) $6,727.75; and to defendant Uerling the sum of $2,990.12."

Evidence was offered of the condition of the company accounts on October 18, 1934. Direct examination of defendant Uerling: "Q. What were the items of the deposits of the company at that time? A. Hastings National Bank, $2,669.58. That's all. Q. That was cash? A. Cash in bank. * * * Q. Then all the assets have been liquidated. A. Yes; everything has been collected." Cross-examination: "Q. Have you performed any services for this company since April? A. I have attended to the collections to this date. Q. Have you received any pay for that? A. Not any. Q. That is a matter to be adjusted at some future time? A. Yes, sir. Q. Have you succeeded in reducing the assets of the company to cash? A. Yes, sir. Q. Without loss? A. Yes, sir." Redirect examination: "Q. Do you know how much has been collected from the assets of the corporation since that date, commencing with April, 1934? A. March 31, 1934, notes receivable, balance, $2,457.20. * * * Q. That was the total amount of the notes which this corporation owned then which hadn't been liquidated? A. Yes, sir."

Uerling was paid a salary until March 31, 1934. He testified that work was more burdensome because collections were harder. The amount of time expended, effort required or value of services performed after March 31, 1934, in making the collections is not shown. It appearing that at the time the decree was entered there was nothing left to be done except to make the distribution in compliance with the order of the court, defendant seems to have been well paid for services rendered. Under the conditions shown by the record, a finding for any further salary or compensation would not be justified. Having reached the same conclusion as did the district court, the decree of that court is

AFFIRMED.

GOOCH FOOD PRODUCTS COMPANY ET AL., APPELLANTS, V. CHARLES ROTHMAN ET AL., APPELLEES.

FILED JULY 14, 1936. No. 29688.

1. Licenses. Under section 16-206, Comp. St. 1929, each city of the first class having more than 5,000 and less than 25,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said section.
2. ———: CLASSIFICATION OF OCCUPATIONS. A city of the above class may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary.
3. ———. An ordinance imposing an excise or a license tax upon a business or occupation will be upheld when it is definite in its application to those upon whom the burden falls, reasonable in amount and uniform as to the class upon which it operates.
4. ———: VALIDITY. The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears *prima facie* reasonable in amount, courts of justice should not declare the ordinance void, unless it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory.
5. ———: ———. Such an ordinance is not void because it imposes a tax on a business not wholly carried on within the city imposing the tax.

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

James L. Brown, William Niklaus and *J. E. Mockett,* for appellants.

Benton Perry and *Calvin Webster, contra.*

George R. Mann, Dwight W. Dahlman and *Paul E. Haberlan, amici curiæ.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and KROGER and IRWIN, District Judges.

IRWIN, District Judge.

This is a suit in equity to enjoin the enforcement of an ordinance of the city of York, Nebraska. York is a city of the first class and derives its governing powers under chapter 16, Comp. St. 1929. The individuals named as defendants were officers of the city at the time the suit was instituted.

The plaintiffs filed their petition in the district court for York county, Nebraska, on December 13, 1934, seeking to enjoin the defendants from enforcing articles II and III, ch. 15, of General Revision Ordinance No. 700, of the city of York, which it is conceded was regularly adopted by said city in October, 1934. Plaintiffs prayed for a restraining order pending hearing on temporary injunction; for temporary injunction; and that upon final hearing said temporary injunction be made permanent.

A restraining order was issued by the county judge of York county on December 13, 1934. By stipulation of the parties and order of the district court on January 7, 1935, the restraining order was continued in force until the final determination of the case.

The cause was heard upon the issues joined in the district court on June 5, 1935, and on said date the trial court entered its decree and adjudged that the plaintiffs had no cause of action against the defendants; the restraining order and injunction prayed for by the plaintiffs was denied; the court canceled and set aside the restraining order and injunction theretofore entered and dismissed the petition.

Motion for new trial was overruled and the plaintiffs have appealed therefrom and from the order of the district court made and entered, as aforesaid, on June 5, 1935.

The appellants contend that the judgment contravenes and is in violation of the provisions of the Constitution of Nebraska and the Constitution of the United States which, in substance, may be said to be that ordinance No. 700 of said city is arbitrary and discriminatory in character and is not uniform in its classifications; that it is so excessive

as to be confiscatory; that the ordinance is void because of indefiniteness; and that the judgment is contrary to and is not supported by the evidence, and is contrary to law.

The greater part of the evidence contained in the record is by way of stipulation and shows that the plaintiffs are Nebraska corporations having their respective places of business in Lincoln, Lancaster county, Nebraska; that they are engaged in the manufacture, sale and distribution of bread, pastry and other baked goods at wholesale in the state of Nebraska and in the trade area including York county; that the only business the plaintiffs carried on in the city of York has consisted of the sale of their products to retail merchants within the city and the delivery of the same by automobile truck, and that such sale and delivery has continued for more than the last past five years; that the same method of sale and delivery is carried on by plaintiffs in a large number of other Nebraska towns within the trade area; that plaintiffs have established a large demand for their products in said city. It further appears by the stipulation that the city of York does not require by ordinance the payment of occupation tax from persons, firms or corporations engaged in selling at wholesale to retail merchants other common food products and delivering the same by trucks, automobiles or other vehicles, nor from jobbers who have their respective places of business in said city and who sell food products to retail merchants in said city; nor from those who have their places of business outside said city and sell their products through traveling salesmen, United States mail, or by telephone or telegraph communications, and who subsequently deliver such filled orders by means of automobile, truck or other vehicle.

That the use made by plaintiffs of the streets of the city in connection with carrying on of their respective businesses as aforesaid has been to enter and leave said city and to stop for a short period near the places of business of the customers of plaintiffs.

Evidence adduced on behalf of plaintiffs shows that the

daily gross sale of baked products in the city of York of each plaintiff is approximately $3 and the daily net profit on those sales would be approximately 15 cents to each plaintiff.

The city of York derives authority for its ordinance No. 700 under section 16-206, Comp. St. 1929, which provides that cities of the first class, 5,000 to 25,000 population, shall have power to levy an occupation tax "to raise a revenue by levying and collecting a license or occupation tax on any person, partnership, corporation or business within the limits of the city and to regulate same by ordinance, except as otherwise in this chapter provided. All such taxes shall be uniform in respect to the class upon which they are imposed."

That part of ordinance No. 700 with which we are concerned is chapter 15, art. II, which provides: "For the purpose of raising a revenue there is hereby levied an occupation tax upon each and every occupation and business carried on within the corporate limits of the city of York, Nebraska, as hereinafter specified and enumerated; and every person, firm, association or corporation carrying on the occupation or business herein specified within the limits of said city shall pay to the city clerk annually the sum hereinafter named, as a tax upon the occupation or business." Occupations and kinds of business are then enumerated and the different amounts of tax levied against each are set forth and include "bread, pastry or bakery products, sellers of at retail, from truck, automobile or other vehicle, per day $1.00; same, per year $10.00; same, sellers of at wholesale per day $2.00; same, per year $10.00."

Article III of chapter 15 provides the general penalty for violation of the provisions of said chapter 15.

The ordinance by its terms levies an occupation tax upon occupations and kinds or classes of business carried on within the city, and it has repeatedly been held by this court that under the Constitution of this state the legislature may by general law confer upon cities and villages the

power to levy and collect occupation taxes. *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, 58 N. W. 415. And to be valid, a city ordinance imposing an excise or a license tax upon a business or an occupation must be definite in its application to those upon whom the burden falls, reasonable in amount and uniform as to the class upon which it operates. *Petersen Baking Co. v. City of Fremont*, 119 Neb. 212, 228 N. W. 256.

The appellants contend that the York ordinance discriminates in favor of those vendors of common foodstuffs other than bread; those who sell bread, but do not deliver by truck, automobile or other vehicle; and those vendors of bread who do not sell and deliver the product simultaneously by means of truck, automobile or other vehicle. From the part of the ordinance which we have heretofore quoted this contention might seem to be sound. However, the same article of chapter 15 also provides for the levy and collection of an occupation tax upon: "Fruit, vegetables, or other commodities, dealers in, selling or offering for sale, to persons, firms or corporations, for purposes of resale, from railroad car, truck, automobile or other vehicle, per day $2.00. Same, per year $10.00."

Thus it is evident that the ordinance does not discriminate in favor of vendors of foodstuffs other than bread as is advanced by appellants. Neither does it exclude those who sell bread, delivering from truck, but who do not sell from truck. The ordinance includes in one classification for the purpose of taxation all those who sell at wholesale bread or other bakery products who solicit, sell and deliver their products from truck, automobile, or other vehicle, whether they are residents or nonresidents of the city. Those vendors of bread who both sell from and deliver by truck are included. There is no distinction made in the ordinance between vendors of other commodities and vendors of bread and bakery products who use the same method of sale and distribution, although it would appear from the stipulation filed in the district court that such a distinction had been made therein. Although strongly contended by

appellants, both in argument and in their brief, we fail to find any provision of the ordinance which provides for the levy of a tax on vendors who make a sale and deliver simultaneously. The language of the ordinance is: "Sellers of at retail, from truck." The tax is imposed on the sellers and not on the method of delivery. The distinction drawn by appellants for the purpose of showing that the classification of those who carry on business in the same manner as did the plaintiffs is an arbitrary selection and not a lawful classification under the ordinance is not convincing when the ordinance is considered in its entirety.

As is said in *Seabolt v. Commissioners of Northumberland County,* 187 Pa. St. 318, 41 Atl. 22, and followed by this court in *Erwin v. City of Omaha,* 118 Neb. 331, 224 N. W. 692: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." This court in *Norris v. City of Lincoln,* 93 Neb. 658, 142 N. W. 114, said: "When a city charter authorizes a municipality to require by ordinance a license tax of persons engaged in any occupation, trade, or business carried on within the corporate limits of the city, the municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary."

It is next contended that the ordinance is excessive and confiscatory. The amount of tax which applies to the appellants as fixed by the ordinance in specific terms is $2 a day on the daily basis, and $10 a year on the yearly basis. The evidence shows the net daily profit on the sales made by each plaintiff in York to be about 15 cents. The amount of tax sought to be collected from each plaintiff was on the yearly basis and we do not think that any court should say as a matter of law that an occupation tax of $10 a year

upon each person, firm or corporation conducting a business within the limits of the city of York, in the same manner and employing the same methods as did the plaintiffs herein, is manifestly unreasonable or confiscatory. Neither must the amount of the tax be governed by the profits of the business taxed.

"The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears *prima facie* reasonable in amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory." *City of Grand Island v. Postal Telegraph Cable Co.*, 92 Neb. 253, 138 N. W. 169. The evidence in this case fails to show that the license charge is such as to make it excessive or confiscatory, and in the absence of any such showing the ordinance must be upheld. Contrary to the contention of appellants, we consider that the charge fixed by the ordinance is entirely reasonable, and, considering the expenses incident thereto which fall upon the city, the contention that the ordinance is confiscatory is without merit.

It is further urged by appellants that the ordinance is ambiguous and so indefinite as to be void. *Petersen Baking Co. v. City of Fremont, supra,* is cited, in which it is said in the body of the opinion: "Its application should not be left by city lawmakers to the whim or caprice of taxing or collecting officers. A valid excise or license tax depends on a lawful exercise of legislative power—a power not committed to administrative or police officers." We fail to find any provision of the ordinance under consideration which does not comply with the requirements laid down by the above case. It is difficult to conceive wherein the York ordinance might be considered indefinite. The kind of business to be taxed is definitely named and the amount of the tax to be charged is definitely stated. The applicant, should he desire to conduct the business for one day only,

may pay the charge fixed by the ordinance of $2. If applicant desired a license for a year he may pay the fixed charge of $10. In either case the amount to be charged the applicant is definitely fixed by the ordinance and no officer of the city is called upon to exercise his discretion in regard thereto. The collecting officers are not called upon or required to define any part of the York ordinance nor to use any discretion in the amount to be collected from the applicant because, as we consider it, no such requirements are necessary.

The ordinance in plain, unambiguous language meets every requirement of the law so far as being definite is concerned, and the fact that in this particular case the tax collector granted a half-year permit at a charge of one-half the yearly basis stated in the ordinance does not make the ordinance indefinite or void.

It is further urged that appellants pursue but a part of their business in York and therefore do not fall within the class sought to be taxed under the ordinance, but the decisions of this court in *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, 76 N. W. 1065, and *Western Union Telegraph Co. v. City of Fremont, supra,* are adverse to the appellants' position.

We are of the opinion that we have disposed of the constitutional objections that have been raised to the ordinance by our conclusions on the other assignments of error. When we consider the ordinance in the light of the precedents established by the decisions of the court of this and other states, we conclude that the ordinance which we have under consideration is definite in its application to those upon whom the burden falls, that it is not excessive or confiscatory, but, on the contrary, is reasonable in amount, and that it is uniform as to the class upon which it operates.

The judgment of the trial court is correct and is

AFFIRMED.

IN RE ESTATE OF ANNIE KOTHE.*
MARIE GONSCHIOR, APPELLEE, V. HENRY DREWES, SR., ET AL., ADMINISTRATORS, APPELLANTS.

FILED JULY 14, 1936. No. 29696.

1. **Attorney and Client:** SURETIES: ESTOPPEL. A practicing attorney should not sign a bond in a legal proceeding as surety and such bond should not be approved, but if it is approved the attorney is estopped from asserting its invalidity. Comp. St. 1929, sec. 12-114.
2. **Courts:** SUPERSEDEAS BONDS: ESTOPPEL. Where the county judge, in a probate matter, approves an appeal bond without the required affidavit of qualification and justification of sureties, a surety on the bond will be estopped from alleging its invalidity, notwithstanding the fact that the statute mandatorily requires such an affidavit. Comp. St. 1929, secs. 20-2223, 20-2224.
3. **Appeal.** Statutory requirements relating to appeals, and more especially in appeal bonds, are mandatory and a failure to conform substantially thereto forfeits one's right to appeal.
4. **Courts:** APPEAL. The constitutional provision declaring that the right to be heard in all civil cases in the court of last resort, by appeal, error or otherwise, shall not be denied, does not prohibit the legislature from prescribing reasonable rules and regulations for the review of a cause by appeal, such as requiring a bond to be given as a prerequisite of an appeal from the county court to the district court in a probate matter. Comp. St. 1929, sec. 30-1603; Const. art. I, sec. 24.
5. ———: SUPERSEDEAS BONDS: APPROVAL. The legal inference of approval of an appeal bond by a county judge who has accepted the bond, marked it filed, and spread it upon the docket, should be limited to a bond conforming to the statute. Comp. St. 1929, sec. 30-1603.
6. ———: ———: OBJECTIONS. A lack of formal approval of an appeal bond, on appeal from the county court in a probate matter, cannot be taken advantage of by appellee in the district court except by specific objection. Comp. St. 1929, sec. 30-1603.
7. **Executors and Administrators:** SUPERSEDEAS BONDS: JURISDICTION. Where an appeal bond, on appeal from the county court on accounts of administrators, was given with but one surety and was otherwise defective, and where, notwithstanding the appellee's repeated and specific objections in the district court, appellant repeatedly refused to amend the bond, the

*Opinion withdrawn. See opinion p. 780, *post*.

district court had no jurisdiction and should have sustained motions for nonsuit and dismissal. Comp. St. 1929, sec. 30-1603.

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

Rain & Rain, L. R. Doyle and *Frank L. Rain,* for appellants.

John C. Hartigan, H. C. Schoening and *Henry J. Beal, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

LANDIS, District Judge.

Marie Gonschior, heir at law, appealed to the district court from a decree by the county court on the accounts of the administrators of the estate of Annie Kothe, deceased. The administrators appeal to this court from a denial by the district court to nonsuit the appellee heir at law herein because of defective appeal bond and failure of filing pleadings making issues on appeal.

The bond furnished by appellee herein to perfect the appeal from the county court to the district court is defective in the following particulars: No formal approval appears to have been made of the bond by the county judge; only one surety was offered; the single surety was an attorney of record; and no affidavit of qualification and justification of the surety was given.

The defective appeal bond was brought to the attention of the counsel for the appellee and the trial court first by motion for nonsuit, assigning as one of the reasons "that the bond does not conform to the requirements of the statute." The attorney who was surety on the bond then asked leave to withdraw objections to administrators' report. Motion for nonsuit was renewed. Then motion to dismiss was made "for the reason the bond now on file does not conform to the requirements of the statutes, as there is only one surety and no justification for any surety."

When the first witness was called, objection to the taking of any testimony in the action was offered on the grounds that no issues were made up in the action, that the bond did not meet the requirements of the statutes in that there was only one surety, no justification of that surety, and the surety was an attorney of record and in fact. At the end of the testimony the motion to dismiss was again made, one of the grounds of which was that there was only a single surety to the appeal bond. All of the motions for nonsuit and dismissal were overruled.

Section 12-114, Comp. St. 1929, provides: "No practicing attorney shall be taken as surety on any official bond, or bond in any legal proceedings in the district in which he may reside."

A practicing attorney should not sign a bond in a legal proceeding as surety. Such a bond should not be approved, but if approved the attorney is estopped from alleging its invalidity and it may be enforced against him. *Tessier v. Crowley*, 17 Neb. 207, 22 N. W. 422. Section 12-114, *supra*, is based upon considerations of sound public policy. The assuming of personal liability by an attorney for his client is properly prohibited. The historical background, sound ethics, and the well-settled rule both in England and this country challenge an attorney never to place himself in an attitude of encouraging litigation. Obedience to law is an attribute of ideal citizenship. The orderly administration of justice is severely handicapped when an attorney who takes an oath on admission as practitioner and court officer disobeys the plain mandate of the statute.

Sections 20-2223 and 20-2224, Comp. St. 1929, provide for affidavit of qualifications and justification of sureties to undertakings, bonds and recognizances provided by the statutes. Section 9522, Comp. St. 1922, declared that county judges "shall have the right to require the person offered as surety to make an affidavit of his qualifications." In 1923 the legislature amended section 9522 and passed House Roll No. 364 (Laws 1923, ch. 112), providing that county judges "shall require the person offered as surety to make

an affidavit of his qualifications." In 1927 (Laws 1927, ch. 68), section 9522, as amended, was repealed, and section 20-2223 was enacted into law and again provided that county judges "shall require the person offered as surety to make an affidavit of his qualifications."

It must be presumed that the law-making body of the state meant what was enacted when it repealed what was a permissive requirement, "shall have the right to require," and twice making a mandatory direction, "shall require." A county judge would be justified in withholding approval of a bond if the requirement was not complied with. But, if approved without the justification affidavit, the surety would be estopped from alleging its invalidity and the bond liable to enforcement.

Article 16, ch. 30, Comp. St. 1929 (sec. 30-1601 *et seq.*) provides for appeals in probate matters. Section 30-1603 thereof provides: "Every party so appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court."

Section 9999, Comp. St. 1922, before 1923 required for appeal a recognizance "with sureties," and it was held in construing this section in *Whetstone v. State,* 109 Neb. 655, 192 N. W. 124: "For the purpose of an appeal by a defendant who has been convicted of a misdemeanor in a prosecution before a justice of the peace, a recognizance with one surety only does not comply with a statutory requirement for a recognizance 'with sureties,' and is fatally defective."

For the purpose of perfecting an appeal, this seems to be the view taken by the courts generally. In *Whetstone v. State, supra,* there is cited *Harris v. Regester & Sons,* 70 Md. 109, 16 Atl. 386; *State v. Fitch,* 30 Minn. 532, 16 N. W. 411; *Gibson v. Lynch,* 1 Murph. (N. Car.) 495; *Jones v. Sykes,* 1 Murph. (N. Car.) 281; *North American Coal Co. v. Dyett,* 4 Paige Ch. (N. Y.) 273; *White v. Rintoul,* 6 N. Y. Super. Ct. 259, as sustaining authority.

In *Killian v. State,* 114 Neb. 4, 205 N. W. 575, wherein section 29-611, Comp. St. 1929, was considered, it was held that the provisions of this section regulating appeals from

an inferior court in misdemeanor cases were mandatory. There the recognizance was conditioned for the appearance of the defendant at the district court on the first day of the next term, instead of "forthwith," as the statute requires. It was held that the district court acquired no jurisdiction.

The holdings of the courts, and in this jurisdiction especially, are to the effect that appeal provisions are mandatory, and a failure to follow them in any material respect forfeits one's right to appeal, which otherwise entitled to. *In re Newton,* 39 Neb. 757, 58 N. W. 436; *Zobel v. State,* 72 Neb. 427, 100 N. W. 947; *Oppfelt v. State,* 117 Neb. 549, 221 N. W. 708; *Brainard v. State,* 127 Neb. 723, 256 N. W. 874.

At common law a recognizance was entered into by the obligor and his sureties personally appearing in court and orally entering into the obligation. In this state the distinction between a recognizance and a bond has largely been lost in actual practice and it has been customary for many years to use a written one. This has been recognized in the present statute which provides for a written recognizance. Reasonably there seems no distinction between a civil appeal bond and a written recognizance as to requiring each to conform substantially to the statute which grants the right of appeal and holding mandatory the requirements of such statutes.

The constitutional provision (article I, sec. 24) which declares "the right to be heard in all civil cases" does not prohibit the legislature from prescribing reasonable rules and regulations for the review of a cause by appeal, such as requiring a bond to be given. *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210.

In *Casey v. Peebles,* 13 Neb. 7, 12 N. W. 840, wherein an appeal to the district court was taken from disallowance of a claim against an estate in the county court, this court announced in the syllabus: "Where the statute requires two sureties upon a bond for an appeal, and a bond containing but one is duly approved, it is not void, but may be amended.

And it will be sufficient unless objected to on the ground that it is signed by but one surety." This case does not help us because there was no objection made therein upon the ground of a single surety to the bond, and in the instant case there was such a specific objection. Likewise, in *Bazzo v. Wallace,* 16 Neb. 293, 20 N. W. 314, the objection to the appeal bond was too general to raise the defect. Both *Casey v. Peebles, supra,* and *Bazzo v. Wallace, supra,* are only authority in this case on the power of the trial court to permit appellees herein, should it have been requested therein, to amend the defective appeal bond or give a new one. *In re Estate of Hoagland,* 128 Neb. 219, 258 N. W. 538.

The record shows that the county judge did not indorse upon the defective appeal bond his formal approval thereof, as required by statute, but marked it, "Filed Dec. 10, 1934, E. R. Bee, county judge." It is part of the transcript under certification. This is all that appears in the record as to approval of the defective appeal bond by the county judge. Appellee cites the rule announced in *Asch v. Wiley,* 16 Neb. 41, 20 N. W. 21: "Where an appeal is sought to be taken from the judgment of a county judge, and appellant files his appeal bond in the proper amount, with two sureties, within the time required by law, the acceptance of such bond by the county judge and spreading it upon the docket is a sufficient approval of the bond, unless the party desiring to take the appeal is notified of the fact that the county judge refuses to approve the bond and sureties."

In effect appellee claims an approval by legal inference. It would seem that there is here the equal inference that this bond was not approved because legally defective. The legal inference of approval ought to be limited to an appeal bond which conforms to the statute. Appellants did not bring the question of approval to the trial court by specific objection but only under a general one, and our court has repeatedly held such is insufficient. Among the earlier cases announcing this is *Bazzo v. Wallace, supra,* and later reannounced many times.

The serious question is the sufficiency of the appeal bond.

It is obviously defective, fails to conform substantially with the statute, all of which was repeatedly brought to the attention of the trial court and counsel for the appellee and no attempt was made in the district court to amend the bond or give a new one.

The seasoned counsel for the appellee consistently refused to amend the bond and, though repeatedly enlightened as to the defects, decided evidently to stand upon this fatally defective appeal bond. To confer jurisdiction upon the appellate court there must be an appeal bond which substantially conforms to the statute. We must hold, under the circumstances of this case, that the appeal bond is fatally defective, confers no jurisdiction in appeal, and that the various motions for nonsuit and dismissal made by the appellants below in the trial court should have been sustained.

While it is not necessary to determine the effect of trying this case below, without framing issues by pleadings, it should be noted that this court announced the rule in *Weideman v. Estate of Peterson*, 129 Neb. 74, 261 N. W. 150, that statutory changes by legislative enactment have abrogated the previous rule that new pleadings in estate appeals need not be filed unless directed by the court.

REVERSED AND DISMISSED.

IN RE ESTATE OF ANNIE KOTHE.*
MARIE GONSCHIOR, APPELLANT, V. HENRY DREWES, SR., ET AL., ADMINISTRATORS, APPELLEES.

FILED JULY 14, 1936. No. 29700.

Appeal in this case ruled by opinion in *In re Estate of Kothe, ante*, p. 531.

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

John C. Hartigan, H. C. Schoening and *Henry J. Beal*, for appellant.

*Opinion withdrawn. See opinion p. 785, *post*.

Rain & Rain, L. R. Doyle and *Frank L. Rain, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

LANDIS, District Judge.

In the matter of the estate of Annie Kothe, deceased, the administrators filed their final report in the county court. Marie Gonschior, an heir at law, made objections thereto, and from the decree in the county court attempted an appeal to the district court.

In the district court the administrators moved for a nonsuit and dismissal of the appeal because based on defective bond. This was denied by the trial court. From the decree in the district court, two appeals were taken to this court. The administrators appealed general number 29696, and the heir at law, Marie Gonschior, also general number 29700.

The separate appeal of the administrators was considered by this court, *In re Estate of Kothe, ante,* p. 531, and it was found there that the bond furnished to perfect the appeal from the county court to the district court was fatally defective.

The opinion announced in *In re Estate of Kothe, ante,* p. 531, rules the instant appeal.

REVERSED AND DISMISSED.

OTTO A. BERGENDAHL, APPELLEE, V. HENRY RABELER, APPELLANT.

FILED JULY 14, 1936. No. 29621.

1. **Trial:** JURY. During proceeding to impanel a jury in an action to recover damages alleged to have arisen from negligence, counsel should scrupulously avoid any act, statement or question of such a nature as might inform the jurors as to whether or not the defendant is indemnified by one not a party to the action against having to pay any verdict the jury may render against him,
2. **Appeal:** CONDUCT OF TRIAL. During the introduction of evidence in the trial of an action to a jury, counsel should not make

declarations of fact further than is honestly useful to a clear presentation of evidence.

3. Trial: CONDUCT OF TRIAL. In the trial of an action to a jury, counsel should not make mention of the result of the jury's verdict, as distinguished from what verdict should be found when the rules of law involved are applied to the facts shown by the evidence.
4. Negligence: PROXIMATE CAUSE. The rule of law to the effect that two disconnected and self-operating acts of negligence may concur to form the proximate cause of an injury applies only when such acts arise from separate sources and when the injury would not have occurred but for the existence of both of such acts of negligence.
5. ———: IMPUTED NEGLIGENCE: EXCLUSION OF EVIDENCE. A minor of normal mind of the age of 17 years, who is a passenger in an automobile, is one to whom the negligence of the driver of such automobile may be imputed, regardless of whether or not such minor was negligent, and proof of any circumstance tending to show the right of such minor to control such driver is admissible to impute any negligence of such driver to such minor.

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

Moyer & Moyer, Baylor & Tou Velle and *George Healey,* for appellant.

Deutsch & Young and *J. J. Harrington, contra.*

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

TEWELL, District Judge.

This action was begun in the district court for Madison county by Otto A. Bergendahl, as the next friend of his daughter, Sonja Bergendahl, a minor of the age of 17 years, to recover damages arising from a collision between two automobiles. Henry Rabeler was the only defendant. Trial was had to a jury and resulted in a verdict and judgment in favor of the plaintiff for the sum of $7,500. The defendant appeals.

The pleadings and evidence disclose that Otto A. Bergen-

dahl had possession of a Chevrolet coach. He operated it for family purposes and was accustomed to taking his daughters Sonja, hereinafter called the plaintiff, and Lilly from the family home to the high school in Norfolk. On the morning of October 4, 1934, he was ill and secured one Kenneth Wehenkel, a boy 18 years of age, to take his daughters to school. Wehenkel returned to the high school that day at noon for the daughters. With the plaintiff riding in the back seat and Lilly, a girl 15 years of age, riding in the front seat with him, Wehenkel drove the Bergendahl car four blocks south on Fifth street to its intersection with Michigan avenue, where the collision involved occurred. Fifth street, which is 80 feet in width, extends from north to south and Michigan avenue, which is 66 feet in width, extends from west to east. The surface of Fifth street, at the time of the collision, was graveled. Michigan avenue, except at the intersection above mentioned, had no surface except one of dirt. The intersection was bounded by cross-walks on all sides except its north. Drainage ditches paralleled both sides of each street. The surfaced portion of Fifth street was about 32 feet wide and the usually traveled surface of Michigan avenue was about 22 feet wide. Private residences surrounded the intersection. The vicinity of the intersection was level and nothing existed to prevent the driver of an automobile approaching it from any direction at a distance of at least 20 feet therefrom from seeing another automobile approaching it from any other direction from at least 100 feet distance. A circular metal sign, 18 inches in diameter displaying the word "slow" painted in white, was mounted on a post stationed on the west edge of Fifth street at a point 54 feet north of the north boundary of the intersection. No other traffic control signs existed near the intersection. The weather was clear and the surface of the streets dry.

Just prior to the collision the defendant drove a Ford sedan eastward on Michigan avenue and upon the south half thereof. In the car with him were his wife and minor son. The evidence conflicts as to which of the two cars first

entered the intersection, and also conflicts upon the question of how fast each car was being driven. The brakes on the Bergendahl car were in such condition as not to be of much, if any, aid in stopping its forward motion. The evidence conclusively discloses that the first impact of one car with the other occurred by the tip of the right front fender of the Bergendahl car striking against the left side of the left front fender of the defendant's car, immediately above the left front wheel hub. The right front spring horn of the Bergendahl car struck the left front wheel hub of the defendant's car. The place of impact, as disclosed by the tracks of the two cars, was several feet south of the center of the intersection and near and probably east of the center line of Fifth street. Immediately prior to the collision the Bergendahl car, which had been driven southward near the center line of Fifth street, was swerved toward the southeast and its speed accelerated, and the defendant's car was swerved in the same direction and then turned toward the south and southwest. Just after the collision the defendant's car came to a stop at a place about 12 to 15 feet south of the south boundary of the intersection headed southwest, and the Bergendahl car was upset and lying upon its left side headed southward, and upon the cross-walk over the drainage ditch at the southeast corner of the intersection. By the upset of the Bergendahl car, the plaintiff was injured.

One assignment of error is based upon the fact that counsel for plaintiff upon the *voir dire* of jurors by the nature of his questions caused jurors, who later served as members of the jury, to believe that the defendant carried insurance against loss from damages such as plaintiff sought to recover. The record of the *voir dire* discloses that many questions were asked of each prospective juror relative to whether or not he was a stockholder in the State Farmers Mutual Insurance Company, of Bloomington, Illinois, or had a policy of insurance with that company, or had ever been an agent for that company. Some of the questions asked were as follows: "You wouldn't want

to give the defendant a verdict just because there is insurance?" "If selected as a juror could you try this case and decide it solely on the law and the evidence just as though the question of insurance was not involved?" "You would decide this case just as fairly and just as easily in your own mind with the question of insurance involved as you could if it wasn't in there?" Questions of like import as the above were asked throughout the *voir dire* examination. If a prospective juror disclosed that he then had, or had ever had, a policy of insurance upon his automobile, he was then usually asked if he had not paid for the insurance. At the time of the trial of this cause the rule of practice announced in *Jessup v. Davis,* 115 Neb. 1, 211 N. W. 190, to the effect that it was error prejudicial to the plaintiff in an action for damages to refuse to allow him on cross-examination to show whether or not the defendant was insured against loss on account of such damages was in effect. This rule was revoked by the opinion in *Fielding v. Publix Cars, Inc.,* 130 Neb. 576, 265 N. W. 726. By the express terms of that opinion, the revocation of such rule did not affect this case, as such revocation affected only cases tried more than 20 days after such opinion was filed. Prior to the date of the opinion in *Jessup v. Davis, supra,* this court held that it was proper for a plaintiff in an action such as this, if the defendant was insured against loss on account of damages for causing personal injury, when impaneling the jury, to interrogate each prospective juror relative to his relations with the company carrying the insurance. *Egner v. Curtis, Towle & Paine Co.,* 96 Neb. 18, 146 N. W. 1032, L. R. A. 1915A, 153; *Koran v. Cudahy Packing Co.,* 100 Neb. 693, 161 N. W. 245; *Penhansky v. Drake Realty Construction Co.,* 109 Neb. 120, 190 N. W. 265. In the opinion in *Fielding v. Publix Cars, Inc., supra,* is found the following statement: "The right of counsel to interrogate jurors on their *voir dire* examination in order to determine whether it is expedient to challenge any of them peremptorily, within proper limits, cannot be denied." Whether or not such an interrogation on *voir dire* as is

involved in this case, relative to insurance, was "within proper limits" was not involved in that case and not thereby decided. To say that such interrogation in this case was made to secure information for use in the exercise of challenges is not worthy of belief. To allow such an interrogation in all cases because it might in some cases have a legitimate use is to allow the unscrupulous and unethical to use it under a false guise for a purpose that no ethical lawyer would desire to attain. The pernicious, unethical purpose for which an unrestricted right to such an interrogation on *voir dire* may be used is such that restriction is necessary to an attainment of a proper consideration of issues in actions tried to juries. To deny such a right entirely would work far less perversion of proper verdicts than does its unrestricted use. Inquiry that is not suggestive of the existence of such insurance will all but always give sufficient information for use in making any kind of challenge. To inform the jury that the defendant does not carry such insurance against loss from paying a verdict such as is requested by the plaintiff has been held by this court to constitute error. *Taulborg v. Andresen,* 119 Neb. 273, 228 N. W. 528. To inform a jury that a defendant was not thusly insured, most persons would agree, would not have as strong an influence to prevent a verdict based only on the facts and rules applicable thereto as would information that such insurance existed. Courts of jurisdictions, other than our own, that allow an interrogation on the *voir dire* of jurors relative to the juror's relation to an insurance company condemn the use thereof for an improper purpose. 64 C. J. 234, and cases cited in footnotes, 35 to 43.

We feel that if such an interrogation is made at all, it should only be made when its legitimate purpose cannot be otherwise attained. We therefore hold that, upon the *voir dire* examination of jurors in a trial to a jury of an action for damages alleged to have arisen from negligence, counsel should scrupulously avoid any act, statement or

question of such a nature as will reasonably inform the jury as to whether or not the defendant is indemnified by one not a party to the action against having to pay any verdict the jury may render against him. A violation of such rule is error prejudicial to the party offended, unless the circumstances of the entire case affirmatively show lack of prejudice thereby or affirmatively show that such information was a necessary incident to securing information that is needed for use in making challenges and that reasonably could not otherwise be secured. To ask of the juror whether or not he is an agent of or stockholder in any corporation and, if he says he is either, to make inquiry of him as to the kind of corporation to which he bears such relation will usually give all information needed without use of the word "insurance." This method of inquiry was suggested in *Fielding v. Publix Cars, Inc., supra.* That case, however, did not involve any method or subject of inquiry upon *voir dire* of the jury.

Improper conduct of counsel for plaintiff during the introduction of evidence is assigned as error prejudicial to the defendant. To set forth all of the acts or statements of plaintiff's counsel of which complaint is made would unduly extend this opinion. We mention but a few. During the cross-examination of defendant's wife, a witness for the defendant, an objection was made by defendant's counsel to a question propounded by plaintiff's counsel. Immediately the following statement was made by counsel in the presence of the jury.

"I am not trying to reflect on Mrs. Rabeler's integrity in the least. In fact, she corroborates our witness to whom her husband stated he did not see the other car. All we want here is to get the facts to this jury and these insurance attorneys want to keep the facts out of this record."

Counsel for appellee repeatedly referred to the plaintiff as "the poor, unfortunate little girl." Several times during the introduction of evidence reference was made either to the plaintiff desiring to be "fair to the jury" or to the defendant's counsel being "unfair to the jury." Counsel

should not make declarations of fact during the introduction of evidence, further than is honestly useful for making a clear presentation of the evidence, and the making of such a declaration may be prejudicial error if the declaration made is of such a nature as reasonably to cause a prejudice against an opposing party or undue sympathy for the party in whose behalf it is made. *Splittgerber Bros. v. Skinner Packing Co.*, 119 Neb. 259, 228 N. W. 531. The declarations of counsel above mentioned had no legitimate use. Under the circumstances shown in the record, they cannot be said not to have been prejudicial to the defendant.

Complaint is made by the defendant of remarks of counsel for plaintiff in his closing argument to the jury. In that argument counsel for plaintiff said in part: "I don't want to punish the defendant. A verdict for this girl will not punish him." This statement, when considered with prior questions and statement of counsel relative to insurance, could only be construed by the jury as an assurance that some insurance company would pay the amount of the verdict. In its opinion in the case of *Standridge v. Martin*, 203 Ala. 486, 84 So. 266, the supreme court said, in part:

"There can scarcely be made to a jury a more seductive and insidious suggestion than that a verdict for damages against the defendant before them will be visited, not upon that defendant, but upon some invisible corporation whose business it is to stand for and pay such damages. Such a suggestion, once lodged in the minds of the jury, is almost certain to stick in their consciousness, and to have its effect upon their verdict, regardless of any theoretical exclusion of it by the trial judge."

We approve of the thought expressed in this quotation. In the trial of a cause to a jury counsel should not in any portion of the proceeding state his conclusions as to what may be the result of the jury's verdict, as distinguished from what verdict should be found when the rules involved are applied to the facts of the cause. A violation of this rule may be prejudicial error. We regard the statement of

counsel last above quoted as being prejudicial to defendant under the circumstances shown in the record.

Assignments of error made by the defendant include error predicated upon the fact that the court failed to properly instruct the jury relative to the doctrine of concurrent negligence. By instruction No. 12 the court told the jury that it was not necessary for the plaintiff to prove that the negligence of the defendant was the sole proximate cause of her injuries, and that if independent acts of two persons combined to produce her injury each was responsible for the entire result. This instruction failed to confine any negligence of the defendant to the specific allegations of negligence that might be used as a basis of his liability. It also failed to inform the jury that, before the defendant could be held liable upon the doctrine of concurrent negligence, the evidence must show that the injury would not have occurred but for such negligence of the defendant. The acts and omissions of the driver of the Bergendahl car were independent and self-operating forces, disconnected from the acts and omissions of the defendant and, logically, alone may have caused plaintiff's injury. Under such circumstances the defendant would not be liable, even though negligent in a manner alleged and proved. The rule of law relating to two or more independent forces concurring to form the proximate cause of a given result presupposes two forces, each self-operating, and coming from two independent and disconnected sources. It applies only when such result would not have occurred except for the existence of both of such forces. *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N. W. 117; *Johnson v. Mallory*, 123 Neb. 706, 243 N. W. 872. The instructions of the court failed to properly inform the jury relative to the doctrine of concurrent negligence, and to make clear the conditions required for its applicability to the evidence. This task was begun by instruction No. 12 but never completed.

The defendant complains of the trial court having refused to admit certain evidence tending to show that plaintiff had such a control over the driver of the Bergendahl car as to

cause his negligence to be imputed to her, and of the court having failed to submit to the jury under proper instructions the question of whether or not the negligence of such driver was imputed to the plaintiff. We treat all assignments relating to these matters together. We state, for the purposes of this case, that Wehenkel, the driver of the Bergendahl car, was under the facts above outlined guilty as a matter of law of negligence that formed a part or all of the proximate cause of plaintiff's injuries to such an extent as to prohibit a recovery, on account of the facts of this case, by him or by any one to whom his negligence was imputed. *Nelson v. Plautz*, 130 Neb. 641, 265 N. W. 885. Such statement is not necessary to a decision in this case, but should materially simplify the issues in the retrial of this case upon the issue of imputed negligence, as well as upon that of contributory negligence of the plaintiff, and upon that of concurrent negligence of the defendant. A minor of normal mind of the age of 17 years, who is a passenger in an automobile, is one to whom the negligence of the driver of such automobile may be imputed, regardless of whether or not such minor was negligent, and competent evidence tending to show the right of such minor to control where and how such automobile should be driven is admissible to impute the negligence of such driver to such minor. The failure of the trial court to receive evidence showing such right of control in plaintiff, and to submit to the jury the issue of whether or not the negligence of Wehenkel was imputed to the plaintiff, in case the court could not say as a matter of law that it was imputed, was prejudicial to the rights of defendant. If imputed as a matter of law, then the plaintiff cannot recover, regardless of how negligent the defendant may have been or how free from negligence the plaintiff may have been. By instruction No. 13 the court practically withdrew the issue of imputed negligence from the jury.

Many assignments of error not mentioned above are made by the defendant. What has heretofore been said may aid in preventing a recurrence of many of the conditions of the

record of which the defendant complains. Without any holding one way or the other upon some of such conditions, we mention a few of them in order to aid in preventing their recurrence. One of the allegations of negligence against defendant is that he drove his car without its brakes being in proper condition, and such alleged act was submitted as a possible act of actionable negligence when no evidence whatever supported such allegation.

The instructions tell the jury that contributory negligence of the plaintiff does not bar her recovery in case the jury found it slight and that of the defendant gross in comparison, but they do not tell the jury that such negligence of the plaintiff otherwise would bar her recovery, except to say that the jury's verdict should be for the defendant if the contributory negligence of the plaintiff was more than slight. What should be done if any contributory negligence of plaintiff existed and the negligence of the defendant was less than gross in comparison is not stated. While instruction No. 10 sets forth the issues upon which the burden of proof is upon the plaintiff, nowhere do the instructions set forth the conditions required for a finding for the plaintiff. Except for the one instance above mentioned, the instructions do not set forth any condition under which the jury should find for the defendant.

On account of errors prejudicial to defendant above discussed, the judgment of the trial court is reversed and this cause remanded.

REVERSED.

FRED L. BURKE, TRUSTEE IN BANKRUPTCY, APPELLANT, V. FRED FREDERICKSON ET AL., APPELLEES.

FILED JULY 14, 1936. No. 29673.

1. **Mortgages: ASSIGNMENT: VALIDITY.** There being a valid consideration, the execution and delivery of an assignment of a beneficial interest in a mortgage termed a "participation certificate," though such instrument is not executed in such form as to permit of recording, is valid as between the parties.

2. ———: ———: ———. There being a valid consideration, the execution and delivery of an assignment of a beneficial interest in a mortgage termed a "participation certificate," though such instrument is not executed in such form as to permit of recording, is valid as against creditors not equipped with deed, mortgage or other instrument duly recorded, or execution or attachment duly levied.
3. Courts: ASSIGNMENT: RECORDING: LAW GOVERNING. In a bankruptcy proceeding or one growing out of bankruptcy where the effect of recording or failure to record is in question, the laws of the state where the recording is required or permitted are controlling.
4. Bankruptcy: PREFERENCES. Under the laws of Nebraska, the recording of the assignment of a beneficial interest termed a "participation certificate" is not a prerequisite to the validity of the transfer of the property described in such assignment and is not thereby a voidable preference.
5. ———: ———. The amendment of 1926 to section 60a of the bankruptcy act by adding the words "or permitted" did not affect section 60b; so, therefore, a transfer by mortgage or otherwise more than four months before bankruptcy, for a valuable consideration, without knowledge of insolvency or facts justifying a belief that such transfer would constitute a preference, but recorded within four months and not fraudulently withheld from record, is valid as against the trustee and cannot be avoided.
6. ———: ———. Under the terms of the assignments of "participation certificates" and the undisputed evidence, the bankrupt held the naked legal title to the note and mortgage in question. In such case the trustee of the bankrupt would not be entitled to recover for the benefit of general creditors of the bankrupt.
7. ———: ———. The trustee in bankruptcy not representing nor being entitled to take the place of a creditor or creditors whose claim or claims stood in a superior position to that of the defendants before the assignment and delivery of the mortgage and note and the recording of the said mortgage is not entitled to have the transaction set aside as a voidable or illegal preference.
8. Corporations: DISPOSAL OF PROPERTY: ESTOPPEL. A corporation, or its trustee, in case of bankruptcy, will be estopped to deny the authority of its managing agent to dispose of the property of the corporation in cases where such agent, with the consent of the board of directors, is in sole charge of its

property and business and is permitted in regular course to carry on the business for which the corporation was organized.

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

E. H. Evans and *Urban Simon*, for appellant.

Halligan, Beatty & Halligan, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY, PAINE and CARTER, JJ., and YEAGER, District Judge.

YEAGER, District Judge.

This is an action instituted by the plaintiff and appellant as trustee in bankruptcy of the Goodman-Buckley Company, a corporation, against the defendants and appellees Fred Frederickson, Ed Todenhoft and Hugo F. Todenhoft, the object and purpose of which is to set aside the transfer by assignment of a note and mortgage held by the bankrupt, the Goodman-Buckley Company, a corporation, to the defendants. The basis of the claimed right to set aside the transfer is the claim that it was made within less than four months before adjudication of bankruptcy and was therefore and thereby an unlawful preference within the meaning of the bankruptcy laws.

The facts as disclosed by the record, to the extent necessary to a determination of this case, are substantially as follows: In North Platte, Nebraska, in about the year 1920, the Goodman-Buckley Trust Company, a corporation, was organized under the banking laws of Nebraska. In 1930 Goodman-Buckley Company, a corporation, was organized, which corporation is the bankrupt for which the plaintiff herein is trustee. It was adjudicated a bankrupt November 18, 1933.

This corporation was organized for certain specific purposes, among which were the following:

"(a) To purchase or otherwise acquire, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in and deal with real and personal property of every class and description and liens and mortgages thereof, of all kinds;

"(b) To issue bonds, debentures, participation certificates and obligations of this corporation from time to time, for any of the objects or purposes of the corporation and to secure the same by mortgage, pledge, deed of trust, or otherwise;

"(c) To lend and borrow money, with or without security, upon real and personal property of all kinds and to buy and sell notes, bonds, mortgages and other evidences of indebtedness of all kinds."

Prior to and at the time of the incorporation of the Goodman-Buckley Company, hereinafter referred to as the bankrupt, the defendants each had moneys on deposit with Goodman-Buckley Trust Company. After the incorporation of the bankrupt, each of them invested funds which had been on deposit with Goodman-Buckley Company in what the bankrupt chose to term "participation certificates." The participation certificates are, in terms, assignments of specific beneficial interests in real estate notes and mortgages with a description of the notes and mortgages contained in the assignments. By the terms of the assignments, the bankrupt held legal title to the notes and mortgages for the purpose of collection and distribution of proceeds. In the first certificates issued to defendants, the only description of notes and mortgages was by number. The participation certificates were all signed "Goodman-Buckley Company, by N. E. Buckley," whose full name is Newton E. Buckley. Newton E. Buckley was secretary and treasurer of the corporation and was in actual charge of its affairs and business.

Up to January, 1933, no certificate held by the defendant Ed Todenhoft had contained any description of mortgage except by number. The same situation was true as to certificates held by Hugo F. Todenhoft until January 25, 1933. Frederickson held one prior to October 1, 1932, which was taken up on that date and a new one issued containing a legal description of the lands covered by the mortgage.

On the 1st day of August, 1932, Harry C. McCann and Dedie McCann executed and delivered to the bankrupt their

note for $17,000, with interest coupons attached, which note was secured by mortgage on the south 53 feet of lots 7 and 8, block 68, Original Town of North Platte, Nebraska. A certificate was issued to Ed Todenhoft by the bankrupt and dated December 1, 1932, which assigned to him a $10,000 interest in this note and mortgage. A certificate was issued to Hugo F. Todenhoft on January 25, 1933, which assigned to him a $3,000 interest in the same note and mortgage. A certificate issued to Fred Frederickson on October 1, 1932, also assigned to him a $4,000 interest in this particular note and mortgage. None of the certificates were executed in such manner and form as to permit them to be recorded. No substitution was ever made for the Frederickson certificate and there never was a reformation of its form so as to admit it for recording. In September, 1933, the Ed Todenhoft certificate was acknowledged and on the 7th of that month was duly recorded. At about the same time the Hugo F. Todenhoft certificate was also acknowledged and duly placed of record.

On or about October 13, 1933, the defendants demanded and received from the bankrupt the McCann note and mortgage, which was the note and mortgage described in their certificates, together with a written assignment thereof, and they have since the said date retained actual possession of such note and mortgage. The certificates of the three defendants taken together are assignments of and consume the entire beneficial interest in this note and mortgage.

It is this transfer of the note and mortgage by the bankrupt to the defendants that plaintiff seeks to have set aside on the ground that it is a voidable preference under the bankruptcy laws, the transfer having been made within four months of the date Goodman-Buckley Company was adjudicated a bankrupt.

There can be no question, and none is raised, that there was a valid consideration for the certificates issued to the defendants in October, 1932, and in January, 1933. It then necessarily follows that, as between the parties, the trans-

action is valid and binding. The failure to record them or to leave them executed in such form as not to permit of recording could not affect the validity of the transaction. They were also valid under Nebraska recording acts, as against creditors not equipped with deed, mortgage or other instrument duly recorded or execution or attachment duly levied. *Stocker v. Church,* 113 Neb. 639, 204 N. W. 398; *Minor Lumber Co. v. Thompson,* 91 Neb. 93, 135 N. W. 429; *Harral v. Gray,* 10 Neb. 186, 4 N. W. 1040; *Mahoney v. Salsbury,* 83 Neb. 488, 120 N. W. 144; *Naudain v. Fullenwider,* 72 Neb. 221, 100 N. W. 296; *Forrester & Co. v. Kearney Nat. Bank,* 49 Neb. 655, 68 N. W. 1059; *Oleson v. Pumphrey,* 125 Neb. 708, 251 N. W. 828; *Carpenter Paper Co. v. News Publishing Co.,* 63 Neb. 59, 87 N. W. 1050; *Wilson v. Lewis,* 63 Neb. 617, 88 N. W. 690; *Folsom v. Peru Plow & Implement Co.,* 69 Neb. 316, 95 N. W. 635; *Rankin v. Cox,* 71 Fed. (2d) 56.

If the assignments were valid under the recording acts of the state of Nebraska, then they were valid everywhere and binding for all purposes, since in passing upon the effect of the failure to record the assignment of a mortgage or other instrument required or permitted to be recorded under the laws of the state where the recording is required or permitted, the laws of the state are controlling. *Sapero v. Neiswender,* 23 Fed. (2d) 403; *Firestone Tire & Rubber Co. v. Cross,* 17 Fed. (2d) 417; *Bryant v. Swofford Bros. Dry Goods Co.,* 214 U. S. 279; *Holt v. Crucible Steel Co.,* 224 U. S. 262; *Martin v. Commercial Nat. Bank,* 245 U. S. 513; *Carey v. Donohue,* 240 U. S. 430.

The plaintiff contends, as against this, that in the issuance of the certificates there was not an assignment of beneficial interests in the note and mortgage but only a pledge for the repayment of moneys invested. This contention we cannot accept in the light of the plain terms of the instruments themselves and the absence of other evidence in the record showing an intention of the parties contrary to that expressed in the certificates.

We must therefore conclude that the beneficial interests

of the defendants in the note and mortgage in question were complete and absolute from and after the dates when they received their certificates containing the legal description of the real estate covered by the mortgage, and that from those dates until the assignment and delivery of the note and mortgage to the defendants the bankrupt held the bare legal title thereto in trust for the use and benefit of the defendants for the purpose of collection and distribution of the proceeds. Those dates were eight months and more before the Goodman-Buckley Company was adjudicated a bankrupt.

Under the laws of Nebraska, recording of the certificates issued by the bankrupt to defendants was not a prerequisite to the validity of the transfer of the property described in such certificates and therefore is not a voidable preference under sections 60a and 60b of the federal bankruptcy act, as amended, unless the amendment to section 60a by addition of the words "or permitted" makes it so.

It is a well-settled rule that the amendment of 1926 to section 60a of the bankruptcy act by adding the words "or permitted" did not in any manner affect section 60b, and that a conveyance or transfer by mortgage or otherwise, more than four months before bankruptcy, for a valuable consideration, without knowledge of insolvency or facts justifying a belief that such transfer would constitute a preference, but recorded within four months and not fraudulently withheld from record, is valid as against the trustee in bankruptcy and cannot be voided. 4 Remington, Bankruptcy (4th ed.) sec. 1790; *First Nat. Bank v. Live Stock Nat. Bank*, 31 Fed. (2d) 416; *In re Cunningham*, 64 Fed. (2d) 296. We must therefore conclude that the amendment to section 60a of the words "or permitted" does not render the transfer in question in this case a voidable or illegal preference.

The record shows conclusively that the transactions at the time of the procurement of the certificates, at least on the part of the defendants, were in perfect good faith. It also shows without substantial contradiction that they had

no knowledge or information such as would justify inquiry as to insolvency of the bankrupt until a considerable period of time after receipt of the certificates. After becoming acquainted with the insolvency, the defendants, by assignment and actual delivery, obtained from the bankrupt the note and mortgage described in their certificates. On October 14, 1933, which was about 35 days before the bankruptcy adjudication, this assignment was duly and regularly recorded. They thus acquired the legal title in addition to the beneficial interest previously held by them.

There is another reason why the trustee should not be permitted to recover in this action. Under the specific terms of the certificates in question and the undisputed evidence in the case, the bankrupt held the naked legal title in trust for the defendants. In such case, even without any recording at all, the trustee of the bankrupt would not be entitled to recover from the defendants for the benefit of general creditors of the bankrupt. Section 47a (2) Bankruptcy Act, as amended, 11 U. S. C. A., sec. 75 (a) 2; section 70, Bankruptcy Act, as amended, 11 U. S. C. A., sec. 110; 4 Remington, Bankruptcy (4th ed.) sec. 1418, 50; *Lowell v. International Trust Co.*, 158 Fed. 781; *In re Coffin*, 152 Fed. 381; *City Nat. Bank v. Slocum*, 272 Fed. 11; *Sapero v. Neiswender*, 23 Fed. (2d) 403; *Strongin v. International Acceptance Bank*, 70 Fed. (2d) 248; *United States Nat. Bank v. Blauner's Affiliated Stores, Inc.*, 75 Fed. (2d) 826; *In re Bell Motor Co.*, 45 Fed. (2d) 19; *Laugharn v. Welch*, 28 Fed. (2d) 866; *Hart v. Ronan*, 58 N. Dak. 516, 226 N. W. 620.

If, however, the trustee represents or is entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer while the same was unrecorded and within four months of the adjudication in bankruptcy, then the foregoing rule does not apply, but in this case no such right exists. *Stocker v. Church*, 113 Neb. 639, 204 N. W. 398; *Martin v. Commercial Nat. Bank*, 245 U. S. 513; *Carey v. Donohue*, 240 U. S. 430; *First Nat. Bank v. Live Stock Nat. Bank*, 31 Fed. (2d) 416; 4 Rem-

ington, Bankruptcy (4th ed.) sec. 1793; *In re Perelstine*, 19 Fed. (2d) 408; *Burrowes v. Nimocks*, 35 Fed. (2d) 152; *Finance & Guaranty Co. v. Oppenhimer*, 276 U. S. 10.

But one question remains for consideration. All of the transactions in question were carried on by Newton E. Buckley. All instruments were signed the corporation, by "N. E. Buckley." On this point and for this reason we have set forth, in part, the purpose of the corporation and functions to be performed. In the light of their broad nature which contemplates the character of business involved in this action and which, of necessity, must be transacted by agents, and coupling this with the fact that Newton E. Buckley was indisputably a managing officer of the bankrupt, we hold that the contention that he was without power to bind the corporation in the premises is without merit.

This court has repeatedly held that a corporation will be estopped to deny the authority of its managing agent to dispose of the property of the corporation in cases where such agent, with the consent of the board of directors, is in sole charge of its property and business and is permitted in regular course to carry on the business for which the corporation was organized. *Wachob, Bender & Co. v. Omaha Life Ins. Co.*, 128 Neb. 320, 258 N. W. 657; *Fremont Nat. Bank v. Ferguson & Co.*, 127 Neb. 307, 255 N. W. 39; *Monarch Portland Cement Co. v. Creedon & Sons*, 94 Neb. 185, 142 N. W. 906; *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517, 116 N. W. 157.

We conclude, for the foregoing reasons, that the decision of the district court was correct and should be affirmed.

AFFIRMED.

IN RE ESTATE OF C. E. REYNOLDS.
IRA E. ATKINSON, ADMINISTRATOR, ET AL., APPELLEES, V. H. B. REYNOLDS ET AL., APPELLANTS.

FILED JULY 24, 1936. No. 29507.

1. **Judgment.** A declaratory judgment duly entered under the provisions of sections 20-21,140 to 20-21,155, Comp. St. 1929, confirming in all respects the validity of a trust agreement, and in particular directing the trustee therein designated to pay the said trust funds, together with interest thereon, to the parties entitled thereto, as set forth therein, is final, controlling, and binding upon the parties to that proceeding, their privies and their successors in interest, and precludes such parties from further litigating the points and questions put in issue and there decided.
2. **Bankruptcy.** A right of action for a tort affecting the property of a bankrupt passes to the trustee in bankruptcy.
3. **Executors and Administrators.** "The proceeds of a life insurance policy in which a third person is named beneficiary belong exclusively to such beneficiary as an individual; they are not the property of the heirs of insured, are not subject to administration, and cannot properly be claimed or received by the administrator or other legal representative of insured as assets of his estate." 37 C. J. 566.
4. ———. The proceeds of a policy, by its terms payable to a creditor, inure to him, at least to the extent of his debt, free from the claims of other creditors or the representatives of the insured's estate. Such creditor takes the insurance money, if at all, directly by the terms of the contract, and not derivatively, or in the capacity of heir or legal representative of the insured. It forms no part of the insured's estate and is not subject to the jurisdiction of the probate court administering the same.
5. **Trusts.** It is not required that the beneficiary of a life policy be designated by name, other proper description suffices. Trustees may be designated in the policy to hold for beneficiaries ultimately intended to receive the proceeds thereof.
6. ———. "An 'insurance trust' is an agreement between a person whose life is insured and a trustee, usually a trust company, whereby the insurance money, the cash proceeds of the policy, is paid directly to the trustee for its investment and distribution to designated beneficiaries in any such manner, or at any such time or times, as the insured has directed in

his trust agreement with the trustee." 2 Couch, Cyclopedia of Insurance Law, 1048, sec. 355.

7. ———. The trust agreement in suit, *held* to create an "insurance trust."
8. ———. The beneficiaries of this insurance trust, identified in the third clause of the contract, are creditors of the insured whose claims are within the limitations there prescribed and expressed.
9. ———. "No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust." Restatement, Trusts, sec. 200.
10. ———. The duty of the trustee of an insurance trust is to take and keep exclusive control of the trust funds, and perform the duties enjoined, without delegating to others the doing of acts which the trustee can reasonably be required to perform personally.
11. ———. "In executing the trust, the trustee must pay over the trust estate or proceeds thereof to the person or persons entitled thereto, directly or through his or their representatives, and his liability to the beneficiaries is not discharged by payment to a person not entitled thereto, even though he acts under advice of counsel, unless the beneficiary elects to proceed against the payee." 65 C. J. 838.
12. ———. The legal remedies for breach of the terms of this insurance trust are confined to the beneficiaries thereof, named and identified therein, and do not include the representatives of the estate of C. E. Reynolds.
13. ———. Under the facts in this record, the executors and representatives of the estate of C. E. Reynolds were never entitled to claim, demand or receive any part of the trust funds from the insurance trust, the same were not assets which they were required to inventory and administer, and the law enjoined upon them no duties with reference thereto.

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

George R. Mann, Dwight W. Dahlman and *George I. Craven,* for appellants.

John J. Ledwith, Sanders, Anderson & Gradwohl, contra.

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

EBERLY, J.

This is an appeal from a judgment or decree rendered by the district court for Lancaster county on December 1, 1934, in a case entitled, "In the Matter of the Estate of C. E. Reynolds, Deceased," then and there pending on appeal from the county court of Lancaster county, Nebraska, and also from the order of that court overruling the motion for a new trial addressed to the aforesaid judgment.

H. B. Reynolds (formerly executor of the last will of C. E. Reynolds, deceased), and Francis V. Robinson, as administrator of the estate of E. C. Wilson, deceased (said Wilson also having been a coexecutor of the last will of C. E. Reynolds, deceased), are the appellants.

The judgment appealed from, in addition to a general finding against the appellants, contained as a specific finding: "The former executors of this estate, H. B. Reynolds and E. C. Wilson, have failed to account for, and should be required to account for, property and estate of $10,446." The judgment entered thereon recited that appellants, "and each of them, be and they hereby are ordered and required to deliver and pay to Ira E. Atkinson, administrator *de bonis non* herein, unadministered property and estate of $10,446, with interest thereon at 6 per cent. per annum from this date; * * * that the foregoing is additional to those assets shown in the final account filed by H. B. Reynolds, all of which the said H. B. Reynolds is specifically ordered and directed to turn over and deliver to the said administrator *de bonis non.*"

The record discloses that H. B. Reynolds, as sole surviving executor of the last will and testament of C. E. Reynolds, deceased, filed his final report as such, in the county court of Lancaster county, Nebraska, on January 18, 1934. Objections were filed thereto by Ann M. Reynolds, as widow, devisee and legatee, which were duly adopted by Ira E. Atkinson, as administrator *de bonis non* of said estate. Francis V. Robinson, administrator of the estate

of E. C. Wilson, deceased, in behalf of his decedent (who was in his lifetime coexecutor of the last will of C. E. Reynolds, deceased), filed, in behalf of the estate represented by him, a final report which was also challenged by Ann M. Reynolds. There were also objections filed to said final reports by H. B. Muffly as trustee in bankruptcy of the Federal Trust Company. A hearing was had which resulted in a finding and judgment by the county court of Lancaster county against H. B. Reynolds and the estate of E. C. Wilson, deceased, and ordering and requiring each of them to deliver and pay to Ira E. Atkinson, administrator *de bonis non,* unadministered property and estate of $10,000, together with interest thereon. An appeal from this judgment to the district court for Lancaster county, Nebraska, resulted as hereinbefore stated.

A careful consideration of the pleadings and evidence discloses that the proceedings were prosecuted by the objectors exclusively on the theory that the proceeds of a certain life insurance policy on the life of C. E. Reynolds, or at least a sufficient part thereof to pay the claims allowed against his estate, constituted assets of the estate of C. E. Reynolds, which it was the duty of his executors, as such, to receive, collect, care for, safeguard, and pay over to the claimants thereto entitled, and which they had failed to do.

The nature of this trust fund and the obligations of the executors in reference thereto are, therefore, the controlling questions in this case.

To sustain liability against the appellants in this case, it is essential that this trust fund, or some portion thereof, be deemed to be within the scope of, or included in, the statutory direction that "Every executor * * * shall, within three months after his appointment, make and return, under oath, into the county court from which he received his letters, a true inventory of the real estate, and of all the goods, chattels, rights and credits of the deceased which shall have come into his possession or knowledge." Comp. St. 1929, sec. 30-401. Unless embraced in the classes of

property thus enumerated, the trust fund in question constitutes no part of the assets of the estate, and it is only in their dealings with the assets of their decedents' estates that executors and their bondsmen incur liability.

A careful study of the record, in connection with the briefs of the parties, discloses that there are no vital facts in serious dispute, so far as the controlling question is concerned.

The following will aid in depicting the situation here presented:

C. E. Reynolds died on December 27, 1930. At and prior to his death he was the owner of 503 shares of the capital stock of the Federal Trust Company, and also possessed the controlling stock of the Federal Credit Company, both of Lincoln, Nebraska. He was in truth the managing officer of both institutions, reputed rich, and a leader in the local business world. He left a last will and testament, bearing date of June 13, 1930, which was in due course admitted to probate. H. B. Reynolds and E. C. Wilson, named therein as executors, were duly appointed, qualified, and entered upon the performance of their duties.

This will provided in "Part One:" "I direct that my just obligations, if any, the expenses of last illness and burial, and the expenses incident to the administration of my estate, shall all be first fully paid."

Then following as "Part Two" were bequests for the benefit of his children, to be handled by trustees.

In "Part Three," "all the capital stock which I may own at the time of my death in both the Federal Trust Company and the Federal Credit Company" was bequeathed to trustees named, who were charged with carrying on the business in which these corporations were engaged, with paying the dividends accruing on his stock to his wife, and finally with selling and disposing of the capital stock, to them devised, and transmitting the proceeds to Ann M. Reynolds, his wife.

In "Part Five," all the rest, residue and remainder of the deceased's estate was bequeathed to his wife, Ann M. Reynolds.

At the time of his death, C. E. Reynolds was insured in the sum of $50,000 by the terms of a life insurance policy issued by the Aetna Life Insurance Company, which was payable, "upon receipt at its home office of due proof of the death of Corl E. Reynolds (herein called the insured), to the beneficiary, Federal Trust Company, Lincoln, Nebraska, as trustee," and which policy contains the following recital:

"The Aetna Life Insurance Company of Hartford, Connecticut, shall not be responsible for the application or disposition of the proceeds of this policy by the trustee, and payment to and receipt by the trustee shall be a full discharge of the liability of said insurance company hereunder."

On August 21, 1930, Corl E. Reynolds, herein referred to as C. E. Reynolds, entered into a trust agreement with the Federal Trust Company with respect to this $50,000 policy of insurance, which, in the first and second paragraphs thereof, provided, among other things, for the collection of the amount due upon such policy, after the death of Reynolds, by the Federal Trust Company, and authorized the deduction by the latter of all payments theretofore advanced by this trust company in the payment of premiums accruing on the policy, together with interest thereon at 6 per cent. per annum.

The third paragraph of this trust agreement provided:

"The trustee shall, after making the payments called for by paragraph designated Second hereof, pay all the just debts owing by the grantor at the time of his death, not including, however, notes to life insurance companies on life insurance policies, and not including any note or notes which the grantor may owe, the proceeds of which were turned over to some company in which the grantor was interested and for the full use and benefit of such company."

By the fourth paragraph the balance of said trust fund remaining after making the payments above directed was ordered to be turned over to the Federal Trust Company

of Lincoln, Nebraska, to be used by it without interest for the period of two years after the death of C. E. Reynolds. At the end of the two-year period, or sooner if the control of the Federal Trust Company should change, certain specific payments were directed to be made to the officers and employees of the trust company.

There was also incorporated in this instrument a provision that, in the event that the sum for distribution was more than sufficient to pay the sums directed, then the excess of balance then remaining, "after making full distribution, shall be given to the Federal Trust Company, absolutely."

It appears that on December 31, 1930, E. C. Wilson was elected president of the Federal Trust Company, and H. B. Reynolds was elected executive vice-president of the same company. Both continued to serve in their respective offices in the Federal Trust Company until April 1, 1933; and the two persons named continued to serve as executors from date of appointment until December 8, 1933.

It also appears that, due to an error in the statement of the age of assured in his application, certain deductions were made by the insurer, so that the total amount paid over to, and received by, the Federal Trust Company on January 17, 1931, was the sum of $47,934.66, which on that date was deposited in "Account No. 1" of the Federal Trust Company with the Continental National Bank. The amounts advanced on premiums by the Federal Trust Company, with interest at 6 per cent., were then deducted from this sum. This action is not complained of in the instant case.

Dissensions having arisen between the parties in interest, on April 25, 1931, an action was instituted by the Federal Trust Company, under the provisions of sections 20-21,140 to 20-21,155, Comp. St. 1929, in the district court for Lancaster county, to determine the validity, force and effect of the trust agreement entered into by and between C. E. Reynolds and the Federal Trust Company concerning the $50,000 insurance fund heretofore referred to. Among the

parties defendant in that proceeding were Harry B. Reynolds, Everett C. Wilson, as individuals and also as executors of the last will of C. E. Reynolds, deceased, Ann M. Reynolds, widow of C. E. Reynolds, deceased, Ira E. Atkinson, John J. Ledwith, Leonard W. Reynolds, and others. Issues were duly joined by the defendants named, and after trial in the district court judgment was, on the 17th day of December, 1931, there entered determining the trust agreement invalid, and ordering the Federal Trust Company, as trustee, to pay the fund in question, together with interest thereon, to the Federal Trust Company as sole owner thereof, and not subject to the conditions and obligations of the trust agreement in question. An appeal was prosecuted to this court wherein, on April 7, 1933, the judgment of the district court for Lancaster county was reversed, and the validity of the trust agreement was in all things confirmed. See *Federal Trust Co. v. Damron*, 124 Neb. 655, 247 N. W. 589.

On June 10, 1933, a judgment on the mandate in said cause was entered in the district court for Lancaster county, in part, as follows:

"It is therefore ordered, adjudged and decreed, by the court, that the prayer of the plaintiff for instructions and the determination of the rights and duties and obligations of plaintiff in the execution of its trust be, and the same hereby is granted; that the plaintiff be, and hereby is ordered and instructed to recognize and enforce each and every one of the provisions of the contract of August 21, 1930, between C. E. Reynolds and the Federal Trust Company relative to the proceeds of the insurance policy involved in this action, exactly as is therein provided; that the plaintiff and the defendants Ira E. Atkinson * * * and John J. Ledwith, and each of them be, and they hereby are perpetually enjoined and restrained from in any manner interfering with the strict enforcement of said agreement; that the plaintiff, as trustee, pay the proceeds of said policy, together with interest thereon, to the parties entitled thereto as set forth in said agreement," etc.

This judgment is concededly in full force and effect, and now constitutes the law of the case.

Further, such judgment, duly rendered upon personal appearance as to all parties to the suit, creates an estoppel, and bars any further suit upon the same cause of action between such parties or their privies, and precludes any further litigation between the parties thereto and their privies, of the points and questions put in issue and there decided. 34 C. J. 507.

The construction of this trust agreement, thus made, is final and binding. Comp. St. 1929, sec. 20-21,141.

No part of the funds here in suit was ever actually paid over by the Federal Trust Company, as trustee, to E. C. Wilson and H. B. Reynolds, as executors of the last will of C. E. Reynolds, deceased.

But, further, it may be said that it appears, without reference to the forms made use of to accomplish the result, that after the date of depositing these insurance trust funds in its "Account No. 1" with the Continental National Bank, the Federal Trust Company (of which E. C. Wilson and H. B. Reynolds were then the active managing officers) exercised over it the same powers and treated it exactly as an ordinary deposit is treated by a commercial bank, and the proceeds were used by the Federal Trust Company in its regular business. When the Federal Trust Company was adjudicated a bankrupt by the United States district court for the district of Nebraska, Lincoln division, on June 16, 1933, this trust fund had been, in this manner, substantially entirely expended. It will be noted in passing that this course of business was in strict accordance with the judgment of the district court for Lancaster county, entered on December 17, 1931, and both E. C. Wilson and H. B. Reynolds vacated their respective offices with the Federal Trust Company on April 1, 1933, six days prior to the reversal of this district court judgment by this supreme court.

Assuming, *arguendo*, that the terms of the judgment of the district court subsequently reversed now afford no protection to appellants, and that this method of conducting

the business constitutes an unquestioned breach of trust on part of the Federal Trust Company, and imposes a personal liability upon Wilson and Reynolds as the executive officers in active charge of its business, the controlling question still remains, viz.: Does this fact create a legal liability in favor of the trustee in bankruptcy and those represented by him, or does it exist in favor of the administrator *de bonis non* of the Reynolds estate? It is quite obvious that it cannot create a double liability. But one replacement and one compensation for a loss thus caused is all that the policy of the law requires.

In this connection, the claim is made that Wilson as president and H. B. Reynolds as executive vice-president improperly and unlawfully drew from the Federal Trust Company more than $20,000 in salaries. The evidence discloses that these parties were duly elected to the offices they occupied. Their respective salaries were approved by the directors. They received and took nothing but what was within the limitation thus fixed. The ultimate failure of the Federal Trust Company appears to be due to transactions it engaged in when under the management of C. E. Reynolds, long prior to their assumption of control over its affairs. The only possible basis of the claim of wrongful receipt of salaries is that the salaries received by Wilson and Reynolds were paid out of the trust assets possessed by the Federal Trust Company as trustee and not out of the corporate funds of that institution. Conceding this claim to exist, *arguendo,* in the instant case, the conclusion follows that such conduct would amount to a tort affecting the property of a bankrupt corporation, and invokes the application of the principle that "A right of action for a tort affecting the property of the bankrupt passes to the trustee." 7 C. J. 131. See, also, *Fillebrown v. Hayward,* 190 Mass. 472, 77 N. E. 45.

The essential nature of the transaction out of which the conflicting claims of the parties in this case arise is a provision for the discharge of his obligations, or certain of them, by a debtor out of his life insurance. In the ordinary

course of business affairs, to accomplish this result two general methods are followed, viz.: (1) Certain creditors are specifically provided for either as designated individuals or as members of a defined class; or (2) the proceeds of the policies are made payable to the decedent's estate and thus incorporated therein as part of the assets thereof.

"Ordinarily the proceeds of a life insurance policy are payable to the executor or administrator of insured as assets of his estate where by the terms of the policy the proceeds are payable to insured, his estate, his legal representatives, his executors or administrators, his 'executors, administrators, or assigns,' or even his 'heirs, executors, administrators, or assigns.'" 37 C. J. 565.

It is quite obvious that in the instant case C. E. Reynolds wholly failed to indicate an intention, in the usual and customary manner, that the proceeds of the $50,000 policy should become assets of his estate. He left this policy payable "to the beneficiary, Federal Trust Company, Lincoln, Nebraska, as trustee."

The general rule is: "The general creditors of insured have no claim to the proceeds of a policy taken by their debtor for another's benefit, unless the beneficiary has consented to such a claim." 37 C. J. 588.

Certain established principles also become important in determining the rights of beneficiaries named or designated as such in life insurance policies.

"The proceeds of a policy, by its terms payable to a creditor, inure to him, at least to the extent of his debt, free from the claims of other creditors or insured's family." 7 Cooley, Briefs on Insurance (2d ed.) p. 6495.

See, also, *Belknap v. Johnston*, 114 Ia. 265, 86 N. W. 267; *Maynard v. Life Ins. Co.*, 132 N. Car. 711, 44 S. E. 405; *Andrews v. Union Central Life Ins. Co.*, 92 Tex. 584, 50 S. W. 572; *Andrews v. Union Central Life Ins. Co.*, 24 Tex. Civ. App. 425, 58 S. W. 1039; *Fitzgerald v. Rawlings*, 114 Md. 470, 79 Atl. 915; *Morrow v. National Life Ass'n*, 184 Mo. App. 308, 168 S. W. 881.

"The right of a creditor named as beneficiary is not cut

off, though the debt itself is barred by the statute of limitations." 7 Cooley, Briefs on Insurance (2d ed.) p. 6498.

See, also, *Townsend v. Tyndale*, 165 Mass. 293, 43 N. E. 107; *Insurance Co. v. Dunscomb*, 108 Tenn. 724, 69 S. W. 345.

And it is a well-established principle that "A named beneficiary takes insurance money, if at all, directly by the terms of the contract, and not derivatively, or in the capacity of heir or legal representative of the insured." 2 Couch, Cyclopedia of Insurance Law, 1043, sec. 354. See, also, *Wallace v. United Order of the Golden Cross*, 118 Me. 184, 106 Atl. 713.

So, too, "If an insurance policy is payable to a designated beneficiary having a vested interest, or has been absolutely assigned, it forms no part of the insured's estate, and is not liable to an inheritance or succession tax." 2 Couch, Cyclopedia of Insurance Law, 1033, sec. 349.

And, in this regard, it is not necessary to designate beneficiaries of a trust by name, other proper description suffices. *Murphy v. Murphy*, 190 Ia. 1221, 181 N. W. 398.

So, also, the rule is unquestioned that "By contract the creditor named as beneficiary (in a life insurance policy) may be under obligation to account for the proceeds after satisfaction of the debt, and of expenses incurred in keeping up the policy, although to the extent of the indebtedness owing to the creditor the policy is not by its terms payable to the executor or administrator of insured and does not become the property of his estate." 37 C. J. 569.

The principle is also universally accepted that trustees may be named in the policy to hold for beneficiaries ultimately intended to receive the proceeds thereof. 37 C. J. 569.

And, it is likewise true that the right to the proceeds of a policy of life insurance is conferred or excluded by agreement. 37 C. J. 571.

The authorities cited not only fully sustain, but render inevitable, the conclusion on this subject which the standard text-books on law state as a rule, substantially as follows:

"The proceeds of a life insurance policy in which a third person is named beneficiary belong exclusively to such beneficiary as an individual; they are not the property of the heirs of insured, are not subject to administration, and cannot properly be claimed or received by the administrator or other legal representative of insured as assets of his estate." 37 C. J. 566. See, also, *White v. White,* 11 Tex. Civ. App. 113, 32 S. W. 48.

The question now remains as to whether the trust agreement of August 21, 1930, hereinbefore referred to, which was employed by the insured to express his intentions, is effective to remove the proceeds of the $50,000 policy from the scope of the rule last quoted. This agreement establishes an "insurance trust." It is neither exceptional nor novel. On this subject, a standard work on insurance law says, in part:

"Although the subject of 'insurance trusts' is one which is not strictly within the scope of the present work, it is so important, and of such growing use, that it has been deemed advisable to refer to it briefly. Generally speaking, an 'insurance trust' is an agreement between a person whose life is insured and a trustee, usually a trust company, whereby the insurance money, the cash proceeds of the policy, is paid directly to the trustee for its investment and distribution to designated beneficiaries in any such manner, or at any such time or times, as the insured has directed in his trust agreement with the trustee. * * * The advisability of the plan arises from the fact that it is extremely flexible and enables the insured to provide for any plan of distribution, however flexible, that he may choose." 2 Couch, Cyclopedia of Insurance Law, 1048, sec. 355.

Considered then as an "insurance trust," in the technical sense of that term, in view of the present litigation the first controlling rule that engages our attention is: "No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust." Restatement, Trusts, sec. 200. And, under the above text, the following

appears: "Comment. a. Settlor and his successors in interest. Neither the settlor nor his heirs or personal representatives, as such, can maintain a suit against the trustee to enforce a trust or to enjoin or obtain redress for a breach of trust. * * * b. Persons incidentally benefited. A person who incidentally benefits from the performance of the trust, but who is not a beneficiary of the trust, cannot maintain a suit to enforce the trust."

In the present case the beneficiaries of the insurance trust are persons identified by membership in a restricted class of creditors of the settlor of the trust. At the death of C. E. Reynolds they become certain as to identity and definite as to their respective interests.

The rule is: "The members of a definite class of persons can be the beneficiaries of a trust." Restatement, Trusts, sec. 120.

Again, "There may be a single beneficiary or several beneficiaries of a trust." Restatement, Trusts, sec. 113.

So, too, "The extent of the interest of the beneficiary of a trust need not be definite at the time of the creation of the trust if it is definitely ascertainable within the period of the rule against perpetuities." Restatement, Trusts, sec. 129.

As to the duties which the trustee under the terms of the "insurance trust" is required to perform, the accepted principle is: "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." Restatement, Trusts, sec. 171.

In connection with this rule is the added requirement: "The trustee is under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property." Restatement, Trusts, sec. 175. And, under this last-quoted text, it is stated: "Comment: * * * f. Exclusive control. The duty of the trustee is not only to take and keep control, but to take and keep exclusive control."

In addition to the foregoing, the adjudications sustain the rule, viz.: "In executing the trust, the trustee must pay

over the trust estate or proceeds thereof to the person or persons entitled thereto, directly or through his or their representatives, and his liability to the beneficiaries is not discharged by payment to a person not entitled thereto, even though he acts under advice of counsel, unless the beneficiary elects to proceed against the payee." 65 C. J. 838.

It is quite obvious that rights conferred in and vested in the Federal Trust Company, as trustee, by the terms of this insurance trust, as well as the duties enjoined thereby, considered in the light of the authorities referred to, render inevitable the conclusion that the proceeds of the $50,000 policy are receivable by the *cestuis que trustent* designated by the insurance trust as their individual property, and the same are not subject to administration and cannot properly be claimed or received by the administrator, or other legal representatives of the deceased, C. E. Reynolds, as property of his estate. The correctness of this conclusion appears even more clearly when the existing available remedies for defaults of the trustee in the payment of the amounts directed are considered. The rule appears to be that if the trust has terminated by operation of law, or otherwise, and the property has vested in the *cestui que trust,* the latter may after that time maintain an action on the title. "So if a sum is set apart as income due to the *cestui que trust,* and the trustee makes an express promise to pay it, an action at law may be maintained." 2 Perry, Trusts and Trustees (7th ed.) p. 1440. This equitable procedure indicated is in strict harmony with our code requirement that "Every action must be prosecuted in the name of the real party in interest." Comp. St. 1929, sec. 20-301.

The insurance trust in effect is a contract made for the benefit of third persons with the Federal Trust Company, in which the trust company has made a definite promise to pay the beneficiaries designated by name, description or otherwise, and none other. In this state, "Where one person makes a promise to another, upon legal consideration, for the benefit of a third person, such third person can

maintain an action on the promise, although the consideration does not move directly from him." As supporting this, see *Shamp v. Meyer,* 20 Neb. 223, 29 N. W. 379; *Barnett v. Pratt,* 37 Neb. 349, 55 N. W. 1050; *Kaufman v. United States Nat. Bank,* 31 Neb. 661, 48 N. W. 738; *Hale v. Ripp,* 32 Neb. 259, 49 N. W. 218; *Doll v. Crume,* 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper,* 46 Neb. 644, 65 N. W. 796; *Meyer v. Shamp,* 51 Neb. 424, 71 N. W. 57; *Morrill v. Skinner,* 57 Neb. 164, 77 N. W. 375; *Stanton Nat. Bank v. Swallow,* 113 Neb. 336, 203 N. W. 561; *Tecumseh Nat. Bank v. Best,* 50 Neb. 518, 70 N. W. 41.

We are committed to the further rule: "One not a party to a contract may maintain an action thereon when such contract was made for his benefit or the benefit of a class to which he belongs." *Rohman v. Gaiser,* 53 Neb. 474, 73 N. W. 923.

Thus, an ample Code remedy is provided for the actual beneficiaries of the insurance trust, but for them only.

However, this principle of liability has been modified to the extent that it is required that "A party seeking to avail himself of the terms of a contract between other parties must do so subject to all its conditions and restrictions." *Simms v. Summers,* 39 Neb. 781, 58 N. W. 431.

So, there can be no recovery by the estate of C. E. Reynolds or its executors and administrators because the insurance trust has not designated either as a beneficiary. And, again, there can be no control exercised over the care of the property and over the payments to be made to beneficiaries, for by the terms of the insurance trust these powers and rights are expressly conferred upon the Federal Trust Company, and it or its successors in interest only may exercise them. The express terms of the insurance trust preclude a recovery by the executors of the last will and testament of C. E. Reynolds, deceased, of any part of the proceeds of the $50,000 policy, because the insurance trust, created and settled by C. E. Reynolds in his lifetime, confers upon the trustee of his choice full and absolute power and control thereof.

It thus appears from the present record that at all times the Federal Trust Company was entitled to full and complete possession and control of the entire trust fund here in suit. It was charged with the duty of exercising due diligence in ascertaining and paying the beneficiaries identified in the insurance trust, and as required by its terms. It owed the estate of C. E. Reynolds and the executors of his last will no duty whatever, so far as these trust funds were concerned. No part of the trust funds here in suit ever constituted assets of the Reynolds estate, and neither were the executors of his last will ever entitled to demand, take over, and receive or retain control or possession thereof from the trustee, to whose possession and control these funds were given. The law at no time enjoined any duties upon these executors with reference to the trust funds, and it was therefore legally impossible for them, in their official capacities, to incur any liability therefor.

Thus, it appears that the district court erred in the entry of the judgment appealed from. Such judgment, therefore, is reversed and the cause remanded to the district court, with directions to reverse and set aside the judgment heretofore entered in this cause by the county court of Lancaster county and remand this cause to that court for further proceedings in harmony with this opinion.

REVERSED.

MARGARET PINCHES, APPELLEE, V. VILLAGE OF DICKENS, APPELLANT.

FILED JULY 31, 1936. No. 29693.

1. **Judgment:** VACATION. A judgment obtained by fraud or false testimony which it would be against conscience to enforce will, on application of the unsuccessful party, be vacated and set aside after the term has expired, provided that the fraud or false testimony be clearly shown and that there be a showing of due diligence. Comp. St. 1929, sec. 20-2001.
2. ———: ———. In an action to vacate a judgment after the term on the ground that it was obtained by fraud, plaintiff must

allege and prove that he exercised due diligence at the former trial and that his failure to secure a just decision was not attributable to his own fault or negligence. Comp. St. 1929, sec. 20-2001.

3. ———: ———. Where plaintiff in an action against a village, brought for personal injuries sustained in a fall, had in her petition alleged the exact place where the injury occurred and set up with particularity the surrounding facts and circumstances so that the village, through its officers and employees, could, by the exercise of ordinary diligence, have located four witnesses who would have allegedly testified to seeing plaintiff fall at a different place, and the village failed to do so, the district court properly denied the village's application, after the expiration of the term at which an adverse judgment was rendered, to have the judgment vacated on the ground that the plaintiff in the personal injury action had fraudulently and falsely testified as to the place at which she fell. Comp. St. 1929, sec. 20-2001.

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

Hastings & Hastings, for appellant.

E. H. Evans and *Urban Simon, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

LANDIS, District Judge.

In a law action for personal injuries had in the district court, on appeal to the supreme court, judgment was rendered for the plaintiff, Margaret Pinches, against the defendant, Village of Dickens.

This is an application brought under the provisions of section 20-2001, Comp. St. 1929, providing that a district court shall have power to vacate or modify its own judgments after the term at which such judgments were rendered for fraud practiced by the successful party in obtaining the judgment or order.

The appeal herein by the village of Dickens presents the question of whether or not the trial court rightly dismissed the petition of the defendant village to vacate the former

judgment obtained against it by the plaintiff Margaret Pinches.

In the law action which resulted in a judgment, the petition alleged the exact place where Margaret Pinches fell, the negligence of the village in allowing ice and snow to accumulate thereat, and set up with particularity the facts and circumstances surrounding her falling and injury at that point. The defendant village by answer joined issue. The plaintiff's testimony in the original action followed and sustained her petition. She further testified that she cut her hand and got muresco on the sleeve of her coat from her fall. The coat of tan color was offered in evidence with muresco on the sleeve. Two witnesses testified to seeing muresco and one witness blood at the place of the fall claimed by plaintiff.

The instant application by the village to vacate the former judgment is based on the grounds that Margaret Pinches fraudulently and falsely testified that she fell at the place set out in her petition, when it is alleged she fell at another place in the middle of the graveled street and not at the place she claimed and testified to in the original action.

With reference to applications brought under section 20-2001, *supra,* the rules were announced in *Secord v. Powers,* 61 Neb. 615, 85 N. W. 846:

"A judgment clearly shown to have been obtained by fraud or false testimony, which it would be against conscience to enforce, will, on application of the unsuccessful party and a showing of due diligence, be vacated and set aside. * * *

"In an action to vacate a judgment on the ground that it was obtained by fraud, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence."

In the instant application, four witnesses testified to a difference in place for the situs of the injuries. Three of these, father, son and hired man, were farmers living with-

in about 15 miles of the village of Dickens. Each of them visited the village fairly often before the original trial, and after two of them were still in the vicinity. One witness, a resident of Dickens for 25 years, was operating a grocery store in the village at the time.

The village was informed by the pleadings of the issues for trial. There could be no justification upon the part of the village in assuming that Margaret Pinches would not produce evidence in support of her contentions, whatever it may be. Section 20-2001, *supra,* is not an excuse to the village for failing to exercise proper diligence in preparing for trial. When the village had such an opportunity to prepare for trial and failed to avail itself of it, then it cannot in effect obtain a retrial of the issue by charging that the judgment against it was obtained by false testimony. Public policy demands that there shall be an end of litigation. The population of the village of Dickens was about 100, and each and all of the four witnesses were available for the original trial. It seems that ordinary diligence would have located these witnesses, and the failure so to do is attributable to the fault of the village of Dickens. The trial court found "that the newly discovered evidence which tends to show that the plaintiff Margaret Pinches fell in a different place in the streets of Dickens than that indicated by her in her former petition and proved at the former trial could have been obtained by a reasonable exercise of diligence in order to be available at the former trial and that the failure to so obtain such evidence and to produce it at the former trial is due entirely to the lack of diligence of the defendant village of Dickens and its officers and counsel and that the petition to vacate the judgment should be dismissed by reason of such lack of diligence." After a careful perusal of the record we are entirely satisfied that the conclusion of the trial court is correct.

When the evidence offered to prove that the plaintiff testified falsely in the original action as to the situs of the fall is considered, it is far from being convincing. Three of the witnesses did not know Margaret Pinches, were in-

definite as to date, and their testimony easily supports the inference that they saw another woman, at a different time, fall in the street, wearing a dark coat. The one witness, who knew Margaret Pinches, stood on his store porch, and testified to seeing her fall about a half block away, is likewise rather indefinite as to collateral facts.

In order to justify equitable relief against a judgment, the fraud or false testimony should be clearly shown. *Secord v. Powers, supra.* Generally a court of equity will set aside a judgment at law on the ground of fraud where such fraud is extrinsic or collateral to the matter tried in the original action, and not where the fraud was in the matter on which the judgment was rendered. *United States v. Throckmorton,* 98 U. S. 61.

This rule is based upon the underlying principles that there must be an end to litigation, and that an issue once tried and passed on should not be retried, since otherwise litigation would be interminable. However, in the case of extrinsic fraud, relief is granted on the theory that such fraud has prevented the unsuccessful party from fully presenting his case and thus that there has never been a real contest before the court on the subject-matter of the issues in the case.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1936

CLARENCE T. SPIER ET AL., APPELLEES, V. ELMER E. THOMAS, JR., APPELLANT: PERRY M. WHEELER ET AL., APPELLEES.

FILED SEPTEMBER 24, 1936. No. 29982.

1. **Attorney and Client.** "Practice of law includes not only the trial of causes in court and the preparation of pleadings to be filed in court, but also includes drawing, and advising as to the legal effect of, petitions for the probate of wills, drawing of wills, deeds, mortgages and other instruments of like character, where a legal knowledge is required and where counsel and advice are given with respect to the validity and legal effect of such instruments." *State v. Barlow, ante*, p. 294, 268 N. W. 95.
2. ———. "In order to constitute the relation a professional one and not merely one of principal and agent, the attorney must be employed either to give advice upon a legal point, to prosecute or defend an action in a court of justice, or to prepare and draft, in legal form, such papers as deeds, wills, contracts, and the like." 6 C. J. 631.
3. **Judges.** One who has not been a practicing attorney in the state of Nebraska for five (5) years is not eligible as a candidate for the office of judge of the municipal court of Omaha under the provisions of section 22-103, Comp. St. 1929.
4. **Statutes.** The title under consideration here, "An act relating to municipal courts," is sufficient to include a section providing for the eligibility of judges of said court, such subject being germane to the subject-matter and within the purposes of the act as expressed in the title.
5. ———. Chapter 82, Laws 1929, of which section 22-103, Comp. St. 1929, was a part, purported to be and was a complete and independent act dealing with the whole subject of municipal courts.

6. ———. A statute complete in itself is not within the provisions of the Constitution requiring a new act to contain section or sections as amended, even though it specifically repeals prior acts or parts thereof.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, CHARLES LESLIE and ARTHUR C. THOMSEN, JUDGES. *Affirmed.*

Thomas & Thomas, L. Ross Newkirk and *Jess P. Palmer*, for appellant.

George C. Pardee, Frederick L. Wolff, David A. Fitch, James T. English and *Jack W. Marer, contra.*

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

DAY, J.

This case was brought to obtain a declaratory judgment relative to the eligibility of Elmer E. Thomas, Jr., as a candidate for the office of judge of the municipal court of the city of Omaha. Thomas was one of ten candidates nominated in the primary for this office. All these candidates and the election commissioner of Douglas county were made parties. Only Thomas and the election commissioner made an appearance. The case was tried before Judges Leslie, Thomsen, and Yeager of the district court for Douglas county. Thomas was held ineligible as a candidate for said office under the provisions of section 22-103, Comp. St. 1929, which was held to be a valid and constitutional provision. Thomas appeals from the judgment of the district court.

The eligibility of Thomas as a candidate is questioned solely because of a provision of section 22-103, Comp. St. 1929, as follows: "No person shall be eligible to the office of judge of the municipal court * * * unless he shall have been a regularly admitted and practicing attorney * * * in the state of Nebraska for at least five (5) years." Thomas was admitted as an attorney in Nebraska in November, 1930, and at the same time he was admitted to practice in the federal courts for the district

of Nebraska. These are the only courts to which he has been admitted to practice law. On December 1, 1930, he entered the service of the federal bureau of investigation of the department of justice of the United States and continued in this service until September, 1933, after which he opened an office in Omaha and has practiced law there to date.

It is contended by the appellant that he was practicing law during the period of his service for the government. Appellant is the only witness in the case. The appellant bases his contention that he was practicing law, first, upon the fact that a requirement for appointment to the service in which he was engaged was that he be admitted to practice law. This does not establish that he practiced law. There are numerous positions which are open only to attorneys, and whether they practice law while working in those positions depends entirely upon the nature of their duties.

The appellant claims that his duties were such that he was practicing law. To use his own words, his principal work was "that of an investigator of the facts to be produced in the trial of the cases." He sat at the counsel table with the district attorney during the trial of some of the cases he investigated. He prepared summaries and briefs of the facts in the various cases. In some cases upon his own initiative he prepared briefs on the law, which, however, were never presented to any court. He was not required to and did not try cases for the government.

He was not an attorney of record in any case, did not examine any witnesses or make any argument to the court. He did appear before the United States commissioner at Sioux Falls and Chicago. But he does not believe that it was necessary to be admitted to practice in the district to appear before the commissioner. The record does not reveal the nature of his appearance and whether it differed from the time he sat at the counsel table with the district attorney at the trial of cases in the district court. A

majority of the judges are of the opinion that the duties of the appellant were those of an investigator of the facts relating to offenses against the federal law for the assistance of the district attorneys, and did not constitute the practice of law.

The practice of law has recently been defined by this court. In *State v. Barlow, ante,* p. 294, 268 N. W. 95, it was said: "Practice of law includes not only the trial of causes in court and the preparation of pleadings to be filed in court, but also includes drawing, and advising as to the legal effect of, petitions for the probate of wills, drawing of wills, deeds, mortgages and other instruments of like character, where a legal knowledge is required and where counsel and advice are given with respect to the validity and legal effect of such instruments." The opinion also states: "An all-embracing definition of the term 'practice of law' would involve great difficulty." But in the present case as in the *Barlow* case, the foregoing definition is sufficient. The appellant did none of these things.

The appellant cites and relies upon *Land Title Abstract & Trust Co. v. Dworken,* 129 Ohio St. 23, 193 N. E. 650. The definition given in that case is: "The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law."

In re Duncan, 83 S. Car. 186, 65 S. E. 210, is also cited. But the definition therein does not differ substantially from those heretofore cited. Under these definitions, the conclusion is forced upon us that Thomas was an agent of the government, and that the relation of attorney and client did not exist. One authority states the rule distinguishing an attorney from an agent as fol-

lows: "In order to constitute the relation a professional one and not merely one of principal and agent, the attorney must be employed either to give advice upon a legal point, to prosecute or defend an action in a court of justice, or to prepare and draft, in legal form, such papers as deeds, wills, contracts, and the like." 6 C. J. 631.

We are further supported in this conclusion by the testimony of the appellant. He testified: "I at all times intended to come back here (Omaha) and carry on the practice of law." And again: "Well, I haven't stated that I considered any of it practicing law, I am simply telling facts of the type of work I did, without classification."

However, the decision of this case does not depend solely upon the determination of that question. The statute provides that, to be eligible for the office of judge of the municipal court, one shall have been a practicing attorney in the state of Nebraska for at least five years. The language is simple and unambiguous and means exactly what the ordinary meaning of the words implies. The record reveals that Thomas was not a practicing attorney in the state of Nebraska until September, 1933, when he opened his office in Omaha. He had no office, no clients, and did not appear in court in connection with any litigation. He did none of the things in Nebraska connected with the duties of his service with the government which he seriously contends constituted the practice of law. The only duty he performed in Nebraska was to interview a few witnesses. He was not present at the trial of any case in Nebraska. He was not admitted to practice law in the courts of any other state. It is presumed that he was not practicing elsewhere. Clearly, therefore, Thomas is not eligible as a candidate for the office of judge of the municipal court of the city of Omaha under the provisions of section 22-103, Comp. St. 1929.

The facts in the cited case of *Barr v. Cardell*, 173 Ia. 18, 155 N. W. 312, are so different from the case at bar that it is not helpful here. Under a similar statute con-

cerning eligibility for office, the court held that a lawyer who discontinued trial work but consulted clients at his office, gave advice, prepared contracts, wills, and other instruments, and attended to some probate matters was a practicing attorney. Thomas does not come within this definition as a practicing attorney.

However, the constitutionality of section 22-103, Comp. St. 1929, is challenged as violative of section 14, art. III of the Constitution, which provides: "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." The appellant argues that, first, the subject is not clearly expressed in the title of the act of which this section is a part; and secondly, the section is clearly amendatory of section 1204, Comp. St. 1922, and therefore violates the above constitutional requirement that the new act "contain the section * * * as amended, and the section * * * so amended shall be repealed."

Section 22-103, Comp. St. 1929, was enacted in 1929, as a section of chapter 82, Laws 1929. This chapter, consisting of 203 sections, had for its purpose the adoption of a complete new Code of Procedure for municipal courts in cities of a certain class, of which Omaha is one. It repealed all the sections relating to such municipal courts. The former provisions did not constitute a complete Code of Procedure for municipal courts.

The title of the 203 sections that compose chapter 82, Laws 1929, now chapter 22, Compiled Statutes 1929, is, so far as material, as follows:

"An act relating to courts and to municipal courts in cities of the metropolitan class and in cities of the first class having a population of more than forty thousand and less than one hundred thousand and to repeal original section 1201 of the Compiled Statutes of Nebraska for 1922 * * * original section 1202 * * * original sections 1203, 1204, 1205 and 1206 of the Compiled Statutes of the

state of Nebraska for 1922; original section 1207 * * * original section 1208 * * * original section 1209 * * * original section 1213 * * * original sections 1214, 1215, 1216, 1217, 1218 and 1219 of the Compiled Statutes of the state of Nebraska for 1922, and to declare an emergency."

It will be noted that the title relates to courts and to municipal courts in cities of the metropolitan class, and that it repeals the old act including section 1204, Comp. St. 1922. The title is "such as to give reasonable notice to the members of the legislature and others interested" that section 1204, Comp. St. 1922, concerning the eligibility of candidates for judge of the municipal court was to be repealed with the other provisions of the old act, and that a complete and independent act was being adopted relating to municipal courts.

The purpose of the constitutional provision limiting a legislative enactment to the object expressed in the title is to challenge the attention of those affected by the provisions of the act and to prevent surreptitious legislation. However, the rule in this state for a long time has been: "The provisions of * * * the Constitution should be liberally construed so as to uphold a provision in a legislative act which, though not specifically expressed in the title, is germane to the subject-matter, and comprehended within the objects and purposes, of the act." *Pandolfo v. State,* 120 Neb. 616, 234 N. W. 483. It is not necessary for the title to analyze the bill in detail. In *State v. Price,* 127 Neb. 132, 254 N. W. 889, it is said: "If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title." In an earlier case, *Nebraska Loan & Building Ass'n v. Perkins,* 61 Neb. 254, 85 N. W. 67, it was stated: "It is not essential that the title chosen by the legislature be the most appropriate; if it indicates the scope and purpose of the act, it is sufficient. * * * Neither is it necessary that the title inform its readers of the specific contents of the bill. If it indicates the subject of

the proposed legislation, it meets all essential requirements. It needs not that it be a complete abstract and epitome of the contents of the bill." The title of the Civil Administrative Code (Laws 1919, ch. 190) "to adopt and establish a Code of Laws for the state of Nebraska relating to the civil government of the state and to provide for their administration and enforcement, to be known as the Civil Administrative Code," was held to express the general subject with sufficient clarity to include the regulation of banking by penalizing a banker's acceptance of deposits, with knowledge of the bank's insolvency. *Westbrook v. State,* 120 Neb. 625, 234 N. W. 579. See, also, *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273. An examination of the cases discloses that a title is sufficient to uphold a provision, though not specifically expressed, if it is germane to the subject-matter and within the purposes of the act.

The title under consideration here, "An act relating to municipal courts," is sufficient to include a section providing for the eligibility of judges of said court, such subject being germane to the subject-matter and within the purposes of the act as expressed in the title.

The second contention of the appellant is that the section is amendatory of section 1204, Comp. St. 1922, and therefore violates the constitutional provision that requires that the new act contain the section as amended, and that the section so amended shall be repealed. Chapter 82, Laws 1929, of which section 22-103, Comp. St. 1929, was a part, purported to be and was a complete and independent act dealing with the whole subject of municipal courts. It is the well-established rule in this jurisdiction that a statute complete in itself is not within the provision of the Constitution requiring a new act to contain section or sections as amended, notwithstanding the new act by implication may modify or repeal prior acts or parts thereof. *State v. Lehmkuhl,* 127 Neb. 812, 257 N. W. 229. The provision in this act did not amend, modify, or repeal any original act by implication, because the act itself specifically repealed

the former sections. Surely an act can do directly that which it can do indirectly. No good reason suggests itself why a complete and independent act cannot specifically repeal prior acts or parts of acts if it can do so by implication. The rule applicable in this case is that a statute complete in itself is not within the provisions of the Constitution requiring a new act to contain section or sections as amended, even though it specifically repeals prior acts or parts thereof.

In *State v. Lehmkuhl, supra,* Mr. Justice Rose stated the rule adequately in the following language. "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."

Several cases are cited by the appellant which dealt with acts which were strictly amendatory and were not complete and independent in themselves. Time and space do not permit a complete analysis of these cases. It seems sufficient to state that this case comes within the rule of *State v. Lehmkuhl, supra,* and *Sheridan County v. Hand, supra,* and that the court is content to adhere to the rules there announced.

As a logical conclusion to the foregoing discussion of the issues presented by this record, it follows, therefore, that the judgment of the trial court was the proper one, and that it should not be disturbed.

AFFIRMED.

GRACE I. BELL, APPELLANT, V. FRANK REED, APPELLEE.

FILED SEPTEMBER 25, 1936. No. 29707.

1. Trusts. Where one person buys land in his own name, but with the money, and for the use, of another, the latter is the equitable owner of the property and the former holds the title in trust.
2. ———. To give rise to such a trust, however, the payment must have been a part of the original transaction of purchase; and a subsequent payment made to a third party to discharge

an existing encumbrance and not shown to have been made in pursuance and as part of the original transaction of purchase will not suffice.

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

A. A. Rezac, for appellant.

C. J. McCaffrey and *L. J. Te Poel, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

BLACKLEDGE, District Judge.

Originally the purpose of this action was to foreclose a tax lien upon a part of lot 4 in Bartlett's Addition to Omaha and to have the defendant, Frank Reed, holding title thereto, declared to be holding as trustee for the benefit of plaintiff as to a two-thirds interest therein.

Plaintiff claims title through the provisions of the will of her mother, Elizabeth Dorothea Reed, by the terms of which there was devised to plaintiff, in the residuary clause and without specific description, all the residue in the estate both real estate and personal property. This claim in turn is based upon the allegation that the mother held title as beneficiary under the trust alleged, by virtue of having furnished and paid the purchase price for said property, the title having been taken in the name of defendant without the consent of the mother. Defendant is the estranged husband of the decedent from whom he separated in 1930 and plaintiff is their daughter.

The petition also included a second cause of action for the foreclosure of a tax lien upon another tract. Before the trial the defendant disclaimed as to the property involved in the second cause of action and redeemed from the tax lien asserted in the first, so that the only controversy remaining was as to the existence of the trust alleged and the resulting title as to the above designated property, which is also referred to as the Mason street property.

Plaintiff produced testimony showing that the Mason

street property was purchased with the proceeds of the sale of another tract which is referred to as the Grace street property and it is as to the Grace street property wherein it is claimed the trust was created; one purpose in this action being to follow the funds into the Mason street property and impress the trust thereon which, it is conceded by defense counsel, might be done if the trust in the original purchase of the Grace street property be established.

The sole question for determination, therefore, in the district court was, and in this court remains, whether such resulting trust was established. At the trial on the close of plaintiff's evidence a motion was made by defendant for a decree in his favor which was granted and a decree was given quieting in defendant the title to the property in controversy as against the plaintiff's claims and from that decree the plaintiff prosecutes this appeal.

From the testimony embodied in the bill of exceptions it appears without dispute that the Grace street property was purchased in 1910 and title taken in the name of the defendant and that the same was sold in the year 1919 and the proceeds applied to the purchase of the property in controversy, the title to which was also taken in defendant's name. It further appears that the Grace street property was purchased subject to a mortgage in the original amount of $2,000, to the Conservative Savings & Loan Association, upon which there remained unpaid in April, 1912, the sum of approximately $1,600; that meantime in 1910 the father of Elizabeth Dorothea Reed had died and she inherited from his estate approximately $2,100; that she by check introduced in evidence, on April 6, 1912, paid to the association the balance due on said mortgage debt. This is the payment relied upon by plaintiff as the basis for establishment of the trust. It is not shown that plaintiff's mother at any time had any other funds than those derived from the estate of the father or that she applied any funds in any way or at any time in connection with the property except those represented by the check. In fact, the petition

sets out the check and makes it the basis of plaintiff's claim, although also alleging the purchase of the Grace street property to have been made in 1910. It thus clearly appears that the funds contributed by plaintiff's mother were paid some two years after the purchase of the property and for the purpose of discharging an existing encumbrance thereon. There is no testimony which even remotely tends to connect this payment to the Conservative Savings & Loan Association with any agreement made or transaction had at the time of the purchase of the Grace street property or of its conveyance to the defendant.

Upon these facts the rules applicable are stated in part as a quotation from 2 Pomeroy, Equity Jurisprudence (2d ed.) sec. 1037, in *Chicago B. & Q. R. Co. v. First Nat. Bank of Omaha*, 58 Neb. 548, 78 N. W. 1064, and the proposition made the third syllabus therein as follows: "Where one person buys land in his own name, but with the money, and for the use, of another, the latter is the equitable owner of the property and the former holds the title in trust."

Such quotation is immediately followed in the text in Pomeroy's treatise, italicized as here indicated, as follows: "In order that this effect may be produced, however, it is absolutely indispensable that the payment should be actually made by the beneficiary * * * or that an absolute obligation to pay should be incurred by him, *as a part of the original transaction of purchase,* at or before the time of the conveyance; no subsequent and *entirely independent* conduct, intervention, or payment on his part would raise any resulting trust."

In *Norton v. Brink*, 75 Neb. 575, 110 N. W. 669, in the opinion on rehearing it is said (p. 580): "The rule is that, in order to establish a resulting trust of this class, it is necessary that the person paying the purchase money should have actually paid it as his own, as a part of the original transaction, at or before the time of the conveyance. The whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one, when the title is taken in the name of another. 10 Am.

& Eng. Ency. of Law (1st ed.) sec. 8; 2 Pomeroy, Equity Jurisprudence (2d ed.) sec. 1037. And we are not aware that the soundness of this rule has ever been seriously questioned."

Also, in 65 C. J. 371, under the title of "Trusts," it is stated: "A resulting trust must result, if at all, the instant the title passes, and will not arise on other than the state of facts existing when the property is acquired. It cannot be created by subsequent occurrences, and after the legal title has once vested in the grantee of a deed, a resulting trust cannot be raised so as to divest that legal estate by the subsequent application of the funds of a third person to the improvement of the property or to satisfy the unpaid purchase money."

Also under the same title, p. 394, it is said: "The consideration must be furnished or paid at or before the time the title passes as part of the original transaction of purchase, and a subsequent payment will not give rise to a resulting trust, unless it is made in pursuance and as a part of the original transaction of purchase."

In the case of *Belcher v. Young*, 155 Pac. 1060 (90 Wash. 303) the rule is thus stated in the syllabus: "A 'resulting trust' arises from the acts of the parties and the implications of the law arising out of such acts and exists from the time the legal title is taken and rests in the grantee; and no oral agreement or payment before or after the title is taken will create a resulting trust unless the transaction is such at the moment the title passes that a trust results from the transaction itself."

This court has held: "A resulting trust will not be declared upon doubtful or uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence." *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982.

It follows as a necessary conclusion that the decree rendered by the trial court was the only one warranted by the pleadings and evidence and it is, therefore,

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. T. W. BASS ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1936. No. 29711.

1. **Evidence.** In an action to recover for an alleged defalcation, against a public official on his bond, the records of the office, kept in the regular course of business and containing entries pertinent to the matter under inquiry, are admissible in evidence on behalf of plaintiff upon being identified as such records, and without the preliminary foundation necessary in instances where plaintiff offers his own books of account.
2. ———. A record in the office of a public officer, provided for and required by law to be kept, is, of itself, strong presumptive evidence of the truth and accuracy of the entries regularly made therein.
3. **States.** The state, as any other litigant, must, in order to become entitled to a favorable judgment, produce in support of its cause of action evidence of sufficient weight and credibility to convince the deliberate judgment of the court that the essential facts do exist and that the judgment, when given, will speak the truth.

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

Perry, Van Pelt & Marti, Gaines, McLaughlin & Gaines, Hall, Cline & Williams, W. C. Fraser and *F. P. Matthews*, for appellants.

William H. Wright, Attorney General, Edwin Vail and *Paul F. Good, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

BLACKLEDGE, District Judge.

This action was instituted in the district court for Lancaster county by the state, as plaintiff, against the defendants T. W. Bass, former state treasurer, and William C. Oelkers, his bond clerk, and the sureties upon their official bonds. It is based on the contention that Bass and Oelkers violated the conditions of their official bonds in that in the

purchase of investments by the state and settlement therefor through the office of the treasurer the defendants Bass and Oelkers permitted the brokerage concerns who sold the bonds to detach from the bonds and retain interest coupons to which they were not entitled.

The petition as originally filed contained 130 causes of action, but in the course of proceedings and before the case was reached for trial disposition was made of a number of these, so that at the time of trial there remained 111 causes of action, all of which involve transactions with Wachob, Bender & Company, as seller of the bonds. Wachob, Bender & Company was not originally a party to the action, but in its progress and on application of the other defendants, Wachob, Bender & Company was made a party defendant and brought into the action upon the theory that, if it should be determined that excessive coupons had been detached and delivered by or through the treasurer's office, Wachob, Bender & Company had received the same and consequently would be liable for an accounting therefor as between it and the other defendants if judgment should go against them.

The case was commenced as an action at law, but was subsequently transferred to the equity docket, for the purpose of aiding in the adjustment of any matters as between the defendants that might become necessary, and on the ground that the multiplicity of suits and necessarily complicated evidence made the case difficult for a jury to properly consider. The appellee, although not joining in the application for transfer of the case to the equity docket, did not in the trial court, and does not here, especially object to it, claiming that such action may or may not have been proper, and that, since plaintiff has not as yet been prejudiced in the case by such action, it raises no particular objection thereto, although desiring to maintain its attitude as plaintiff in a purely law action so far as concerns the consideration of its rights, and that the other features of the case are for consideration as between the defendants themselves in which plaintiff has no particular interest. In

view of this situation and the broad jurisdiction of the court to determine all issues as between the parties, whether legal or equitable, or both, and arrive at a final determination of the whole subject of controversy, we do not find it necessary to give further consideration to this question of practice.

There are no seriously controverted propositions of law in the case, neither is it necessary to make determination of any new propositions of law or equity. The case turns upon questions of fact, and more properly upon consideration of the weight and credibility of the evidence, to which we find it necessary to apply only well-established and familiar rules.

The difficulties arise in the complexity of the facts in which the whole situation is involved. For an understanding of these it is necessary to make, as briefly as circumstances permit, a statement of the situation which, nevertheless, must in order to fairly reflect the record be somewhat extended.

The case involves, as stated, 111 different causes of action in which the state seeks to recover various sums respectively ranging from as low in amount as $6.13 to $5,669.70, and making a total somewhat in excess of $56,000. The judgment in the trial court was for the aggregate sum of $56,338.72. The period covered by the transactions under investigation included practically all of the years 1931 and 1932, and the amount of school funds handled and disposed therein was in excess of one and one half million dollars. The trial of the case consumed 11 days of actual trial work and the record presented in this court is of three volumes in excess of 1,200 pages, so that in these days of oily butter and wilted collars with the temperature standing at 100 plus, Fahrenheit, when courts and judges are supposed to be on vacation, recuperating for the work that is to come, the court may not be entitled to many eulogies upon entering consideration of responsibility for the distribution of these thousands of interest coupons, but should consider ourselves fortunate that the case neither

alleges nor involves the loss of any part of the principal sum of nearly two millions of school funds of this state, involved in the transactions. The cause of action is to the effect that the state failed to receive some $56,000 of income which rightly belonged to it.

It is quite evident from the record before us that in his disposal of the case the trial judge spent many days in serious and laborious effort. He has made an admirable and exhaustive analysis of the facts and lucid statement of his conclusions therefrom, and, although finding ourselves unable to agree with the learned judge in some of the inferences and conclusions which he has drawn, we nevertheless desire to acknowledge the very great assistance which his labors have been to this court in its consideration of the case. He in turn, as he states, found certain agreements and assistance of the counsel for both sides of material help, for he says: "The court has found this last computation of inestimable assistance in saving an immense amount of work in checking and verifying various items." Also, "Were it not for this agreement it would be utterly impossible for this court to make any finding of amounts due with any degree of definiteness."

The board of educational lands and funds of this state, of which the treasurer was a member, is by law in charge of and responsible for the investment of the school funds of this state. Therein the financial transactions in the disposition of funds in payment for securities purchased were necessarily completed by the treasurer who had immediate charge of the funds. The powers and acts of the board were in general governed by the provisions of article VII of the Constitution, and of article 2, ch. 72, Comp. St. 1929, relating to school lands and funds. It is there provided, among other things, that the board shall consist of the governor, secretary of state, treasurer, attorney general and commissioner of public lands and buildings; that the governor shall be chairman and the commissioner of public lands and buildings secretary of the board; that they shall keep a record of all proceedings and orders made by them;

that no order shall be made except upon the concurrence of at least three members of the board; that the board shall meet on the second Tuesday of each month. It appears without contradiction that, in the purchase of these bonds for investment, they were uniformly purchased at a premium of some amount. This premium was not arrived at by the payment of a certain per cent. premium, but the bonds were purchased upon what is known as a "basis of yield." That is, a bond of, say, $1,000, carrying a rate of interest of 5 per cent. would be sold at such a premium as would make the rate of interest yield a return of 4 per cent. on the total amount paid for the bond, which in case of a $1,000 bond would require a payment of $1,250. By a course of procedure, the origin or necessity for which is not explained, the practice was adopted whereby, instead of simply buying the bonds and paying for them the principal sum plus the agreed premium so as to make the rate of yield that which was agreed upon, a check was issued by the treasurer covering the face amount of the bond only, and the premium was provided for by the detachment of interest coupons from the bonds, supposedly computed at their present worth, and then delivered to or retained by the seller as and for the premium agreed upon. It is needless to say that by such procedure it would be in very rare instances that the amount of the coupons could correspond exactly with the amount of premium to be allowed, so that in each instance there must be some balance one way or the other unaccounted for in this method of settlement. The contention is made here that in a series of transactions covering a period of time the plus would approximately balance the minus and so no injury resulted. Why it was deemed necessary, or even desirable, to do this when there was open the approved, simple and entirely accurate method of simply buying and paying for what they bought in one check is not explained. The board did not, as required by law, keep a record of the proceedings and orders made by it. The evidence discloses that out of the 111 causes of action in suit in only 16 instances did the minutes of the

board disclose the rate of yield at which bonds were supposed to be, and are herein claimed to have been, bought. In all other instances there is no record in the proceedings of the board and in many more instances there is no record in such minutes of even the purchase of the bonds or its authorization.

In reference to this situation the trial court found and states: "The evidence discloses an amazingly inefficient system of keeping records by the state board of educational lands and funds of its actions pertaining to the purchase of bonds, and the investment of school and other special funds. Also there is an astounding disclosure of the total disappearance of letters, circulars and lists of bonds that bond houses offered to sell to the state, each of which, it is claimed, contain a rate of interest basis of yield at which the seller offered to sell and on which the board acted. Three former members of that board testified that in many instances bonds were purchased by not less than three members of the board approving such offers all signing their names upon these various separate sheets, and upon that authority the treasurer made purchases and settlements, afterwards delivering the sheets to the commissioner of public lands and buildings who filed the same in his office. When bonds were thus purchased these sheets and letters constituted the only record or evidence upon this subject, as there was no record made in the minutes of the meetings of the board. It now develops that all of these separate sheets and letters have disappeared entirely from the office of the land commissioner. When and where and how is undisclosed."

Although the law fixed the times at which the board of educational lands and funds should meet and transact their business, no record was even then made of these *ad interim* purchases or their approval. It was suggested that by reason of some other meetings they found the time inadequate and so resorted to this practice in the purchase of bonds by passing slips and memoranda from one member to another and obtaining approval by means of initials and

signatures until a majority of the members of the board had been obtained. It seems that any one of even slight business experience would know that members of this board, or any similar organization, cannot lawfully transact business in that manner. It was also suggested that this was done because there were funds on hand to invest and the board was anxious to keep the funds invested as closely as possible and so could not wait the regular monthly meeting. The answer is that what they in effect did was, instead of purchasing the securities and paying for them whatever premium they agreed to pay so that the income whatever it was would be at once coming in to apply to the purpose of the fund, they hurried to get these funds into the hands of the sellers of the securities, and not only that, but to deliver to them the early maturing coupons covering a period of one or more years in accruing interest, so that instead of accelerating any benefit to the state from the fund by means of such investment, they simply paid out the money and left a vacancy during an extended period of time in which nothing in income would be coming to the fund from any source.

The state offered and there was received in evidence the minutes of the meeting of the board in so far as the same contained any reference to the authorization for the purchase of the bonds involved in these 16 causes of action.

For the rest it was undertaken to support the allegations of the plaintiff's petition by the introduction in evidence of two certain books known as bond registers which were books regularly kept in the treasurer's office in the course of business and in which was supposed to be entered the details respecting the purchase of each consignment of bonds showing a rather complete description thereof with the name of the maker, date of issue and maturity, principal amount, rate of interest, yield rate at which purchased, the face value, number and amount of coupons detached and total premium. This record was kept by defendant Oelkers, bond clerk, in the office of the treasurer.

The determination of the case turns, as it did in the trial

court, upon the weight and evidential value which ought to be given to this bond register. It is argued by the appellants that this bond register should not have been received in evidence at all, lacking as it did support by way of testimony as to its truthfulness and accuracy by the one who made it and that the making of the entries were contemporaneous with the transactions themselves. With this contention, however, we cannot agree because the record was not offered on that basis. It is to be remembered that this is a suit by the state against a former treasurer and his employee in his office, and the register being identified as a record of the office regularly kept in the course of its business and containing a record of the transactions of the office was properly admissible against the defendants responsible for its keeping as statements or admissions on their part. We think that the admission of this register in evidence was properly allowed and controlled by the holdings of this court in *Paxton v. State,* 59 Neb. 460, 81 N. W. 383; *German Nat. Bank of Hastings v. Leonard,* 40 Neb. 676, 59 N. W. 107, and *Globe Savings Bank v. National Bank of Commerce,* 64 Neb. 413, 89 N. W. 1030.

We hold that the bond register was properly received in evidence, and, it being properly received as against the principal defendants, Bass and Oelkers, it was competent evidence in the case for whatever its worth might turn out to be. It was not, however, what might properly be termed an official record. It was, perhaps, necessary and at least convenient in the transaction of the business of the office, but was not provided for by statute nor by any law given an official standing or surrounded by any presumptions which should operate to give it special weight or character. In fact, we do not understand the state to contend here that it was conclusive, for it is stated in the brief on behalf of the state that it is not contended, in view of the decision in this court in *Paxton v. State, supra,* that the bond register was absolutely conclusive in the sense that evidence to contradict it was not admissible. There was considerable testimony given at the trial for the purpose of contradict-

ing the showing, as the state contended it to be, of these entries on the bond register.

However, before considering that phase of the matter, an examination of the register itself as to the statements therein and the inferences properly to be drawn therefrom is somewhat illuminating when considered apart from any other evidence tending to support or contradict the disclosures made thereby. Having in mind the fact that these bonds were all purchased on a basis of yield different from simply the face value and rate of interest named in the bonds, the sole question for determination in this case is: What was the actual basis of yield upon which the contract of purchase was made and what is the disclosure in that regard by the bond register itself? This record to be of value should be consistent with itself. The only basis Oelkers had upon which to make a truthful entry in the column for basis of yield, or in the column for coupons detached, was the contract of purchase for the bonds and, if truthfully and correctly made, these two columns should be in agreement, which they are not. The appellants contend that the column showing coupons detached is the truthful one and corroborates their theory of the case. The state contends that this is arguing in a circle, for that, although the register shows the number of coupons detached and that such a number was excessive on the basis of yield, as shown by the other column, the entries in the coupon column do not purport to show that that was the basis of yield, but only what was done by the state treasurer. This seems to be a continued reasoning in a circle. The conclusion is inescapable that the only right basis for an entry in either column was that of the rate of yield at which the bonds were purchased. The entries in the two columns, respectively, contradict each other and there is no way to determine from the record itself which of these is correct. Resort must be had, therefore, to other evidence for the determination of that question, if it may be determined. It is argued on behalf of the state that the falsity of the record must be in the coupon column

because that would be more difficult of detection than that in the rate of yield column. It would, no doubt, require some computation to be able to make a proper comparison of one entry with the other, and yet it does not seem to be a very complicated matter to tell that upon a $2,000 ten-year bond bearing 5 per cent. and sold on a basis of yield of 4.50, $200 in coupons would be an excessive deduction and would, in fact, mean 4 per cent. instead of 4.50. However this may be and however necessary some computation was in order to determine the actual showing made by the record itself, the fact was there that the two columns each supposedly represented the same thing; and the court is asked by one side of the case to believe one column and by the adversaries to believe the other. Necessarily the evidence offered by this record would be secondary in its nature. The original, and that which should be reliable evidence, is in a very great majority of instances missing from the records of the board of educational lands and funds where it should be found; not only so, but the record upon which it is claimed the board actually acted is not only missing from its proper place, but it is claimed to have been kept by means of pencil memoranda on letters and bond lists which were passed around between the various members of the board and the treasurer's office and finally landed in a pigeon-hole in the office of the commissioner of public lands and buildings, the secretary of the board. Even they have disappeared and no one has been able to find them or account for them.

It is true that the defendant Oelkers, when confronted with the situation and condition of the record as kept by him, attempted an explanation, as to which the trial court found: "To the amazement of this court it is now sought to discredit this register by the oral testimony of the defendant Oelkers who was the bond clerk in the treasurer's office, and as such had full charge of making settlement for purchases of bonds. He now testifies that all the entries of the interest yield in the purchase of bonds involved in this case were false and do not state

the true basis of the yield; that he made the entries and knew at the time they were false and that in each instance the rate was actually 4 per cent. while the register shows from 4.15 to 4.70. It is upon this testimony that the court is now asked to discredit the bond register, and as the next best evidence to accept the carbon copies of letters of offers of sale of bonds from Wachob, Bender & Company and also that company's ledger sheets which show the interest basis of yield at which it sold the bonds."

Oelker's weird statement as to why he did this is in effect that two of the board members had told him they did not desire to buy any bonds under 4 per cent. yield; that many different bond men and bond houses were examining the records from time to time, and that he put down in the one column a higher rate of yield than the actual rate at which the bonds were purchased, thus endeavoring to mislead the bond houses and searchers of the record when they were trying to ascertain the rates at which the state was buying bonds and thus secure a better rate on bonds for the state which it might buy. Of course, such explanation is fantastic, if correct, and we do not doubt that the trial court was amazed thereby. Yet this is the witness who kept the whole record, which record is the sole reliance of the state for an affirmance of the judgment as to the majority of its causes of action.

The bond register was simply and only a bookkeeping record kept by a business office for the purpose of recording transactions proper to be noted therein and without any particular sanctions or presumptions attached by law to it. The transactions therein noted that are concerned in this case were between that office and the office of Wachob, Bender & Company, sellers of the bonds. The records of the transactions as disclosed by the books of the Wachob, Bender & Company were offered and received in evidence. They were received over the objections of the state, but we do not think such objections were well founded. The records were, of course, offered on a

different basis from that which allowed the offer of the bond register on the part of the state. The records were offered by the defendants, supported by testimony of witnesses to their truthfulness and accuracy and that they were made contemporaneously with the transactions and constituted a part of the regular records of the office in the course of its business. They were the records of the other party to the transaction and were entitled to be received and considered. The trial court, however, refused to consider them, or, rather, in its consideration of them completely discredits the letters and ledger books of the defendant, and, thereupon accepting the evidence of the minutes of the board of educational lands and funds in so far as the necessary facts were shown thereby, proceeded to compare the facts disclosed by the letters and books of Wachob, Bender & Company, and by the Marsh memorandum as against the record in the basis of yield column in the bond register and to discredit everything that did not agree with the entries contained in that column of the bond register, concluding that, because a public officer who himself keeps a record might not be allowed to later say, when to his benefit to do so, that he simply made false entries and so avoid the effect of the record, and that because in 16 instances the minutes of the board and the bond register did agree, therefore, the bond register should be held to be binding as to all the other instances and, therefore, to support a conclusion that the bond register is conclusive as to the interest basis of yield, in the absence of the minutes or other record of the action of the board of educational lands and funds.

We may agree with the trial court in its characterization of the weight or effect of the testimony of the defendant Oelkers, but we think the court clearly fell into error in giving to the record kept by that same discredited witness a force and efficacy sufficient not only to overcome evidence in opposition thereto, but in reality, as we believe, to support a judgment in favor of the state upon any consideration.

The state was bound to support its case by competent and credible evidence in order to become entitled to a favorable judgment and in this was no different from any other litigant upon the presentation of its case to the court. We have no hesitancy in reaching the conclusion from a careful study of the whole record and from the comparatively brief reference herein made to it that so far from overcoming the weight of countervailing testimony, if that were necessary, the evidence relied upon by the state, and which reduced to its ultimate means the bond register, is insufficient except when supported by other competent evidence to authorize a judgment for the state. It should be remembered that the transactions here involved cover a period of two years in time and the fact that the bond register and the minutes of the board agree in 16 instances during that time is not sufficient ground upon which to hold that the other 95 cases must by inference be bound by the same record.

The state found itself much in the situation that the prosecution does in a criminal case when its chief witness fails. There was nothing left upon which its case could stand. The fault lies primarily, of course, with the board of educational lands and funds in its failure to keep a full and accurate record of its transactions as the law requires. Had it done so, none of this controversy could have arisen, or if it did to some extent arise it would have been comparatively easy to ascertain the truth. The state must act through the agency of its officers, and when they so far fail in their duty that no proper or competent record is left from which the facts may be ascertained, the state is left to suffer the consequences of the delinquency of its officers the same as is the result with any other business institution. The result in this case is not that the defendants have been exonerated or established a clean bill of health, only to the extent that the plaintiff has not been able to prove a case against them, except as to a comparatively small portion of the state's demand. This court has made some appropriate statements respecting a some-

what similar situation and in reference to the duties of a county board and the effect of its failure to perform such duties in the opinion in the case of *Kuhl v. Pierce County*, 44 Neb. 584, 62 N. W. 1066.

It has long been a maxim in the law relating to evidence that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or nonexistence of facts which he asserts or denies to exist, must prove that those facts do or do not exist." Jones, Evidence (2d ed.) sec. 180, quoting Stephens, Evidence, art. 93.

It also will, we believe, be recognized as elementary that, to warrant a favorable judgment, any quantum of evidence offered in support of a fact on which the court is asked to render judgment must be of sufficient weight and credibility to convince the deliberate judgment of the court that such fact does exist and that the judgment when given will speak the truth. Otherwise, the plaintiff will not have made a case entitling him to a favorable judgment and his prayer therefor must be denied.

This we believe to be the situation in the present case except as to the 16 causes of action which we find did have sufficient support in the evidence and are designated in the record of the board of educational lands and funds. These causes of action aggregate $2,969.01. As to them the judgment of the trial court will be affirmed and as to the remaining causes of action the judgment will be reversed and they dismissed. The provisions as made in the judgment of the trial court for relief to the defendants *inter se* will remain, as necessarily modified to apply to the recovery granted herein, and the cause will be remanded, with instructions to enter a judgment in accordance herewith.

AFFIRMED IN PART AND REVERSED IN PART.

CARTER, J., concurs in the result.

SPEIER'S LAUNDRY COMPANY, APPELLEE, V. CITY OF WILBER ET AL., APPELLANTS.

FILED OCTOBER 9, 1936. NO. 29715.

1. Licenses. Municipal occupation tax must be reasonable. If so high as to prohibit business, it is confiscatory and will not be enforced.
2. ———. Taxes levied by a municipal occupation tax ordinance must apply uniformly and equally to the classes upon which they are imposed.
3. ———. To be valid, a municipal ordinance classifying occupations for the purpose of levying a tax thereon must not be arbitrary in its classification. The classification must rest on some reason of public policy or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.

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

C. R. Stasenka, for appellants.

Field, Ricketts & Ricketts and *Bartos, Bartos & Placek, contra.*

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

GOSS, C. J.

This action in equity was to enjoin the city of Wilber from enforcing certain sections of an occupation tax against plaintiff, which is a Nebraska corporation and operates a laundry and dry cleaning business in Lincoln. It collects articles by truck from Wilber. After it services these articles they are returned by truck and delivered to the Wilber customers. Plaintiff has no local place of business in Wilber and pays no taxes or license fees of any sort there.

Ordinance No. 101, passed by the city of Wilber, a city of the second class, levied a tax of $2 a day or $50 a year upon all dry cleaners, their agents, solicitors, or servants, not having a permanent place of business in Wilber, when such business is done by taking garments to be cleaned or

renovated outside the city and delivered or collected for within the city of Wilber; then the same ordinance fixed the tax at $5 a year upon "Any person, firm or corporation engaged in the above business or occupation, but who are residents having a permanent place of business within said city."

The above facts were established on the trial, chiefly by stipulation of the parties.

Upon the trial the district court found that the ordinance was not adopted as a police regulation but purports to be adopted for revenue purposes only; that it creates an arbitrary classification between residents and nonresidents, and discriminates between the same; that the tax as levied is not uniform; that as to plaintiff's business conducted in Wilber the tax is confiscatory; that it denies to plaintiff the equal protection of the laws; and that it is void both under the Constitution of the United States and of the state of Nebraska. The court perpetually enjoined the city and its agents from enforcing the provision of the ordinance against plaintiff. Defendants appealed.

The ordinance required nonresidents, like plaintiff, to pay $2 for a single day or $50 if the tax were paid by the year. The evidence shows the amount of business done by plaintiff in Wilber for 31 weeks. Plaintiff's truck covered about 100 miles a day. It served customers in Wilber twice a week, making that city on Mondays and Thursdays. The average weekly earning on these trips for the period named was $17.58. About three-fifths of these earnings were on account of laundry and two-fifths were on account of the dry cleaning business. It needs no argument to prove that for the expense of a truck, of a man to operate it, and for the laundry or cleaning service, the tax would be confiscatory. It would prevent plaintiff from carrying its service to Wilber.

Municipal occupation tax must be reasonable. If so high as to prohibit business, it is confiscatory and will not be enforced. *Hoyt Bros. v. City of Lincoln,* 130 Neb. 79, 263 N. W. 898.

Taxes levied by a municipal occupation tax ordinance must apply uniformly and equally to the classes upon which they are imposed. *Petersen Baking Co. v. City of Fremont,* 119 Neb. 212, 228 N .W. 256; *Rosenbloom v. State,* 64 Neb. 342, 89 N. W. 1053; Comp. St. 1929, sec. 17-436. The mayor frankly testified that the ordinance was "for the protection of home industry." This ordinance taxed the home industry only one-tenth of the tax levied against nonresidents by the city although both classes performed the same type of service.

To be valid, a municipal ordinance classifying occupations for the purpose of levying a tax thereon must not be arbitrary in its classification. The classification must rest on some reason of public policy or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified. Comp. St. 1929, sec. 17-436; *Petersen Baking Co. v. City of Fremont,* 119 Neb. 212, 228 N. W. 256; *Rosenbloom v. State,* 64 Neb. 342, 89 N. W. 1053; *Norris v. City of Lincoln,* 93 Neb. 658, 142 N. W. 114.

The judgment of the district court is

AFFIRMED.

JOHN ASMUS, JR., APPELLEE, V. J. F. LONGENECKER ET AL., APPELLANTS.

FILED OCTOBER 9, 1936. No. 29716.

Deeds: CONSIDERATION. "A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Bouvier's Law Dictionary, p. 613.

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

Emil J. Eret and *T. R. P. Stocker,* for appellants.

Edward J. Kubat, contra.

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

GOOD, J.

Plaintiff sued to cancel a deed to a farm executed by him and his wife; also to have the deed declared a mortgage. The grounds alleged for cancelation of the deed were that it was not acknowledged, as required by law, and that it was obtained by fraud, and without consideration. Defendants admitted the execution of the deed and denied the other allegations of the petition. The trial resulted in a decree canceling the deed, on the ground of lack of consideration. Defendants have appealed.

The record discloses the following facts: Early in January, 1933, plaintiff was the owner of a farm in Saline county, consisting of approximately 200 acres. The farm was encumbered by a mortgage for $11,000 and delinquent taxes for several years. Plaintiff was in default in the payment of interest on the mortgage, and an action for foreclosure was then pending. Plaintiff and defendant Longenecker entered into an agreement whereby plaintiff and his wife were to convey the farm in question to Longenecker, who in turn would lease the premises to the plaintiff for a period of five years, without the payment of rent. They visited an attorney's office and had a deed drawn from plaintiff to defendant Mayland and a lease of the premises by defendant Longenecker to plaintiff for a period of five years, ending March 1, 1938. The lease also contained an option that on or before March 1, 1938, plaintiff might repurchase an 80-acre tract, on which were located the buildings and improvements, upon payment of the sum of $10,000. Defendant Mayland on the same day executed a deed to the premises to defendant Longenecker. Apparently, Mayland was simply used as a conduit for conveying the title from plaintiff to defendant Longenecker. The deeds were executed on the 5th day of January, 1933. On the 3d day of February following, the foreclosure action was dismissed and has not been recommenced.

In his petition plaintiff avers that Longenecker had acquired ownership of the note or bonds secured by the mortgage. The evidence upon this point indicates that Longenecker and his friends owned or controlled the bonds, or a part thereof at least, that were secured by the mortgage. The allegation that the deed was void for fraud and was improperly executed finds no support in the record, and the district court so found. Plaintiff's positions in his petition are inconsistent. In one part he alleges that the deed was intended as a mortgage and to secure the payment of the indebtedness represented by the previous mortgage, and at the same time he attempts to charge that the deed is absolutely void, as indicated.

The case seems to have been tried on the theory that the deed was void for want of consideration. Plaintiff was unable to pay the delinquent taxes upon the property; was unable to pay the accruing interest, and apparently would lose possession of his farm within a short period. At that time there was no moratory statute. Plaintiff would have been entitled, under the law as it then existed, to a stay of nine months after entry of the decree of foreclosure. Under the circumstances, plaintiff had good reason to believe that he could retain possession of his farm for not more than one year. By the arrangement entered into with defendant Longenecker, he was assured of possession of the farm for a period of five years. He conveyed the equity in his farm to Longenecker, upon the condition that Longenecker would protect him in the use of the premises for a period of five years. That period has not yet expired, but plaintiff has not been molested in his possession. The action to foreclose the mortgage was dismissed shortly after the deeds were executed. It is inferable that the dismissal of that action was procured by defendant Longenecker. The latter has bound himself, by his lease, to protect the plaintiff in the use of the premises for a period of five years. We think the facts disclosed show there was a valuable consideration for the execution of the deed.

In *In re Estate of Griswold*, 113 Neb. 256, 202 N. W. 609,

it was held: "A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers of value to him."

We find this definition in Bouvier's Law Dictionary (p. 613): "A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Like definitions may be found in 6 R. C. L. 654, sec. 67, and 13 C. J. 311.

The evidence does not support the judgment and decree of the trial court that there was no valuable consideration for the execution of the deed. It follows that the judgment of the district court is erroneous and is

REVERSED.

MAUDE W. PORTER, APPELLEE, V. BRINN-JENSEN COMPANY ET AL., APPELLANTS.

FILED OCTOBER 9, 1936. No. 29863.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: BURDEN OF PROOF. Burden of proof rests upon plaintiff, in cases arising under workmen's compensation law, to prove with reasonable certainty that the employee met with an injury or death in an accident arising out of and in the course of his employment.
2. ———: ———: COMPENSABLE INJURY. Under workmen's compensation law, an award of compensation cannot be based upon mere possibilities or probabilities, but must be based upon sufficient evidence showing a disability or death of the employee arising out of and in the course of his employment.

APPEAL from the district court for Otoe county: DANIEL W. LIVINGSTON, JUDGE. *Reversed.*

Thomas E. Dunbar and *Hall, Cline & Williams*, for appellants.

Joe R. Wells and *Pitzer & Pitzer, contra.*

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

GOOD, J.

J. Ray Porter lost his life about 9 o'clock p. m., February 21, 1935, in an automobile accident on highway No. 75, nine miles north of Nebraska City, Nebraska. Porter was engaged in selling merchandise for Brinn-Jensen Company on a commission basis. Plaintiff, the widow of Porter, brought this action against Brinn-Jensen Company and its insurance carrier, American Employers Insurance Company, to recover an award of compensation and funeral expenses, based on provisions of the workmen's compensation law, and on the allegation that her husband's death was caused by an accident arising out of and in the course of his employment. The trial court awarded plaintiff compensation, funeral expenses and attorney's fees. Defendants have appealed.

It is defendants' contention that Porter was not an employee within the meaning of that term as used in the workmen's compensation law; secondly, that his death occurred as the result of his use of intoxicating liquors; and, lastly, that at the time of the accident resulting in his death he was not engaged in any work or business of Brinn-Jensen Company, and that therefore his death did not arise out of his employment.

The record discloses the following pertinent facts: Brinn-Jensen Company has a place of business at Omaha, Nebraska, and is engaged in selling paper, paper bags, and other merchandise at wholesale. For some time prior to his death, Porter had been selling for Brinn-Jensen Company its merchandise to retailers and receiving a commission upon sales made by him. His territory is not precisely designated by the record. It is said, however, to extend both north and south from Omaha, along and on both sides of the Missouri river. How far south or how far north is not disclosed. The extent of his territory was sufficient to require five weeks in which to cover it. Porter was re-

quired to use his own automobile; to furnish his gas and upkeep of the car; to call upon the merchants in person; was not allowed to carry any other lines or side business, and was required to devote all of his time for at least five or six days out of each week to the business of Brinn-Jensen Company. He was also required to make collections and remit them daily, and to make daily reports of his orders for merchandise sold. He was not permitted to deliver any merchandise, nor to fix the price thereof, nor the terms of credit, if any. He simply took orders for the merchandise which were sent to Brinn-Jensen Company, and, if approved by it, were filled. Porter was allowed a drawing account of $25 a week for expenses, and at the end of each month his commissions were ascertained and from the commissions was deducted the amount of advances made.

It is disclosed that some time on the 20th of February, 1935, Porter arrived in Nebraska City, transacting some business for Brinn-Jensen Company; stayed overnight at a hotel, and the next forenoon was engaged in his duties as a salesman and collector. At about noon he settled his account and checked out of the hotel, but still remained in Nebraska City and apparently was drinking to such an extent that he indicated a state of considerable intoxication. In the afternoon he stated to the hotel proprietor that he was going either to Dunbar or to Omaha. Dunbar is west and Omaha north of Nebraska City. At about 9 o'clock in the evening of February 21, we find Porter and one Wilson driving into a filling station on the outskirts of Nebraska City, with Porter at the wheel. Apparently they stopped and had the car serviced. There is some evidence that at this time Porter was argumentative and possibly quarrelsome. In a few minutes they left, taking highway No. 75 toward Omaha, with Wilson at the wheel. Forty-five minutes later the filling station attendant was informed of an automobile accident nine miles north, in which it appears that both Wilson and Porter were killed. There is sufficient in the evidence from which it is inferred that there was a collision between the car in which Porter and

Wilson were riding and another car. How the accident occurred or who was at fault is not disclosed by the record.

It is disclosed that Porter had with him his sample case, a portfolio containing orders which he had taken that day, and a part of which had been already filled by Brinn-Jensen Company, and a part unfilled. There is nothing, other than has been stated, to indicate the destination or purpose of the drive by Wilson and Porter. We are uninformed of whether their destination was Omaha, Plattsmouth, or some other point. It has been suggested that Porter may have intended to go to Murray or to Plattsmouth, but there is no showing in this record that he had any customers either in Plattsmouth or Murray, or that he had any intention of going to either of those places. Does this state of facts warrant a finding that plaintiff's husband met his death in an accident which arose out of his employment?

The rule of law applicable is that in workmen's compensation cases the burden of proof is on the claimant to show with reasonable certainty that the employee sustained injury or death which arose out of and in the course of his employment. This rule, in substance, has been announced in *Pensick v. Boehm,* 124 Neb. 28, 244 N. W. 923; *Saxton v. Sinclair Refining Co.,* 125 Neb. 468, 250 N. W. 655; *Kuhtnick v. Carey,* 124 Neb. 762, 248 N. W. 89; *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560; *Parsons Oil Co. v. Schlitt,* 125 Neb. 223, 249 N. W. 613; *Huffman v. Great Western Sugar Co.,* 125 Neb. 302, 250 N. W. 70. It is also a rule that an award of compensation cannot be based upon mere possibilities or probabilities, but must be based upon sufficient evidence showing a disability or death of the employee arising out of and in the course of his employment. *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Townsend v. Loeffelbein,* 123 Neb. 791, 244 N. W. 418; *Kuhtnick v. Carey, supra; Mullen v. City of Hastings, supra; Parsons Oil Co. v. Schlitt, supra; Saxton v. Sinclair Refining Co., supra; Hudson v. City of Lincoln,* 128 Neb. 202, 258 N. W. 398.

The facts disclosed by the record leave us in doubt as to

the destination of Porter and his companion at the time of the accident, or the object or purpose of their trip. It is possible that Porter may have been intending to visit some town on the business of Brinn-Jensen Company. It is equally possible that he may have been upon some mission of his own and bound for some other place than Omaha, Plattsmouth or Murray. His destination and mission are matters of speculation. The law requires that the evidence show with reasonable certainty that the employee was injured or met his death in an accident in the course of and arising out of his employment. Guess, speculation, possibility, or even probability will not suffice. Plaintiff has not carried the burden which the law imposes. The conclusion upon this point renders it unnecessary to consider the other defenses urged by defendants.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

REVERSED.

LEWIS N. WILLSON, APPELLEE, V. JOHN R. QUEIN ET AL., APPELLANTS.

FILED OCTOBER 9, 1936. No. 29719.

1. **Mortgages**: FORECLOSURE: SALE: CONFIRMATION. When a large property of the value of $75,000 to $80,000 sells at a judicial sale for more than $72,000, the price is not so inadequate as to shock the conscience of the court or to be evidence of fraud.
2. ———: ———: MORATORIUM. Where an applicant for a moratory stay of proceedings appears to have no equity in the land secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application.

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

Neighbors & Coulter, for appellants.

C. G. Perry, contra.

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

DAY, J.

This is an appeal from the order confirming sale and denying a moratorium in a mortgage foreclosure case. The only question presented by the record is the correctness of these rulings.

Should the sale of the mortgaged premises have been confirmed? The rule applicable has been frequently repeated by this court. It is well stated in *Erickson v. Hansen*, 129 Neb. 806, 263 N. W. 132: "Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless shocking conscience of court, or amounting to evidence of fraud." The only complaint in the instant case is that the price was inadequate. There is evidence in the record as to the amount of the purchase price in 1918 when the defendant acquired the ranch from the plaintiff. However, the question for determination here is the value of the ranch at the time of the sale.

On November 3, 1933, when the decree of foreclosure was entered, the indebtedness amounted to $65,913.19. In addition to this, there were the taxes which had been assessed and levied for the years 1931 to 1934, which were unpaid, amounting to $1,991.75. Also, there were other liens against the property amounting to $3,190.31. Thus, it will be noted that the total liens against the premises at that date amounted to $71,095.25. The sale took place September 10, 1934, and the property was sold to the plaintiff, mortgagee, for $72,030.55. At that time there was more than a year's additional interest due, in addition to another year's taxes and the costs.

The evidence of the various witnesses was in dispute as to the value of the place. The estimated values varied from $75,000 to $80,000 placed on the ranch by the plaintiff, to $100,000, the value given by the defendant. The trial court after hearing the testimony of all these witnesses determined that the value of the land was $80,000. From an

examination of the record, our conclusion is that the property was not worth more. The property involved is a large ranch of approximately 10,000 acres, with which the trial judge is familiar. When a large property of the value of $75,000 to $80,000 sells at a judicial sale for more than $72,000, the price is not so inadequate as to shock the conscience of the court or to be evidence of fraud. Again, there is no evidence in the record that another sale would produce more money or benefit the parties in any way.

The defendant applied for a stay under the moratorium act. In *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792, it is said that, where an applicant for a moratory stay of proceedings appears to have no equity in the land secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application. The defendant has no equity in the real estate involved herein. The mortgage, judgment liens, the court costs, and the taxes at the time of the application, together with the taxes and interest which would accrue during the period of the suggested stay, exceed the value of the premises. The holder of a mortgage in order to avoid stay of proceedings under the moratorium has the burden to show good cause why application should not be granted. *Howarth v. Becker,* 128 Neb. 580, 259 N. W. 505. In this case, the holder of the mortgage sustained this burden and demonstrated good cause why the application should not be granted, in that the defendant had no equity to protect.

Therefore, it is the conclusion of this court that the trial court did not err in any particular.

AFFIRMED.

L. F. PARKER ET AL., APPELLEES, V. WILLIAM BOURKE ET AL.: CONSERVATIVE MORTGAGE COMPANY ET AL., APPELLANTS.

FILED OCTOBER 9, 1936. No. 29718.

1. Trusts. A trust, when not qualified by the words "charitable," "resulting," or "constructive," is a fiduciary relationship with

respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

2. ———. The insertion of the word "trustee" after the name of the grantee in a real estate mortgage does not of itself establish the existence of such a trust relationship.
3. Mortgages: FORECLOSURE: DECREE: REVIEW. "While the decree finding personal liabilities first rendered in a foreclosure proceeding is to a certain extent interlocutory, yet, as to findings of fact made in such decree on issues properly pleaded, it is not subject to review on objections to a deficiency judgment." *Parratt v. Hartsuff*, 75 Neb. 706, 106 N. W. 966.
4. ———: ———: DEFICIENCY JUDGMENT. But, where the petition for foreclosure does not show a personal liability of defendant for a deficiency, the finding in the decree that personal liability exists will not preclude the defendant from resisting the application for a deficiency judgment by any defense that is available to him.

APPEAL from the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Reversed.*

D. O. Dwyer and *W. L. Dwyer*, for appellants.

A. L. Tidd, contra.

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

CARTER, J.

This is a foreclosure action in which appellees filed an application, after sale, for a deficiency judgment. Appellants Conservative Mortgage Company and John H. Fowler filed objections to the entry of such a judgment against them. The trial court sustained appellees' motion to strike the objections and entered a deficiency judgment. From this order the Conservative Mortgage Company and John H. Fowler appeal.

The record discloses that on March 7, 1925, William Bourke executed and delivered a series of first mortgage bonds aggregating the sum of $13,500 to the Conservative Mortgage Company, trustee, and to secure the payment of

the same gave a mortgage on the lands foreclosed in the suit at bar. The mortgagor also executed a second mortgage to the Conservative Mortgage Company in the amount of $675. On or about March 14, 1925, the Conservative Mortgage Company, trustee, sold and assigned the bonds in the amount of $13,500, which the first mortgage was given to secure, to the plaintiffs in this action. On October 5, 1926, the Conservative Mortgage Company commenced foreclosure of its second mortgage for $675, subject to the first mortgage. The defendant John H. Fowler purchased the real estate at the foreclosure sale and on April 17, 1928, sold it to the Robertson Furniture Company for $6,500 subject to the first mortgage held by appellees.

The petition of appellees for the foreclosure of the mortgage held by them alleged that the Conservative Mortgage Company, being the trustee in said mortgage, was duty bound to protect the interests of the bondholders and not to make a profit by reason of the trusteeship; that appellees are now entitled to an accounting from the Conservative Mortgage Company, John H. Fowler and the Robertson Furniture Company of all profits received by them to meet any deficiency which said lands will not pay when they are sold and the proceeds applied to the payment of costs and the amount due to appellees.

The record shows that summons was served upon the Conservative Mortgage Company and John H. Fowler and that they failed to appear and default was entered against them. On April 29, 1933, the trial court entered a decree of foreclosure in which it was stated, after a recitation of the above facts, as follows: "The court further finds that the Conservative Mortgage Company as trustee and John H. Fowler its president, both stand in the relation of a trustee for the benefit of the plaintiffs in the above entitled action. That there should be deducted from said Six Thousand Five Hundred ($6,500) Dollars the sum which was due and owing to the Conservative Mortgage Company at the time of said foreclosure of its said mortgage and costs of suit in the sum of $838.92, leaving a balance on April 17,

1928, in the sum of $5,661.08 which together with interest thereon at the rate of seven (7) per cent. from the 17th day of April, 1928, is subject to be applied in the payment of any deficiency which may accrue in favor of plaintiffs. * * * It is further ordered, adjudged and decreed that the defendants Conservative Mortgage Company of Lincoln, Nebraska, and John H. Fowler, are decreed to hold the sum of $5,661.08 with interest thereon from the 17th day of April, 1928, at the rate of seven (7) per cent. per annum for the benefit of the plaintiffs in this action, and to pay any deficiency which there may be determined after the sale of said premises."

The mortgaged property was subsequently sold for $12,000, which, after the payment of interest, taxes and costs, left a deficiency of $6,593.78. On April 18, 1935, appellees filed an application for judgment against the Conservative Mortgage Company and John H. Fowler in the sum of $6,593.78. Appellants filed objections thereto in which they denied that the Conservative Mortgage Company was trustee or that either the Conservative Mortgage Company or John H. Fowler was in any way liable for a deficiency judgment. The trial court struck appellants' objections and entered the deficiency judgment as prayed. From this action by the trial court, an appeal was taken to this court.

The first question to be determined is whether the petition states a cause of action against the appellants Conservative Mortgage Company and John H. Fowler. The basis of the liability alleged was that the Conservative Mortgage Company was a trustee for the benefit of appellees and that liability accrued because of such relation. We do not believe that the allegations of the petition show any such relationship. The sole basis for appellees' contention that the Conservative Mortgage Company was trustee for appellees is the fact that the word "trustee" appears after the name "Conservative Mortgage Company" in the mortgage itself. "A trust * * * is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with

the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Restatement, Trusts, sec. 2. There is no manifestation of any intent to create a trust shown, either for the benefit of appellees or any one else. That the use of the word "trustee" following the name of the grantee in the mortgage could not of itself establish a trust relation is fundamental. Under such circumstances many essential elements of a trust relation are lacking. No beneficiary is named, nor is any attempt made to impose enforceable duties upon the alleged trustee. We necessarily conclude that a trust relationship was not pleaded in the petition and that a cause of action making appellants personally liable was not stated therein.

Appellees contend, however, that appellants were properly served with summons in the foreclosure action and that they are now, after default, precluded from raising the defenses set out in the objections filed thereto. Appellees rely upon the cases of *Parratt v. Hartsuff*, 75 Neb. 706, 106 N. W. 966, *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385, 213 N. W. 342, *Stuart v. Bliss*, 116 Neb. 305, 216 N. W. 944, and *Arnold v. Hawley*, 128 Neb. 766, 260 N. W. 284. It will be noted that, in each of these cases, the rule announced was dependent upon a cause of action showing personal liability being properly pleaded. But in the case at bar no cause of action was pleaded that would sustain the decree of the trial court. The decree adjudging personal liability in a foreclosure action must be sustained by the pleadings and, if not, the application for a deficiency judgment is subject to any defense that the person against whom it is sought may have.

The trial court therefore erred in striking the objections of appellants to the application for a deficiency judgment and in entering a deficiency judgment against them. The judgment of the trial court is therefore reversed and the cause remanded.

REVERSED.

FLOYD HENTON V. STATE OF NEBRASKA.

FILED OCTOBER 9, 1936. No. 29787.

1. **Criminal Law: SANITY OF ACCUSED: NONEXPERT TESTIMONY.** A nonexpert witness who has not seen the defendant for four years prior to the act in question and has never had an intimate personal relationship with him cannot, over objection, testify to the sanity or insanity of the defendant.
2. ———: ———: **BURDEN OF PROOF.** Where an accused interposes a defense of insanity, and offers competent evidence to support it, the burden of proof is upon the state to establish his sanity beyond a reasonable doubt.
3. ———: ———: **SUFFICIENCY OF EVIDENCE.** The evidence of witnesses as to the circumstances surrounding the commission of the offense and the defendant's conduct and appearance at the time of the doing of the unlawful act may be sufficient to sustain the verdict of a jury that the defendant was sane and able to distinguish between right and wrong.

ERROR to the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Grenville P. North and *Harold E. Hanson,* for plaintiff in error.

William H. Wright, Attorney General, and *Daniel Stubbs, contra.*

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

CARTER, J.

Plaintiff in error, who will hereafter be referred to as the defendant, was convicted of the crime of shooting with intent to kill and sentenced to serve three years in the state penitentiary. From the overruling of his motion for a new trial, defendant brings the case to this court for review.

The record discloses that on April 12, 1935, the defendant called at the room of Edna Henton, his estranged wife, and, in the altercation which followed, shot her twice with a revolver inflicting serious bodily injuries. Defendant then went to a near-by beer tavern and attempted to commit suicide by shooting himself through the chest. The facts

above recited are not denied. Upon the trial of the case the defendant interposed a plea of insanity as a defense.

It is contended that the trial court erred in excluding the opinion evidence of Lena Ishmael that defendant was insane at the time of the shooting. It is further contended that evidence was produced which overcame the presumption of sanity and that the state failed to produce evidence to the contrary sufficient to sustain the burden of proof cast upon it under the law.

During the course of the trial Lena Ishmael was called as a witness and testified that in 1931 and prior thereto the mother of the defendant resided at her home and that the defendant called on his mother twice during that period and that she observed his appearance and actions at that time. She was then asked to state her opinion as to whether the defendant was sane or insane on April 12, 1935. The court sustained objections to this question. The correct rule was stated in *Torske v. State,* 123 Neb. 161, 242 N. W. 408, as follows: "Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion." It is clear that, under this rule, the witness did not qualify herself as one with sufficient knowledge of the situation to give her opinion as to defendant's sanity. At all events, her testimony was too remote to be material. The trial court properly rejected the evidence in question.

Defendant contends that evidence was offered tending to overcome the presumption of sanity and that the state failed to sustain the burden of proving his sanity. The defendant testified in his own behalf. His story was that, immediately prior to the shooting, his mind became a complete blank and that he knew nothing until after being taken to the hospital. Dr. Roy A. Dodge, in answer to a hypothetical question, testified that, in his opinion based on the assumed facts contained in the question, the defendant

was mentally deficient and did not know right from wrong. It must be noted, however, that the hypothetical question assumed the fact to be true that defendant's mind was a complete blank at the time the shooting took place. Of course, if an expert medical witness must assume that defendant's mind was a complete blank at the time the alleged crime was committed, the answer would necessarily be that the defendant was mentally deficient and did not know right from wrong. The whole question was therefore predicated on defendant's evidence that his mind was a complete blank at the time. The jury apparently did not believe his story. They heard the testimony of the complaining witness as to his actions immediately prior to the shooting and the evidence of the police officers immediately after. In addition to this, they saw the defendant on the witness-stand and observed his conduct and demeanor at that time. If the jury disbelieved his evidence, the basis for the hypothetical question and the opinion evidence of Dr. Dodge based upon it was gone. Except upon the assumption of the facts recited in the hypothetical question, Dr. Dodge refused to testify that, in his opinion, the defendant was insane at the time of the commission of the alleged crime.

It has long been the rule in this state that, where an accused interposes a defense of insanity, and offers evidence to support it, the burden of proof is upon the state to establish his sanity beyond a reasonable doubt. But counsel for defendant assume that such rebutting evidence must be of an expert nature. Such is not the case. In *Wilson v. State,* 120 Neb. 468, 233 N. W. 461, this court said: "The evidence of witnesses as to the circumstances surrounding the commission of the offense in the present case, and the defendant's appearance and conduct at the time in question here, *held* sufficient to justify the jury in finding, beyond a reasonable doubt, that the defendant was clearly responsible for the unlawful act." Resolved to a final analysis, the sole question was whether the jury believed the story of the defendant that his mind suddenly became a blank at the time of the shooting or whether they believed the evidence of the

other witnesses called in the case. The jury have passed upon that question and we are of the opinion that there is ample evidence to support their finding. The evidence of any mental deficiency on the part of the defendant is so meagre that a jury would be justified in finding that the presumption of the sanity of the defendant was not satisfactorily rebutted. The verdict of the jury is amply supported by the evidence.

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

AFFIRMED.

SARAH METTLEN, APPELLEE, V. GEORGE E. SANDOZ ET AL., APPELLANTS.

FILED OCTOBER 9, 1936. NO. 29710.

1. **Mortgages**: FORECLOSURE: SET-OFF: LIMITATIONS. The defense of reduction or recoupment, which arises out of the same transaction as plaintiff's claim, survives as long as the cause of action on plaintiff's claim exists, although an affirmative action upon the subject of the recoupment may be barred by the statute of limitations.
2. ———: ———: ———: ———. In an action to foreclose a mortgage securing the unpaid balance of the purchase price upon the property mortgaged, defendants *held* not barred by limitation from setting up, by way of recoupment, their damages sustained by reason of plaintiff's alleged misrepresentations concerning water and irrigation rights, even if an independent action by defendants to recover such damages would be barred by the statute of limitations.
3. **Bills and Notes**: RENEWALS. The taking of a new note for an existing note is merely a renewal of the old indebtedness and not a payment of the debt, unless the parties specifically agree that the new note shall extinguish the original debt.
4. ———: ———: DEFENSES. A renewal note, as distinguished from a new note specifically taken as a satisfaction of the debt, is, as between the original parties and as against transferees who are not *bona fide* purchasers for value, open to all defenses which might have been made against a claim on the original note.

5. ———: ———: ———. The fact that the mortgagors in a purchase-money mortgage had renewed the note and mortgage did not create estoppel or constitute a waiver which would prevent them, in a foreclosure action by the mortgagee, from recouping their damages for alleged misrepresentations as to water and irrigation rights, where there was no agreement that the giving of the new note and mortgage should extinguish the original debt.
6. **Mortgages**: FORECLOSURE: SET-OFF: LACHES. In an action to foreclose a mortgage securing the unpaid balance of the purchase price of the mortgaged property, defendants *held* not barred by laches from setting up, by way of recoupment or reduction, their damages sustained through plaintiff's alleged misrepresentations concerning water rights, since they pleaded it in their answer at the first opportunity, even though the doctrine of laches might apply had defendants pursued some other remedy.
7. ———: ———: ———. Where plaintiff's deceased husband, during negotiations for the sale of a tract to defendants, had, in plaintiff's presence, represented to defendants that there was a right, appurtenant to the land, to irrigate 130 acres and that the existing ditch was entitled to 10 second-feet of water, and defendants, relying on such representations, had paid a higher unit price for the acreage represented as irrigable than for the rest of the tract, but they were later prevented by the state from irrigating more than 56½ acres, with the amount of water reduced to 4.9 second-feet, defendants *held* entitled to recoup their damages in plaintiff's action to foreclose a mortgage securing the unpaid balance of the purchase price.
8. **Record** and evidence examined *de novo*, and *held* not to sustain the decree of trial court.

APPEAL from the district court for Sioux county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

J. E. Porter, for appellants.

E. H. Boyd and *W. R. Metz, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

LANDIS, District Judge.

In this suit instituted by Sarah Mettlen as plaintiff, there was sought foreclosure of the security for certain indebted-

ness of the defendants George E. Sandoz and Helen Sandoz, his wife.

Defendants interposed the defense of recoupment or reduction against the indebtedness representing the purchase price, based upon representations as to certain water and irrigation rights as appurtenant to the land, which were relied upon and failed.

Plaintiff joins issue and pleads the statute of limitations, estoppel and laches against the claim of recoupment by defendants.

The court awarded decree of foreclosure and found "generally in favor of the plaintiff and against the defendants, and that said defendants are not entitled to recover any damages from the plaintiff by reason of the allegations contained in that portion of their amended answer constituting a cross-petition, and that said defendants are not entitled to have any amount set off against or allowed as a recoupment upon the amounts herein found due to plaintiff."

Defendants' motion for new trial was overruled, supersedeas bond given and appeal made to this court, wherein defendants are appellants and plaintiff appellee.

No special findings were asked or made. The general finding for the appellee would indicate that the trial court found the ultimate facts established by the evidence and which were determinative of the judgment as sustaining appellee on the issues of statute of limitations, estoppel and laches.

Our court announced the rule in *Kaup v. Schinstock*, 88 Neb. 95, 129 N. W. 184: "Persons induced by fraud to purchase and agree to pay for real estate may, if they act promptly after discovering the facts, rescind the contract or may retain the land and, within the time limited by statute, maintain an action against the vendors for damages, or, whenever sued by their vendors to recover the price for which the land was sold, may plead such damages by way of recoupment." That was a suit by vendees to cancel purchase-price notes and mortgage for fraud. The vendors prevailed because of the statute of limitations, the vendees having failed to act within the time limited by law.

However, the court held that the vendees had a further right to recoup their damages should an action be commenced upon the notes or to foreclose the mortgage. It was said in the opinion: "This action is primarily one to recover damages, and should have been commenced within four years of the time the plaintiffs (vendees) discovered the facts. Having failed to act within the time limited by law, the plaintiffs must wait until an attempt is made to foreclose the mortgage or recover upon the notes." While the judgment of the district court for the plaintiffs (vendees) was reversed by this court, it was with directions to dismiss the action without prejudice to the plaintiffs' defense of recoupment in any action prosecuted upon the notes or mortgage described in the action.

The defense of reduction or recoupment which arises out of the same transaction as the claim, which is true in the instant case, survives as long as the cause of action upon the claim exists, although an affirmative action upon the subject may be barred by the statute of limitations.

In the instant case it would be error to hold that the statute of limitations was a bar to appellants claim of recoupment.

Appellants renewed the original note and mortgage, and appellee claims, in effect, this creates an estoppel and waiver. "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note." *Auld v. Walker*, 107 Neb. 676, 186 N. W. 1008. Other decisions of this court to the same effect are *Davis v. Thomas*, 66 Neb. 26, 92 N. W. 187; *Exeter Nat. Bank v. Orchard*, 39 Neb. 485, 58 N. W. 144; *Exchange Nat. Bank v. Schultz*, 113 Neb. 346, 203 N. W. 496; *Berwyn State Bank v. Swanson*, 111 Neb. 141, 196 N. W. 125; *Willis v. Sponsler*, 117 Neb. 1, 219 N. W. 581.

A critical examination of the record fails to show any agreement by the parties that the giving of the new note should extinguish the original debt. It would be error in this case to hold that the renewal of the original note by appellants constituted any waiver or estoppel without such evidence.

Considering appellee's claim of laches which the general finding for her might be inferred to have sustained, we reach a different conclusion.

Appellants rely on recoupment and reduction against the purchase price indebtedness and mortgage. This defense would not be available to appellants until the appellee declared upon such. Appellee instituted this suit November 17, 1932, and then for the first time the defense of recoupment and reduction could be asserted by appellants, which was done by answer. It would be inconsistent to grant a right of recoupment and when it is asserted at the first available opportunity apply the doctrine of laches, even though such might apply to some other remedy open to appellants and not claimed.

Upon the trial *de novo* here, we must determine whether the finding against the appellants in the trial court upon the merits of their claim for recoupment and reduction is warranted.

The evidence in the record shows Jackson Mettlen and appellee, his wife, in 1918 owned a tract of land located on the Niobrara river in Sioux county, Nebraska. Part of this tract stood in the name of appellee. A portion was irrigable land, subject to a completed irrigation project known as "Mettlen's Canal" allowed by the state as docket 292. Application docket 292 was filed April 27, 1896, which is the date of priority.

George E. Sandoz entered into negotiations with the Mettlens in 1918 to purchase the tract of about 840 acres and a school section under lease. Only evidence of such as was made in presence of appellee was offered. It was represented to Sandoz, appellant, as to appurtenant water rights to the land, that all of the land under the ditch up to

the east section line of three had been irrigated; that there was a right dating back to 1896 to irrigate all of the land under the ditch, amounting to 130 acres, and that the ditch was entitled to 10 cubic feet of water, which means, in irrigation terms, an amount of 10 second-feet of water.

Relying upon these representations as to appurtenant irrigation rights, Sandoz bought the tract on a basis of $110 an acre for the 130 acres under the ditch; the remainder, not subject to irrigation, at $5 and $10 an acre; school land lease $500.

The purchase was consummated April 9, 1918, and as part thereof a mortgage on the tract was assumed; later this was paid from the proceeds of a loan negotiated by Sandoz through the Federal Land Bank of Omaha, which became a first mortgage, and the $10,000 purchase price mortgage upon which had been paid $2,000 at this time was renewed for $8,000. This mortgage was executed by Sandoz and wife, appellants, to Sarah Mettlen, appellee. On this mortgage appellants paid $500 in April, 1929, and $500 October 31, 1929, and some interest, thus reducing the principal on the purchase price indebtedness to $7,000.

Sandoz permitted the interest on the Federal Land Bank mortgage to become delinquent, as well as taxes and the interest on the balance of the $7,000 mortgage. Appellee, to protect her mortgage, paid the taxes, payments as they became due on the Federal Land Bank loan, and on November 17, 1932, started the instant action to foreclose.

Sandoz found the irrigation system in working order when he took possession in 1918 and continued to irrigate practically all the lands lying between the canal and river until 1931. A complete copy of the file of the department of public works of the state with reference to reports, and correspondence made by Mettlen and Sandoz, and the replies thereto, is in evidence by consent of the parties. Sandoz did not definitely know or fully appreciate until 1931, when the state finally stopped him from irrigating more than 56 acres of his land, that he was not entitled to water as represented for the 130 acres.

The file shows that in 1923 Sandoz had some controversies with the department of irrigation as to the irrigated acreage reported by him, but he continued to irrigate his whole 130 acres.

In 1921 the department returned a report made by Sandoz and he took it up with appellee and her husband, and they informed him that "the department often made mistakes and that there was nothing wrong with the appropriation." Sandoz made annual reports to the department for the year 1924 to 1930, inclusive. The department appears to have acquiesced until 1931, when Sandoz was actually and finally stopped from irrigating any except 56 acres. Sandoz then went to appellee, who told him he "better get it fixed up because the place wasn't worth much without irrigation," and also advised Sandoz to get a lawyer and put in an application to get it reinstated and she would help.

Appellee furnished Sandoz with an affidavit for the hearing before the department, in which she testified that she resided on said lands as long as they owned the same, and sold said lands to George E. Sandoz; that the irrigation district was formed and the Mettlen canal constructed during the time of her residence on the land; that said lands were irrigated from the Niobrara river and through the Mettlen canal during all of the time after its construction and while she was living on the land; that all of said 130 acres was irrigated, at least to the extent it was possible; that it was the intention to irrigate all of said land under the ditch at the time our application was made.

Sandoz secured an attorney and filed an application with the department to have appropriation No. 292 reformed. The hearing resulted in a rejection of the requested reformation to include the additional acreage, but allowed to Sandoz 56½ acres with a reduced amount of water to 4.9 second-feet. Appellee was notified by Sandoz of the adverse decision and thereafter he refused to pay her any more on the indebtedness.

This land deprived of water gradually becomes of little value and the record fully sustains the contention of ap-

pellants that there should be some recoupment or reduction of the balance of the purchase-price mortgage for the land represented as irrigated, bought as such and not obtained. The evidence is not clear as to what damage, if any, because of failure to obtain 10 second-feet of water as represented and actually being allowed 4.9 second-feet finally on the 56½ acres.

After an examination of the evidence *de novo*, we have come to the conclusion that the decree of the trial court cannot be sustained. The judgment is therefore reversed and the cause is remanded, with directions for the trial court to determine the amount of the recoupment and to enter a decree of foreclosure on the mortgage for the amount due appellee in excess thereof.

REVERSED.

ROBERT L. DUNLAP, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED OCTOBER 23, 1936. NO. 29875.

1. **Master and Servant**: WORKMEN'S COMPENSATION LAW: LIMITATIONS. "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 48-139 hereof." Comp. St. 1929, sec. 48-138.
2. ———: ———: COMPENSABLE INJURY: LIMITATIONS. Claimant, under the workmen's compensation law, was an officer in the Omaha fire department. May 1, 1922, he was injured in an explosion while on duty fighting a fire, and was paid his full salary for a year as totally disabled. He then applied for a pension, which was denied. About 1922 he went to California to live and, although disability from his injury continued, never applied for compensation under the Nebraska workmen's compensation act until December 3, 1931, shortly after an examination disclosed that he had an enlarged heart as a result of the accident in 1922. Evidence examined and *held* to establish (1) that the accident of May 1, 1922, was compensable; and (2) that the failure of claimant to petition for compensation within one

year after May 1, 1923 (to which date the city had paid him his salary in full) bars the present claim for compensation.

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

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Seymour L. Smith, Harold C. Linahan and *William W. Wenstrand, contra.*

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

GOSS, C. J.

Robert L. Dunlap appealed from a judgment of the district court setting aside an award in his favor by the Nebraska workmen's compensation court and dismissing his action.

About May 1, 1922, Robert L. Dunlap, a junior captain in the Omaha fire department, received an injury while on duty attending a fire. From that moment he never did a day's work on the fire department. The injury was caused by an explosion (probably of films) and resulted from inhaling gas, smoke and fire. He was disabled for a considerable time and received from the city his full pay of $165 a month (with $2.50 a month deducted for the pension fund) for a year, at the end of which time he was ordered to report for active duty. Thereupon he filed an application with the city council, requesting that he be placed upon the pension rolls of the city on the ground that he was permanently and totally disabled as a result of the injury received. A hearing was had before the city council and on June 6, 1923, his application was denied. He filed a petition in error in the district court for Douglas county, asking for a mandatory order directing the city council to sustain his application for a pension and to pay the same as provided by law. This petition in error was dismissed by the district court and that matter was ended.

The application for a pension in 1923 appears to have

been heard upon appellant's claim that he could not go back on fire fighting duty because of his inability to endure fire and smoke by reason of their effect upon his pharynx and larynx, or, in ordinary words, the irritation of his throat when exposed to smoke, gas or fire. He claimed a total and permanent disability to act as a fireman from and after May 1, 1923, although, up to the time he applied for the pension, the city had paid him his former salary for a full year after the accidental explosion had injured him. On the theory that he was able at the end of the year to do at least light work, the city refused him a pension, but evidently offered him a position at a station where ordinarily there were only a few calls a year to fight fires. It was proposed that he try out the plan; if it failed the council would reopen the case. He refused the offer and went to California, where he remained for more than eight years before starting proceedings to obtain compensation. After his first two years in California he was gainfully employed for several years (at least up to the time of applying for compensation) at congenial work for which he was qualified and at as good average pay as he received from the city of Omaha when employed in the fire department. But his California work did not require much physical exertion; chiefly it was an executive job.

In July, 1931, appellant was examined in California, and brought this action in the compensation court in Nebraska December 3, 1931, alleging that he was suffering from a fibrous mediastinitis and that his heart had become greatly enlarged as a culmination of his disability received in the Omaha fire of May 1, 1922. He claims that the disability there received was latent and progressive through the intervening eight years after his pay as a fireman ceased and after his pension was refused in 1923; that he first knew of it, or was bound to know of it, in 1931; that the statute of limitations has not run against his claim and that he is entitled to compensation.

The compensation court awarded appellant $15 a week from and after June 1, 1935, for 300 weeks, and $12 a week

thereafter during life. On appeal the district court set aside the award of the compensation court and dismissed the action on the grounds that the findings of fact were not supported by the record, that on or about April 30, 1922, claimant received his compensable injury, consisting of burns on his throat and lungs, was paid his salary for a year from May 1, 1922, was fully aware of his condition at and prior to May 1, 1923, made an application for a pension from the city May 29, 1923, in which he alleged himself to be totally disabled as a result of said injuries, in 1931 discovered he had a disabling affection of the heart which the medical evidence agrees is due to the burns of 1922, and in December, 1931, commenced this action. The court found that the statutes require that such an action must be brought within one year from the date of the injury or within one year from the date of the last payment made on account of the injury, and that May 1, 1923, was the date of the last payment made by the city of Omaha to the claimant.

By written stipulation of the parties, and to save calling additional oral witnesses, the case was tried in the district court March 19, 1936, upon the record and evidence upon which it was tried before the compensation court on October 11, 1935. In that trial was used a transcript of the hearing before the city council June 4 and 5, 1923, when Captain Dunlap's application for a pension was heard by the city council. We have carefully read the proceedings before the city council in the pension hearing. There appears no testimony relating to any heart affection. Several doctors testified, but their evidence was directed to the condition of Captain Dunlap's throat and lungs.

In the proceedings before the compensation commissioner, used on the trial in the district court, Dr. A. S. Pinto, city physician, testified that he had examined the claimant about a year after his injury and "didn't find any heart involvement at that time." The claimant's lungs were affected so that on deep inspiration he had a hacking cough affecting the smaller bronchi. This doctor again examined claimant

in 1934, about a year before the trial. Then his general condition was better, but "he had an enlargement of the left heart. * * * The heart condition developed since that time;" that is, since the doctor's examination in 1923. He testified that the lung condition was more chronic and he was of the opinion that condition had "an effect upon the heart." On cross-examination the doctor testified that, in his opinion, Captain Dunlap was totally disabled from physical labor when he examined him in 1923. It is noted that, when Dr. Pinto was examined in the proceedings to obtain a pension in 1923, he was not asked about Captain Dunlap's heart, nor as to his ability to resume his work.

Dr. William Nance Anderson, of Los Angeles, testified for appellant, by deposition, that he had been practicing in Los Angeles for a little over two years, prior to which he had practiced nineteen years in Omaha. He is a specialist in internal medicine and diagnosis. He was associated with the late Dr. LeRoy Crummer, who was a heart and lung specialist in Omaha, and who also removed to Los Angeles. The first time Dr. Anderson examined Dunlap after he went to Los Angeles was in January, 1931. He then discovered and disclosed to Dunlap that he had "a definite increase in the size of the left side of the heart, the aorta was enlarged beyond his years, there was an increased density of the mediastinum to the right and a sluggishness of activity of the right diaphragm. The above condition, in my opinion, is the final result or culmination of the injury on May 1, 1922." He diagnosed it a fibrous mediastinitis or an increase of fibrous tissue in the structure between the lungs or into the substance of the lungs which covers the area around the heart. This produces scar tissue which hardens the substance around the heart and makes more work for the heart to do in forcing the blood through the tissue which is deformed. The doctor again examined the patient on August 26, 1932, the day the deposition was taken. He found the "total size of the heart was ten per cent. larger than expected." The condition makes the patient short of breath and cuts down his capacity for exertion.

Dr. Anderson had examined Dunlap in Omaha in 1923. He had no record of any enlargement of the heart at that time, but he did then discover "an increase of fibrous tissue in the substance of the lung toward the right diaphragm." He stated that "it takes a certain length of time for fibrous tissue of that sort to progress to a place of contraction and to be of sufficient greatness to eventually demand an increase in the size of the heart."

Captain Dunlap testified that, after he went to California (which probably was late in 1922 or early in 1923, as he testified it was before he applied for a pension in 1923), "Approximately for two years I was in pretty bad condition. I was unable to do anything at all, could not hardly walk." After that "there was some improvement and I had a setback again."

There is other evidence which might be stated, but we have set forth the history of this case so fully, in order to give a picture of the situation of plaintiff, that we forego further reciting of evidence. It shows clearly that Captain Dunlap had a valid compensable claim arising out of the accident on May 1, 1922.

The city recognized that claim by payment of Dunlap's salary in full for a whole year. That payment tolled the statute of limitations for one year, under the terms of the statute. "Where, however, payments of compensation have been made in any case, said limitation (of one year after the accident for filing the petition required by section 48-139, Comp. St. 1929) shall not take effect until the expiration of one year from the time of the making of the last payment." Comp. St. 1929, sec. 48-138. See *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42.

Appellant cites the following Nebraska cases and argues therefrom that his injury resulting from the accident was latent and progressive and, under these authorities, he was not required to file his petition for compensation until his heart enlargement was disclosed by Dr. Anderson's examinations in January, 1931: *Marler v. Grainger Bros.*, 123 Neb. 517, 243 N. W. 622; *Stone v. Thomson Co.*, 124

Neb. 181, 245 N. W. 600; *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449; *City of Hastings v. Saunders*, 114 Neb. 475, 208 N. W. 122; *Astuto v. V. Ray Gould Co.*, 123 Neb. 138, 242 N. W. 375; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316; *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925; *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, 242 N. W. 457.

An examination of these cases will show that in most of them the "accident" seemed trivial at the time it occurred and no compensation was sought at the time, but later it was discovered that the accident had culminated in compensable injuries; in other cases the compensation had been paid until the apparent disability had ceased and compensation had ended, but a latent or progressive disease had developed, clearly traceable to the original accident, upon ascertaining which a new claim was filed. In these situations it has been uniformly held by this court that the time within which some affirmative action must be taken by the employee begins to run at the time when he has notice of the culmination of the injury into one that is compensable.

But, in this case, Dunlap and the city agreed, by the city paying and by him receiving his full salary, that he was totally disabled for at least a year. For that period both waived any notices or action to enforce the compensation statutes. Whether or not the city believed that Dunlap was still entitled to compensation, he believed it as shown by his testimony. First he litigated his right to a pension with its more ample pay than under the compensation statutes. Then, for a year or two more, while in California, he was almost incapacitated. He knew when he applied for a pension that he was entitled to compensation; he knew when, during the first two years in California he was unable to do any work, that he was entitled to compensation; and he knew for all the eight years before his heart enlargement was disclosed to him by Dr. Anderson's ex-

amination in 1931 that he would have been entitled to compensation all the years since the accident in 1922.

Section 48-138, Comp. St. 1929, says: "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 48-139 hereof."

No such petition was filed. If it had been filed and heard, the presumption under the facts is that it would then have been allowed. Whether appellant's condition had remained one of continued compensability for total disability, or would have culminated in the condition in which his doctor now finds him, would have produced no change in his compensation. We do not think the legislature intended the workmen's compensation law to be so interpreted that one clearly compensably injured as the result of an accident may, while fully cognizant of his right to compensation, first seek and obtain his regular pay for a year, then gamble on the fruits of higher pay in another field for eight years, and at the end of that period first seek, under the statute, compensation as for a latent and progressive injury as a result of the same accident for which he was all the while eligible to have claimed compensation if he had made timely application.

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

AFFIRMED.

JAMES MCDANIEL, APPELLEE, V. WILLIAM MCDANIEL ET AL., APPELLANTS.

FILED OCTOBER 23, 1936. No. 29197.

1. **Appeal.** In an equity case, where the evidence adduced on the trial is not preserved by bill of exceptions duly allowed, the only question presented on appeal is whether the decree entered in the trial court is supported by the pleadings.

2. ———: MISJOINDER. The question of a defect of parties arising from nonjoinder, where the petition states a cause of action against the defendants properly made parties thereto, cannot be successfully urged for the first time in this court.
3. ———: REPLY. Where no reply is filed, and a cause is tried and submitted on the theory that a material allegation of the answer is in issue, a claim that such allegation stands admitted by failure to reply comes too late if made for the first time on appeal.
4. Pleadings construed, and *held* to support the decree entered by the trial court.

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

Charles H. Slama, for appellants.

Schiefelbein & Donato, contra.

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

EBERLY, J.

This is an action in equity between James McDaniel, as plaintiff, and William McDaniel, his wife Mary McDaniel, and Ernest S. Schiefelbein, as defendants, tried in the district court for Saunders county. The purpose of the action was to secure the cancelation and annulment of a certain deed executed by plaintiff and his wife, and by them delivered to defendant Ernest S. Schiefelbein in escrow; and also to obtain the cancelation of an agreement in writing entered into by the plaintiff and wife with the defendant William McDaniel and his wife pertaining only to the deed constituting the escrow, and for other relief.

After a trial "on the amended petition of the plaintiff, and the answer thereto of the defendants William McDaniel and Mary McDaniel, and the evidence," decree was entered for plaintiff as prayed. From the order of the trial court denying their motion for a new trial, defendants appeal.

It may further be said that the bill of exceptions containing the testimony adduced on the trial of the case was quashed by order of this court entered on March 5, 1936.

This situation materially restricts the limits of the review to which appellants are entitled.

In an equity case, where the evidence adduced on the trial is not preserved by bill of exceptions duly allowed, the only question presented by the record is whether the decree is supported by the pleadings. *Pettibone v. Fitzgerald,* 62 Neb. 869, 88 N. W. 143; *Beatrice Savings Bank v. Beatrice Chautauqua Assembly,* 54 Neb. 592, 74 N. W. 1065; *Grove v. Dineen,* 4 Neb. (Unof.) 722, 96 N. W. 253; *McIntyre v. Mote,* 77 Neb. 418, 109 N. W. 763.

The appellants challenge the right to maintain the action because of an alleged defect of parties defendant. The record does not disclose that this question was in any manner presented to the trial court. We are committed to the rule, viz.:

"The question of a defect of parties and of the legal capacity of the plaintiff to maintain an action cannot be successfully urged for the first time in this court." *Taylor v. Weckerly,* 69 Neb. 739, 96 N. W. 618. See, also, 20 Standard Ency. of Procedure, 998.

Appellants also challenge the correctness of the decree because of the failure of plaintiff to file a reply to the answer of the defendant and to new matter set forth therein. However, the decree entered by its terms fairly discloses that the court tried the cause on the theory that the material allegations of the answer were in issue. This decree was not challenged by the appellants in their motion for a new trial on the ground here presented. We are committed to the rule that, where no reply is filed, and a cause is tried and submitted on the theory that a material allegation of the answer is in issue, a claim that such allegation stands admitted comes too late when made for the first time after verdict or decree entered, or if made for the first time on appeal. *In re Estate of Cheney,* 78 Neb. 274, 110 N. W. 731; *Moore v. Moore,* 104 Neb. 122, 175 N. W. 665; *Hunter v. Weiner,* 103 Neb. 538, 172 N. W. 521; *Schuster v. Carson,* 28 Neb. 612, 44 N. W. 734.

Lastly, appellants complain that paragraph 4 of the

amended petition, on which the case was tried in the district court, to the effect that "it was fully understood and agreed by all the parties to said agreement that if the terms of said agreement to be performed by said William McDaniel and Mary McDaniel, or any of them, were disregarded or broken, that, in that event, the plaintiff under the provisions of said agreement giving him a lien on said real estate for sums of money therein provided, remaining unpaid, could at his option demand payment of said unpaid amount or proceed to repossess himself of the real estate in said agreement described," was at complete variance with a copy of exhibit "A" attached to plaintiff's petition.

It will be noted that, in reference to the additional agreement so pleaded, it is not alleged as an "oral agreement." The language employed was equally applicable to a written agreement, if such it was. We have no bill of exceptions to determine this fact. In the absence of affirmative proof to the contrary, the finding and judgment of the trial court must be deemed correct.

However, waiving this point for the present, exhibit "A" is a written contract, signed by James McDaniel and his wife, as parties of the first part, and William McDaniel and his wife, as parties of the second part. It is not executed by Ernest S. Schiefelbein, the holder of the escrow. It thus appears that, while exhibit "A" is a bilateral contract, the transaction necessarily involves a tripartite agreement. The legal effect arising from this situation may be seen in the following:

"A and B make an informal contract by which A agrees to give his sealed promise to pay $10,000 and B agrees to transfer Blackacre and Whiteacre, documents to be exchanged at the C bank. A immediately thereafter writes and seals a promise for the agreed amount, and delivers the document to the C bank, stating that it is not to be binding until B shall deliver a conveyance of Blackacre and Brownacre. B tenders in accordance with the original contract a conveyance of Blackacre and Whiteacre. A's promise does not become a contract under seal. He has violated his

original contract with B, but the condition imposed by him when delivering his written promise in escrow is nevertheless operative." Restatement, Contracts, sec. 103, illustration 2 under subsection (2).

The transaction involved in the present case may be properly regarded as an escrow, which is properly defined as "a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent with a stranger or third person, * * * to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered over to take effect." 21 C. J. 865.

"Until the performance of the condition the legal title to the land to be conveyed remains in the grantor." 21 C. J. 882. See, also, *Patrick v. McCormick,* 10 Neb. 1, 4 N. W. 312; *County of Calhoun v. American Emigrant Co.,* 93 U. S. 124, 23 L. Ed. 826; *Muirhead v. McCullough,* 234 Mich. 52, 207 N. W. 886.

The form of the transaction implies the power of termination by the promisee in the event of failure to reasonably perform the controlling conditions required.

In *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.,* 24 Idaho, 63, 133 Pac. 655, it was held that, although a grantor cannot withdraw the instrument deposited as escrow when the grantee has complied with his part of the escrow agreement, he may do so upon actual failure of the grantee to perform. See, also, Restatement, Contracts, sec. 103, subsection (2).

In addition, the essential nature of this tripartite transaction is such as to modify the application of the parol evidence rule on which, it appears, appellants rely in the present appeal. Thus, authorities lay down the governing principle in the following language: "The condition upon which an instrument is delivered in escrow need not, however, be expressed in writing, but may rest in parol, or be partly in writing and in part oral. The rule that a contract or instrument made in writing inter partes must be deemed to contain the entire writing or understanding has no ap-

plication in the case of escrows." 10 R. C. L. 623, sec. 5. See, also, 21 C. J. 868.

These principles were accorded recognition by this court in the rule announced by it in *Gregory v. Littlejohn*, 25 Neb. 368, 41 N. W. 253. See, also, *Stanton v. Miller*, 58 N. Y. 192.

It is obvious, therefore, that the contention of the appellants that the language contained in paragraph 4 involves a fatal contradiction of the terms of exhibit "A" attached to plaintiff's petition, thus necessitating the reversal of the judgment entered herein, cannot be sustained.

No substantial errors appearing on the limited review of this record permitted, the judgment of the trial court must be deemed correct, and it is

AFFIRMED.

ROSA OFT, APPELLEE, V. KATHRINA DORNACKER, APPELLANT.

FILED OCTOBER 23, 1936. NO. 29723.

1. **Contracts: REFORMATION.** In order to secure a reformation of a written contract on the ground of mistake, the evidence must be clear, convincing and satisfactory that the contract as written was made by mistake and does not reflect the real contract and agreement of the parties.
2. **Pleading: SET-OFF: LIMITATIONS.** The defense of recoupment must arise out of the same transaction as plaintiff's claim and survives as long as plaintiff's cause of action exists, even if affirmative action upon the subject of the recoupment is barred by the statute of limitations.
3. ———: ———. But, where it appears that the subject of the recoupment did not arise out of the contract sued upon, the defendant cannot avail himself of this defense.
4. **Trial.** In a law action begun to recover the amount due under an annuity clause in a deed, where the defendant denies that the annuity contract states the true agreement and asks for a reformation thereof, the issue is triable to a court without a jury. In such a trial the function of a jury, if one is called, is advisory only.

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

Robins & Yost, for appellant.

John A. McKenzie, contra.

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

CARTER, J.

This is a suit brought by Rosa Oft, the appellee, against her daughter, Kathrina Dornacker, the appellant, for the amount due under the terms of an annuity clause contained in a deed to certain real estate conveyed by appellee and her husband to the appellant. The case was submitted to a jury which returned a verdict for the appellant. Thereupon the trial court sustained a motion for a judgment *non obstante veredicto* and entered a judgment for appellee for $526.50. Appellant filed a motion for a new trial which was overruled by the trial court. From this order appellant appeals.

The record discloses that on February 8, 1919, Eggert Oft and Rosa Oft, his wife and appellee herein, conveyed 160 acres of land to their daughter, Kathrina Dornacker, by warranty deed containing the following annuity clause: "The grantee herein agrees to pay to the grantors, as long as either one may live, Five Hundred Dollars ($500) on the first day of September each and every year. This being part of the consideration." The evidence is not disputed that appellant made each annual payment up to and including the year 1931, and $20 on the payment due in 1932. This suit was commenced, however, to enforce collection of the $500 payment due on September 1, 1934.

Appellant alleged in her answer that it was the understanding and agreement of the grantors and grantee, contained in the deed at the time of its execution and delivery, that the consideration for it was for services rendered in the past, that the $500 annual payment was conditioned upon said payment being necessary for the support and maintenance of grantors or their survivor, and conditioned also upon the land producing the amount of the annuity

above costs during the year for which payment was demanded, and further conditioned upon each of the four daughters to whom conveyances were made paying equal amounts necessary and proper for support and maintenance, and prayed for a reformation of the deed to correctly state the agreement. Appellant further pleads that the lands failed to produce the amount of the annuity during the year 1934, and consequently that there is nothing due appellee. Appellant further alleged in her answer that in the summer of 1919 each of the four sisters paid $937.38 to their father, to pay for improvements made on certain city property then owned by the father, under an express agreement that each was to receive one-fourth of the net income received from the property and that the net income has not been paid or accounted for. Appellant further alleges that in 1920 each of the four daughters paid $2,554.75 to the Bennington State Bank, to pay off a debt of more than $10,000 owing by the father, under an express agreement that the amounts thereof were to be credited on the annuity payments in the future, which was never done. Appellee denies these allegations and, in addition thereto, pleads the statute of limitations as to the amounts of $937.38 and $2,554.75 advanced by each of the daughters.

At the close of appellant's evidence, the court withdrew all the alleged defenses from the consideration of the jury except whether there was an understanding prior to the execution and delivery of the deed that the annuity payments were to be made only if produced by the land over and above the cost of farm operations. The verdict of the jury was for the defendant. The trial court, however, set aside the verdict and entered judgment for appellee for the amount prayed. The question for determination is whether the trial court was correct in these rulings.

The record shows that Minnie Ohrt and Meta Jungbluth, sisters of appellant, and George Ohrt and Herman Jungbluth, their husbands, testified to various conversations between Eggert Oft and Rosa Oft and the other members of the family in which appellant was a participant. We

have examined the record carefully and we fail to find any evidence of any definite agreement being entered into prior to the execution and delivery of the deed. In *Hallgren v. Becker*, 94 Neb. 415, 143 N. W. 467, this court said: "It is a well-settled rule of equity jurisprudence that, in order to secure a reformation of a written contract, the evidence must be clear, convincing, and satisfactory that the contract as written does not reflect the real contract and agreement of the parties." In *Sutherland State Bank v. Dial*, 103 Neb. 136, 170 N. W. 666, this court also said: "It is settled law that, in order to justify the reformation of a written instrument, the proof that it does not conform to the intention of the parties, and was made by mistake, must be clear, convincing and satisfactory. While a preponderance of the evidence is all that is required, the fact that the note bears no evidence upon its face that it is other than the individual obligation of the men who signed it raises a strong presumption, and under the statute almost an unrebuttable, that the defendants did just what they intended to do, and that it is their individual obligation. Unless this presumption is overcome by convincing proof, the instrument must stand as it was written. This court has stated these principles repeatedly. *Topping v. Jeanette*, 64 Neb. 834, and cases cited in opinion. Also, *Baker v. Montgomery*, 78 Neb. 98; *Bingaman v. Bingaman*, 85 Neb. 248."

In addition to this, Rosa Oft, the mother, and Nancy Gordon, the youngest daughter, testified that the conversations testified to by the two daughters and their husbands did not take place. The burden of proof is, of course, upon the party seeking the relief. There was a sharp and irreconcilable conflict in the evidence, appellant's witnesses testifying that there was an understanding between the parties that was never incorporated in the deed, while appellee and her witnesses asserted just as positively upon the witness-stand that no such understanding or agreement was ever made. Applying the well-known rule of equity to the evidence that the evidence must be clear, convincing and satisfactory to obtain the reformation of an instrument, we are constrained to hold that it was not sufficient to justify a

reformation of the contract and that the trial court was right in so holding.

Appellant contends that the trial court erred in not permitting her to recoup the amounts advanced by her to improve certain properties of the father and to pay off the indebtedness of the father to the Bennington State Bank. We agree with appellant that, if the items were proper subjects for a recoupment, the statute of limitations would not be a bar. *Mettlen v. Sandoz, ante,* p. 625, 269 N. W. 98. We cannot agree, however, that appellant is entitled to a recoupment in the case at bar. The payment of the sum of $937.38 to the father, as her share for the repair of the city property remaining in the father's name, did not grow out of the annuity agreement upon which this cause of action was based. In *Mettlen v. Sandoz, supra,* we said: "The defense of reduction or recoupment, which arises out of the same transaction as plaintiff's claim, survives as long as the cause of action on plaintiff's claim exists, although an affirmative action upon the subject of the recoupment may be barred by the statute of limitations." Having concluded that the item of $937.38 is not a proper subject for recoupment, it is clearly barred by the statute of limitations and the trial court was correct when it so held.

What has been said about the claim of $937.38 is generally true of the claim of $2,554.75, which was paid by appellant to assist in paying a $10,000 indebtedness of her father to the Bennington State Bank. It must be borne in mind that the father, Eggert Oft, had conveyed 640 acres of valuable land to his four daughters at the time this $10,000 indebtedness was outstanding. That the lands could have been subjected to the payment of the indebtedness cannot be questioned. The debt was not paid because of any provision in the contract upon which this suit is brought, but to protect the interest of the daughters in the land from the equitable interest that the Bennington State Bank had therein. It is not a claim arising out of the original contract and is not a proper subject for recoupment against Rosa Oft, the widow of Eggert Oft. A purported agreement to credit an item on a specific obligation is not sufficient

to make it a subject for recoupment in a suit on that obligation; the subject of the recoupment must arise out of the same transaction as plaintiff's claim. The trial court therefore properly held that the claim was barred by the statute of limitations.

Appellant complains that, as the court elected to submit questions of fact to the jury on the equitable phases of the case, it is bound thereby. In discussing the subject of jury trials in equity proceedings, this court in *Peterson v. Estate of Bauer,* 76 Neb. 652, 107 N. W. 993, said: "In the trial of such a suit the functions of a jury, if one is called, are advisory only, and the court cannot commit reversible error in the giving or refusal of instructions." In *Simmons v. Baker,* 109 Neb. 853, 192 N. W. 511, this court said: "In a law action, begun to recover a payment of money made by plaintiff on an executory written contract for the purchase of real estate, on the ground of fraud, where the defendants denied the alleged fraud, and prayed for specific performance of the contract, the issue is triable to the court without a jury. In such a trial the function of a jury, if one is called, is advisory only. No error can be predicated upon the giving or refusal of instructions." We conclude, therefore, that the trial court was not bound by the advisory verdict of the jury.

It is contended, however, that the action as commenced by appellee was one at law and that appellant was entitled to have that portion of the case passed upon by a jury. Appellant in her pleadings admits that the annuity clause of the deed is as pleaded by appellee. Appellant has failed to establish any equitable defense thereto and does not plead any defense other than those of an equitable nature. When the trial court determined that the equitable defenses set up were without merit, appellee clearly became entitled to a judgment on the pleadings for the amount for which she brought suit. Under these circumstances, the trial court did not commit error when it entered a judgment for plaintiff *non obstante veredicto.*

The judgment of the trial court is

AFFIRMED.

HATTIE WINN ET AL., APPELLEES, V. JESSE G. WINN ET AL., APPELLANTS.

FILED OCTOBER 23, 1936. NO. 29743.

1. **Executors and Administrators**: DISTRIBUTION: CONTRIBUTION. Where an heir consents to a final decree of distribution in the probate of an estate without making claim for improvements made by him upon the real property of the estate, he cannot subsequently maintain a suit for contribution against the other heirs.
2. **Husband and Wife.** A wife may purchase at tax sale land of which her husband is a tenant in common, and will acquire thereby a valid lien for the amount of the purchase price, interest and costs.
3. **Tenancy in Common**: CONTRIBUTION. A tenant in common who pays taxes on the common property is entitled to maintain a suit for contribution against his cotenants for their proportionate share thereof.
4. ———: ———. A tenant in common who makes lasting and valuable improvements upon the common property, with the permission of his cotenants, may maintain a suit for contribution against them for their proportionate share of the amount which the property was thereby enhanced.
5. ———: ACCOUNTING. Where a tenant in common has the possession of the common property, and holds the same to the exclusion of the other cotenants for his personal use, he is ordinarily liable to account to them for their proportionate share of its rental value.

APPEAL from the district court for Antelope county: CHARLES H. STEWART, JUDGE. *Affirmed in part and reversed in part, with directions.*

Brome & Thomas, for appellants.

Ralph M. Kryger and *Webb Rice, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and MUNDAY, District Judge.

CARTER, J.

This is an action for the partition of lots 13, 14 and 15, in block 19, in the city of Neligh, Antelope county, Nebraska. From a decree granting a partition thereof and fixing the rights of the various parties in the property, the defendants have appealed.

The record discloses that on December 4, 1906, Abner G. Winn died intestate, seised and possessed of the three city lots involved in this suit, which will hereafter be referred to as lots 13, 14 and 15. He left surviving his wife, three daughters and two sons. The probate of his estate was not completed until December 1, 1913, which was after the death of his widow. Prior to February 12, 1934, the defendant Jesse G. Winn had become the owner of the undivided one-fifth interest of his brother George Winn, so that he was then the owner of an undivided two-fifths interest, and each of his three sisters, the plaintiffs herein, was the owner of an undivided one-fifth interest. On February 12, 1934, the youngest sister, Grace Winn, became the owner of the undivided two-fifths interest of Jesse G. Winn in lot 15 by purchase at execution sale on a judgment she had procured against him for money that she had loaned to him.

The record discloses that after the death of Abner G. Winn in 1906 the widow and five children continued to live in the home located on the property involved in this action. Also located on the property were a blacksmith and repair shop that had been operated by Abner G. Winn with the help of his son Jesse G. Winn. Jesse G. Winn continued to operate the shop and support the family after the death of the father. During the lifetime of the mother, and prior to the final settlement of the estate of Abner G. Winn, Jesse G. Winn built a garage building on the lots, and, as business increased, enlarged it so that, at the time the estate of Abner G. Winn was finally closed in 1913, there was a building 48 feet by 142 feet extending across all three lots from north to south. Subsequent to the closing up of the estate of his father, he added additional space by erecting a building 80 feet long and 46 feet wide on the west side and at the north end of the existing garage building. The interests of the various parties in this building must necessarily be determined. The defendant contends that he also spent large sums of money in repairing and remodeling the residence on the premises, as well as in the maintenance of the three sisters over a period of years. The plaintiffs con-

tend that they worked in the garage office for many years and maintained the home without being paid compensation. They also contend that Jesse G. Winn failed to pay any rent on the premises. The record further discloses that Jesse G. Winn paid the taxes on the property up to and including the year 1924, and then made no further payments thereon. On January 31, 1934, Augusta Winn, wife of Jesse G. Winn, purchased a certificate of tax sale of the property in question for the sum of $1,737.75 with funds she alleged to be her own, and subsequently paid the 1934 taxes amounting to $106.20, and now asks for a tax sale foreclosure of the amount due her. The record further shows that Lyle E. Jackson has a first mortgage lien against the undivided two-fifths interest formerly owned by Jesse G. Winn, which is also prior to the rights of Grace Winn in the undivided two-fifths interest in lot 15 which she purchased at the execution sale hereinbefore referred to.

The trial court ordered a partition of the real estate; denied the claim of a tax lien on the part of Augusta Winn on the theory that she purchased the tax sale certificate as the agent and with the money of her husband Jesse G. Winn; denied plaintiffs the right to an accounting against Jesse G. Winn, except for the last two years involved in the action; fixed the rental value of the garage at $25 a month during the two years; found that Jesse G. Winn is entitled to contribution from plaintiffs for the present value of the improvements placed on lots 13 and 14 after December 1, 1913, the date the final decree was signed in the probate of the Abner G. Winn estate, found the amount to be $1,109.24 and granted an equitable lien therefor; found that Jesse G. Winn is entitled to contribution for improvements placed on lot 15 after December 1, 1913, fixed the amount due at $856.31 and granted an equitable lien therefor; found that Jesse G. Winn is entitled to an equitable lien for the money represented by the tax certificate purchased by his wife, making $425.88 a lien on lot 15, and $851.76 a lien on lots 13 and 14; fixed the mortgage lien of Lyle E. Jackson as a first lien upon an undivided two-fifths interest in all of said

lots in the amount of $400 and interest; found that Daisy Winn and Grace Winn assisted Jesse G. Winn in the conduct of the business from December 1, 1913 to January 1, 1925, and denied a right of contribution from them during that period. From this decree, defendants have appealed.

It will be noted in the case at bar that the defendant Jesse G. Winn made improvements on the premises after the death of his father in 1906, and prior to the date of the filing of the final decree of distribution in 1913 in the proceedings wherein his father's estate was probated. The trial court held that any claim for improvements made while the estate was being administered could not successfully be maintained against the other heirs at law. The other heirs at that time were not entitled to possession of the premises. Neither had it been determined by the probate court that there would be any interest remaining after the payment of debts and the costs of administration. The trial court correctly found that Jesse G. Winn had no claim for contribution against the other heirs prior to December 1, 1913, the date the final decree in the probate of his father's estate was filed.

The trial court found that the improvements placed on lots 13 and 14 after December 1, 1913, enhanced the value of the premises to the extent of $1,109.24, and the improvements placed on lot 15 during the same period enhanced the value of the premises to the extent of $856.31. The evidence was conflicting as to the amount that the improvements enhanced the value of the property. The trial court heard the evidence and saw the witnesses on the witness-stand. Under these circumstances we conclude that the trial court is in a better position to determine the issue than is this court. The evidence in the record is amply sufficient to sustain the trial court's finding. We conclude, therefore, that the findings of the trial court with reference to the amounts that the improvements enhanced the value of the premises are correct.

It appears from the record that Jesse G. Winn paid the

taxes on the property in question up to and including the year 1924. None of the taxes accruing after 1924 has been paid. On January 31, 1934, Augusta Winn, the wife of Jesse G. Winn, purchased the lots in question at tax sale for the sum of $1,737.75, and on May 2, 1935, paid the 1934 taxes amounting to $106.20, making the total amount due $1,843.95, plus interest. The trial court found that the tax sale certificate was in fact purchased by the husband. The evidence of Augusta Winn and Jesse G. Winn is to the effect that the money used was that of the wife, that some of it had been earned by her prior to her marriage and the balance left to her by her parents. There is no evidence in the record disputing this evidence. Under such circumstances, Augusta Winn is entitled to a finding in her behalf. Without going into the evidence in detail, we conclude that the finding of the trial court that the tax sale certificate was purchased with the funds of Jesse G. Winn is erroneous. We hold that Augusta Winn is entitled to a decree foreclosing her tax lien as a first lien on the property in question. That a wife may purchase a tax sale certificate on the lands of her husband seems to be settled law. In *Willard v. Ames,* 130 Ind. 351, 30 N. E. 210, the court said: "It seems to be settled law that a husband, whose duty it is to look after the business interests of his wife and family, as well as to support them, will not be permitted to acquire title to the property of his wife by purchase at a tax sale; but we know of no law to prevent a wife from purchasing at a public tax sale the lands of her husband, or of others of which he is in possession, provided the purchase is made on her own account and with her own money. A wife is under no obligation, moral or legal, to pay the taxes on her husband's property." For the purpose of determining the rights of all the parties, we find that of the amount of $1,843.95, $614.65 plus interest is a first lien on lot 15, and $1,229.30 plus interest is a first lien on lots 13 and 14.

The record further discloses that after December 1, 1913, and prior to the tax year 1925, the defendant Jesse G. Winn paid taxes on the property in question in the amount of

$1,472.17. We are of the opinion that the defendant Jesse G. Winn is entitled to contribution from his cotenants in common on this amount plus interest. In *Carson v. Broady*, 56 Neb. 648, 77 N. W. 80, this court said: "The purchase by a tenant in common of an outstanding title to, or encumbrance on, the joint estate inures to the common benefit; and the purchaser is, in such case, entitled to contribution from his cotenant." Also, in *Hanson v. Hanson*, 4 Neb. (Unof.) 880, 97 N. W. 23, this court said: "A tenant in common who discharges encumbrances or makes lasting and valuable improvements upon the property under circumstances entitling him to reimbursement, is entitled to interest upon moneys expended in so doing." We conclude therefore that Jesse G. Winn is entitled to contribution proportionate to their interests from his cotenants for the sum of $1,472.17 advanced for taxes, plus interest not exceeding the amount prayed for in his answer. Of this amount thus found to be due one-third thereof will be deemed to be an equitable lien against the interests of his cotenants in lot 15, and two-thirds against the interests of his cotenants in lots 13 and 14.

Plaintiffs contend that they are entitled to rent during the time Jesse G. Winn was using their property. Defendant contends that cotenants in joint use and possession of property are not entitled to collect rent for the use of the common property in the absence of a showing that the cotenant being charged wrongfully excluded other cotenants. We agree with this contention of the defendant. Do the facts in this case place it within the rule? We think not. The evidence shows that Jesse G. Winn at all times after December 1, 1913, was in the exclusive possession of the garage building on the lots in question. It is true that the record shows that two of the sisters worked in the garage office at times, but it is clear that they worked as employees and not by virtue of their interest in the real estate as tenants in common. It would appear, therefore, that the other cotenants in common would be entitled to a reasonable rental for the premises while they were occupied solely by

the defendant Jesse G. Winn for his personal use. The evidence of the rental value of the premises is conflicting and unsatisfactory. The trial court found that a reasonable rental over a period of years, after considering the fact that the defendant had constructed the improvements on the premises, was $25 a month. We think the evidence sustains such a finding. We hold, therefore, that each cotenant owning a one-fifth interest in the property is entitled to rent at the rate of $5 a month from December 1, 1913. Hattie Winn is therefore entitled to receive $1,227, Daisy Winn $1,227 and Grace Winn $1,242, as rent due on May 12, 1934, the date of filing the petition.

We therefore conclude that plaintiffs are entitled to a decree ordering a partition of the premises; the defendant Augusta Winn is entitled to a foreclosure of her tax sale certificate as a first lien; the intervener Lyle E. Jackson is entitled to a second lien on the two-fifths interest formerly owned by the defendant Jesse G. Winn, to be satisfied first from the sale of lots 13 and 14, and, if this be insufficient, the balance from the sale of lot 15; that the defendant Jesse G. Winn is entitled to contribution from his cotenants in common for the taxes he advanced plus interest, to be decreed an equitable lien therefor in the manner and amount previously set out in this opinion; that the defendant Jesse G. Winn is entitled to contribution from his cotenants for their proportionate share of the amount that the improvements enhanced the value of the premises in the manner and amount previously set out herein, and to an equitable lien against their interests in the premises; that the plaintiffs are entitled to a judgment for rent in the amounts hereinbefore mentioned, to be offset, first, against defendant Jesse G. Winn's equitable lien for taxes advanced, second, against the defendant Jesse G. Winn's equitable lien for improvements made on the property, and, if there be a balance remaining unpaid, that it be an equitable lien against any interest the defendant Jesse G. Winn may have in said property.

The decree of the district court granting a partition of

the premises involved in the suit at bar is affirmed, and that part of the decree adjudicating the rights of the parties in the property is reversed and the cause is remanded, with instructions to modify the decree of the district court to comply with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

MARY J. PRICE, APPELLANT, V. BURLINGTON REFRIGERATOR EXPRESS COMPANY ET AL., APPELLEES.

FILED OCTOBER 23, 1936. NO. 29878.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: BURDEN OF PROOF. In a suit under the workmen's compensation law, the burden of proof is upon the claimant to show that he suffered an injury and that the injury resulted from an accident arising out of and in the course of his employment.
2. ———: ———: ———. Awards for compensation cannot be based upon possibilities or probabilities. They must be supported by evidence showing that claimant has incurred a disability arising out of and in the course of his employment.
3. **Evidence:** RES GESTÆ. "The declaration of a person which is merely a narrative of a past transaction, made after the transaction to which it relates has been fully completed and shown not to have been spontaneously or involuntarily made, is not admissible in evidence as a part of the *res gestæ*." *Milton v. City of Gordon*, 129 Neb. 888, 263 N. W. 208.
4. **Master and Servant:** WORKMEN'S COMPENSATION LAW: LIMITATIONS. Where an employee, with full knowledge of his injury, fails to make a claim for compensation within six months after the injury and fails to file a petition therefor within a year from the date of the accident his claim is barred by the statute.
5. ———: ———: ———. Where the statute has become a bar to a claim for compensation during the lifetime of the injured employee, it is also a bar to a claim by his dependents after his death.

APPEAL from the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed.*

Anson H. Bigelow, for appellant.

Kennedy, Holland, De Lacy & Svoboda and *Edwin Cassem, contra.*

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

CARTER, J.

Plaintiff commenced this action under the workmen's compensation law for compensation for the death of Vern Price, her husband, from an accident arising out of and in the course of his employment with the Burlington Refrigerator Express Company. The trial court dismissed the case and an appeal has been taken to this court.

The main question necessary for this court to determine is whether it has been established by the evidence that the deceased died as a result of an accident. This will necessitate an examination of the evidence in the record on that point.

The only competent evidence pertaining to an accident was that given by the witness H. O. Dooley. Mr. Dooley's testimony is to the effect that on or about March 1, 1931, he and deceased were doing repair work in a refrigerator car for the Burlington Refrigerator Express Company; that the deceased was taking down a bunker beam and in some way it fell and struck him and that deceased appeared dazed for a few minutes thereafter. He further testified that he observed a lump on deceased's throat and noticed its condition from time to time thereafter. On cross-examination Mr. Dooley stated that he did not know the date or even the year that the accident happened; that he did not see the bunker beam strike the deceased; and that he did not know whether he first observed the lump on the throat of the deceased before or after the accident.

The record further shows that a bunker beam is five inches wide, two inches thick and about eight feet long. It is used to hold the ice-bunker in position in the end of the car and is held in place by five bolts protruding from the roof of the car. In order to remove the bunker beam, it is necessary to remove the nuts from the bolts and then pry the beam down with a crowbar inserted between it and the ceiling. The bunker beam in place is about seven feet.

above the floor and therefore from twelve to eighteen inches above the head of the workman. The deceased was engaged in removing such a beam when the accident is alleged to have happened.

The record discloses that a swelling was noticed on the throat of the deceased for several weeks in the spring of 1931, the swelling having the general appearance of a boil or carbuncle. He informed the foreman that he thought he had a goitre and that he was being treated by a local osteopath. Subsequently the swelling broke open and became a running sore. The running sore failed to heal and in December, 1931, and May, 1932, operations were performed and skin grafts made. Due to constrictions in the scar tissue, formed as a result of these operations, the deceased died of strangulation and suffocation on November 8, 1932.

The record also discloses that the deceased continued to work intermittently until a short time before his death. The appearance of his throat became so bad that the attention of other employees was called to it. Many talked with him about it and advised him to take care of it. The superintendent called him into his office and advised him to go to Omaha and see a specialist in order to get proper treatment. During all of this time prior to September, 1932, it was never mentioned to any of his fellow employees by the deceased that his throat condition was due to an injury nor did he claim compensation for any such injury.

It is the contention of the defendant that the deceased never received an injury that caused the throat affliction but that it was the result of a syphilitic condition. While there is much conflicting evidence in the record on the question whether deceased was afflicted with syphilis, it is not necessary for us to determine that point and we will content ourselves by saying that it is at least a possible explanation of the throat ulcer and its failure to heal.

The burden of proof in a compensation case is upon the claimant to establish by a preponderance of the evidence that the injuries complained of are a result of accident arising out of and in the course of the employment. From

an examination of the record in this case, we conclude that claimant has not sustained this burden. The witness Dooley, who was working with the deceased at the time of the alleged injury, did not see the bunker beam strike the deceased; he was unable to say whether the throat swelling existed before or after the bunker beam is alleged to have fallen; he does not testify that the deceased claimed at the time that he suffered any throat injury on that occasion. The subsequent conduct and statements of the deceased himself corroborate the theory that the injuries complained of were not the result of an accident. This situation, coupled with the fact that no claim of injury by an accident was ever made to the employer or any of its employees for more than 17 months thereafter, makes it appear that the claim is based on a possibility that the alleged injury could have been caused at that time. This, of course, is not sufficient to establish liability.

"Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton*, 123 Neb. 599, 243 N. W. 772. See, also, *Huffman v. Great Western Sugar Co.*, 125 Neb. 302, 250 N. W. 70; *Milton v. City of Gordon*, 129 Neb. 888, 263 N. W. 208.

While expert testimony was produced to the effect that trauma could produce the condition with which Price was afflicted, there is no evidence that such was the fact. Claimant contends that the evidence of the statements made by the deceased to his wife, his daughter and to physicians, who treated him long after the alleged accident, is competent to establish that the throat affliction was the result of an accident arising out of and in the course of his employment. In *Milton v. City of Gordon, supra*, we said: "The declaration of a person which is merely a narrative of a past transaction, made after the transaction to which it relates has been fully completed and shown not to have been spontaneously or involuntarily made, is not admissible in evidence as a part of the *res gestæ*." To the same effect is

Young v. Johnson & Blind, 113 Neb. 149, 202 N. W. 463. The statements thus made by the deceased fall within the above rule and are not competent testimony to prove the happening of the accident or the injury alleged to have been caused thereby.

The workmen's compensation law of this state provides that 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 or filed a petition therefor before the compensation commissioner. Comp. St. 1929, sec. 48-138. It is quite apparent from the record in this case that the deceased was under no mental disability after the date of the alleged accident and prior to his death. It is also quite apparent that there was at all times physical evidence of the alleged injury. Under such circumstances the claimant is required to file his petition within a year from the date of the accident. This he did not do. Neither did he give notice of a claim for compensation as required by statute. In *Park v. School District,* 127 Neb. 767, 257 N. W. 219, we said: "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." We are therefore constrained to hold that the claim of the deceased was barred under the circumstances of this case one year after the accident is alleged to have occurred. It having been barred as to the deceased at that time, it is also barred as to his dependents and personal representatives.

In *Lincoln Packing Co. v. Coe,* 120 Neb. 299, 232 N. W. 92, it was held that, where an injured employee negotiated and accepted a lump sum settlement of his claim, upon his death his wife could not maintain an action for a further award. In *Bliss v. Woods,* 120 Neb. 790, 235 N. W. 334, it was held that, where an injured employee elected to sue

for damages at common law and accepted a settlement and dismissed his action, it was a bar to a suit by his dependents to recover again under the workmen's compensation law. Also, in *Welton v. Swift & Co.*, 125 Neb. 455, 250 N. W. 661, it was held that, where an employee, in the absence of fraud, signed a release for an injury, such act was binding upon his dependents after his death.

In the case at bar, the deceased would have been barred from recovering compensation had he lived. Under the holdings of this court his dependents are therefore barred from recovering after his death.

The judgment of the trial court is

AFFIRMED.

EDWARD R. GOODMAN V. STATE OF NEBRASKA.

FILED OCTOBER 23, 1936. No. 29998.

Criminal Law: PETITION IN ERROR: TIME. Where a defendant in a criminal action negligently fails to file a transcript and petition in error in this court within three calendar months after the rendition of the judgment or the making of the final order complained of, as required by sections 20-1931 and 29-2306, Comp. St. 1929, a motion to dismiss the petition in error must be sustained.

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

Shuman & Overcash, for plaintiff in error.

William H. Wright, Attorney General, and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MUNDAY, District Judge.

CARTER, J.

This case is before the court on a motion of the attorney general to dismiss the petition in error for the reason that the transcript and petition in error were filed in this court

out of time. Should this motion be sustained?

The record in this case discloses that on May 4, 1936, the trial court overruled defendant's motion for a new trial and sentenced him to two years in the penitentiary. On May 7, 1936, the journal entry overruling the motion for a new trial and sentencing the defendant was filed and entered on the court journal in the office of the clerk of the district court. There can be no question therefore that the time for perfecting error proceedings commenced to run on May 7, 1936.

The record further shows that the transcript and petition in error were filed in this court on September 9, 1936. On September 12, 1936, the attorney general moved to dismiss for the reason that the transcript and petition in error were filed more than three calendar months after the order overruling the motion for a new trial was filed and entered in the district court journal.

Section 20-1931, Comp. St. 1929, provides as follows: "No proceedings for reversing, vacating or modifying judgments or final orders shall be commenced unless within three (3) calendar months after the rendition of the judgments or making of final order complained of; except that when the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, he shall have one year exclusive of the time of his disability, within which to commence such proceedings."

Section 29-2306, Comp. St. 1929, provides in part as follows: "In all criminal cases, writs of error shall be issued by the clerk of the supreme court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of costs as in civil cases."

Under numerous holdings of this court, the words "as in civil cases" are held to fix the manner and time within which a petition in error must be filed, the same being within three calendar months. The last case on the subject is *Dimmel v. State*, 128 Neb. 191, 258 N. W. 271, in which this court said: "The state challenged the jurisdiction of

this court to review the final judgment of the district court for that the petition in error was not filed here within three calendar months. The provisions of the law applicable to a review of the judgment are sections 20-1931 and 29-2301, Comp. St. 1929. The supreme court cannot exercise appellate jurisdiction in a criminal case, unless the petition in error is filed within three months after the rendition of final judgment. *Kock v. State,* 73 Neb. 354; *Dirksen v. State,* 86 Neb. 334; *Omaha Loan & Trust Co. v. Ayer,* 38 Neb. 891." We conclude therefore that section 20-1931, Comp. St. 1929, fixes the time at three calendar months in which the transcript and petition in error in a criminal case must be filed to give this court jurisdiction.

Counsel for the petitioner in error further contends that this court has inherent power to grant leave to perfect error proceedings after the time fixed by statute has expired upon a proper showing. He cites three Nebraska cases to which we will refer briefly.

In *Sanders v. Nightengale,* 109 Neb. 667, 192 N. W. 200, this court said: "The transcript in this case was filed out of time and defendant in apt time moved for that reason for a dismissal of the appeal. It is shown, however, that the delay was caused on account of the press of other official business in the office of the clerk of the district court, and through no fault of defendant. We overruled the motion to dismiss on the authority of *Continental Building & Loan Ass'n v. Mills,* 44 Neb. 136, where it was held: 'Where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal.' "

In *Fitzgerald v. Brandt,* 36 Neb. 683, 54 N. W. 992, this court said: "As a matter of law, appellants' contention that it was the duty of Sullivan & Reeder to return the draft of exceptions to appellants within ten days after its submission is correct; but this evidence falls far short of establish-

ing the fact that appellants were deprived of the opportunity to file their transcript here in time for appeal, by reason of Sullivan & Reeder's not returning the draft of exceptions in ten days after its submission."

Also, in *Chicago, R. I. & P. R. Co. v. Sporer,* 72 Neb. 372, 100 N. W. 813, this court said: "The filing of a petition in error with a transcript of the judgment complained of, and the issuance of a summons in error thereon within six months after the rendition of such judgment, together with the service of such summons, alone gives this court jurisdiction to review the proceedings of the district court in an action at law. It follows that the objection to our jurisdiction must be sustained unless a valid excuse has been shown for a failure to perfect the error proceedings within the time limited by the statute. The only excuse presented by counsel for the defendant company is that he relied on the clerk of the district court to inform him of the time when his transcript must be filed in this court. This does not deserve serious consideration. Counsel who tried the case knew when the judgment was rendered and when his time to perfect his error proceedings would expire, much better than the clerk of the district court, or any one else. It is to be regretted that the defendant company cannot have the proceedings of the trial court reviewed. But we see no way to avoid the consequences of the delay, which unfortunately has occurred in this case. Therefore the objection to our jurisdiction is sustained, and the proceeding in error is hereby dismissed."

These cases clearly are not in support of the argument of petitioner in error. The failure of the court reporter to get out a bill of exceptions promptly is one of the excuses advanced for filing the transcript and petition in error out of time. A bill of exceptions is not required in perfecting error proceedings, and *Fitzgerald v. Brandt, supra,* so holds. Counsel also urges that the trial court fixed the time for the filing of the petition in error. This can avail defendant nothing as he is bound to know the law and not rely upon the judgment of others with respect thereto, and the case

of *Chicago, R. I. & P. R. Co. v. Sporer, supra,* so holds. There is no showing that the transcript was not procured in ample time. Petitioner in error therefore has no sufficient excuse for failing to file his transcript and petition in error within the prescribed time.

The failure to perfect error proceedings within the time prescribed by statute is due to the negligence of the defendant. There are no cases which support the theory that this court has the inherent power to extend the time fixed by statute for perfecting error proceedings under such circumstances. The motion of the state to dismiss the petition in error ought to be and is hereby sustained.

ERROR PROCEEDINGS DISMISSED.

MADGE M. CLAUSEN, APPELLANT, V. OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE.

FILED NOVEMBER 6, 1936. No. 29714.

1. Appeal: NEW TRIAL: REVIEW. "An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor." *De Matteo v. Lapidus,* 116 Neb. 549, 218 N. W. 379.
2. Malicious Prosecution: ACTING ON ADVICE OF COUNSEL. "As a general rule, 'one who, before instituting a criminal prosecution, makes a full, fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable in an action for malicious prosecution.'" *Duffy v. Scheerger,* 91 Neb. 511, 136 N. W. 724.
3. ———: PROBABLE CAUSE. Want of probable cause is an indispensable element of an action for malicious prosecution.
4. ———: ———: DIRECTION OF VERDICT. "In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant." *Bechel v. Pacific Express Co.,* 65 Neb. 826, 91 N. W. 853.

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

O'Sullivan & Southard and *T. J. O'Brien,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, Sidney W. Smith and *H. W. Shackelford, contra.*

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

GOSS, C. J.

This is a law action to recover damages for malicious prosecution. Plaintiff appeals from two judgments in two separate trials. On the first trial, before the late Judge Redick, she recovered a verdict and judgment for $17,700. This was set aside. On the second trial, before Judge Sears, plaintiff's action was dismissed when plaintiff rested, at the close of evidence before the jury on behalf of plaintiff. Plaintiff brings up the record on both trials, seeking, first, the restoration of the judgment in the first trial, and, on failure to secure that, second, a reversal of the judgment of dismissal on the second trial.

This action was begun on March 29, 1933, by the filing of a petition, but on some day, not named, but shortly before the first trial (which began February 28, 1934), plaintiff presented an amended petition upon which the case was tried.

The amended petition declared against Omaha Loan & Building Association, a corporation, Sidney Smith, its attorney and official, Penelope Anderson, its attorney and official, Lucile Huff, its employee, and Alfred Nelson, an officer of the Omaha police department. It charged that, on or about March 16, 1933, defendant association falsely and maliciously, and without reasonable or probable cause therefor, induced defendant Alfred Nelson to charge plaintiff with being insane, and that said Nelson did thereupon file such a complaint before the insanity commission of Douglas county, causing that commission to make out a

warrant for apprehension of plaintiff and to arrest and imprison plaintiff; that upon the filing of the complaint plaintiff was arrested and committed to the Douglas county hospital against her will, there placed in a ward with a number of insane people and held incommunicado from 2 p. m., March 16, 1933, to 1 p. m., March 17, 1933, when she was taken before the insanity commission, given a full hearing, and found to be perfectly sane; that plaintiff is 50 years of age and had up until the time of her prosecution a good reputation in the city of Omaha and had innumerable friends and customers, who purchased soap and other toilet preparations from her, by which means she earned her livelihood and maintained her son, who attended Central high school; that defendants Smith, Anderson and Huff testified without reasonable or probable cause before the insanity commission; that plaintiff had been greatly injured in her credit and reputation, brought into public scandal and disgrace, suffered great pain of body and mind, and her income reduced about $25 a week, all to plaintiff's damages in the sum of $50,000, for which she prays judgment.

For its separate answer defendant association admitted its status as a building and loan association, admitted that Sidney Smith was its attorney, that Penelope Anderson was an attorney and an employee of the association, and that Lucile Huff was also its employee; admits that, on March 16, 1933, plaintiff was arrested on a warrant duly issued by the insanity commission, and that on the next day a hearing was had and she was discharged, but defendant denies all other allegations of the petition.

Each of the other defendants made separate answer to the amended petition. It does not appear necessary to notice their answers here because, on the second day of the first trial, these personal defendants were, on their motions, dismissed out of the action, and thereafter it proceeded as against defendant association.

We have not been favored with the reasons of Judge Redick for setting aside the judgment on the verdict of $17,700. It may well have been because the verdict was so

large as, in the light of the evidence, to shock the sensibilities of the court. It may be that he felt he had prejudiced defendant by certain rulings on the admission and exclusion of testimony. By instruction No. 10, the court informed the jury he had stricken from the record six specified and numbered items, testified by or on behalf of plaintiff, as immaterial and instructed them not to consider these items in arriving at a verdict; and instructed the jury that the evidence of Robert A. Nelson, on behalf of defendant, which had been stricken by the court on the trial was restored to the record for their consideration. This may well have been considered by the court as confusing to the jury, as well as precluding defendant from following up the presentation of its evidence, had the rulings been corrected on the taking of evidence, rather than by an instruction. Be that as it may, a trial judge has wide latitude in the use of his discretion in granting a new trial.

In *De Matteo v. Lapidus*, 116 Neb. 549, 218 N. W. 379, there were three trials in an action for personal injuries. The first trial resulted in a ten to two verdict for $20,000. The verdict was set aside. The second trial was before Judge Redick, the verdict being for $20,000, which was also set aside. The third trial was before Judge Troup, resulting in a verdict for $4,000, in which plaintiff (appellant) was denied a new trial. A bill of exceptions was settled following the second trial, and this court was asked to set aside the order of Judge Redick, granting a new trial, and to reinstate the judgment for $20,000 entered on the verdict in the second trial. The sole question was whether the trial judge abused this discretion. As points of law this court held: "An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor. * * * An order granting a new trial by a *nisi prius* court which affords a litigant an opportunity to present his claims fairly in another trial will not be scrutinized as closely as would an order putting an end to his demands."

We are of the opinion the trial court did not abuse its

discretion in granting a new or second trial in the case now under review.

What follows relates to the second trial. Judge Redick had dismissed all defendants save defendant association, and the second trial, before Judge Sears, proceeded against the association only.

The charge of insanity against plaintiff grew out of the dealings of the parties through a series of years in relation to a mortgage which defendant held and foreclosed on the home of plaintiff. These dealings were carried on for defendant, of course, by its officers and employees and by its attorney. In their course there is evidence that it was brought to the attention of these parties, partly through the acts and conversation of plaintiff herself with these officers and employees and partly from reports of others who seemed credible, that she had become so disturbed over the prospective loss of possession of her home that she was threatening suicide, threatened to commit that act at the home of one of the officers of defendant, and threatened "to get" one of the officers. Defendant, being a corporation, could act only through its attorney, its officers or employees. An evidently complete disclosure of the facts was made to the attorney of the association and he was directed to take whatever action seemed necessary. Accordingly he advised with some of the officers of the insanity commission as to the procedure and as to whether or not a complaint of insanity should be filed against plaintiff. They advised the filing of a complaint. Thereupon a complaint was caused to be filed; plaintiff was detained under restraint until the next day when a hearing was had and she was discharged. It does not seem advisable or necessary to state in detail the evidence on the further facts leading up to the hearing.

The evidence shows that the attorney made to the insanity commission a full and fair disclosure of all the facts that had come to his attention. These included all facts that were known to defendant or to any of its officers or employees so far as was ascertained at the trial.

"As a general rule, 'one who, before instituting a criminal

prosecution, makes a full, fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable in an action for malicious prosecution.'" *Duffy v. Scheerger,* 91 Neb. 511, 136 N. W. 724, by Letton, J.; *Jensen v. Halstead,* 61 Neb. 249, 85 N. W. 78, Norval, C. J.

We do not find that the above rule has even been changed or modified by this court. The same rule is stated in 38 C. J. 427-428, citing the above two Nebraska cases, in a full page of citations from many states and from England and Canada, and saying this: "If he shows these things he is entitled to immunity from damages, although it may appear that the facts did not warrant the advice nor the prosecution, or that accused was innocent."

Want of probable cause is an indispensable element of an action for malicious prosecution. 38 C. J. 398; *Cobbey v. State Journal Co.,* 77 Neb. 626, 113 N. W. 224; *Hudson v. Truman,* 78 Neb. 840, 112 N. W. 325.

While some of the facts supporting probable cause were disputed by evidence on behalf of plaintiff, yet there were others undisputed upon which the defense of probable cause might be predicated. In such circumstances we have held that the question of probable cause is one of law for the court. "In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant." *Bechel v. Pacific Express Co.,* 65 Neb. 826, 91 N. W. 853, by Pound, C.; *McHugh v. Ridgell,* 105 Neb. 212, 180 N. W. 75; *Kersenbrock v. Security State Bank,* 120 Neb. 561, 234 N. W. 419.

We are of the opinion the trial court properly considered the evidence a matter of law for the court on the question of probable cause, and committed no error in withdrawing that from the jury and in deciding it in favor of the defendant.

The judgment is

AFFIRMED.

SAMUEL L. ROBERTS ET AL., APPELLANTS, V. CITY OF MITCHELL, APPELLEE.

FILED NOVEMBER 6, 1936. No. 29722.

1. **Municipal Corporations: SPECIAL ASSESSMENTS: REVIEW.** The legislature has so far provided no appeal to the district court from the act of a city council of a city of the second class sitting as a board of equalization to levy special assessments for paving. In such a situation, the only way a district court gets jurisdiction is by proceedings in error.
2. **Courts.** Jurisdiction of the subject-matter cannot be conferred on the district court by consent of the parties.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

F. J. Reed, for appellants.

Floyd E. Wright, contra.

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

GOSS, C. J.

Plaintiffs brought to the district court error proceedings from the city council of the city of Mitchell, sitting as a board of equalization. The district court affirmed those proceedings and dismissed plaintiffs' petition, which had been filed in the district court in accordance with a stipulation. Plaintiffs appealed.

The proceedings before the city council, as shown by the transcript therefrom (which was in turn included in the transcript brought here), record the steps taken by the council leading up to the paving, in paving district No. 2, of a street in front of plaintiffs' properties, and the assessment of the cost thereof against the properties of plaintiffs.

The section of the statutes giving power to the district court to reverse, vacate or modify the judgment or order of a "tribunal" like a city council, is section 20-1901, Comp. St. 1929. Another section of the same chapter provides for the review by the district court by a " 'petition in error,' filed in a court having power to make such reversal, vacation or modification." Comp. St. 1929, sec. 20-1903.

Whether a proceeding shall be taken by appeal from a tribunal, clothed by the legislature with power to decide in the first instance, for review by the district court, is fixed by the statute creating such tribunal and giving it its powers. The right of appeal is purely statutory. Unless the statute provides for appeal in the specific instance under examination at any time, such right does not exist. So, in *McCague Investment Co. v. Metropolitan Water District*, 101 Neb. 820, 165 N. W. 158, it was held that the statutes make no provision for appeal from the equalization and assessment of special taxes by a metropolitan water district, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review the order made; and in *Whedon v. Lancaster County*, 76 Neb. 761, 107 N. W. 1092, it was held that the statutes make no provision for an appeal from the order of the county board in making the tax levy, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review such order.

In cities of the second class, the city council is the "tribunal" granted the specific power to make the assessments provided for in the preceding section of the same chapter, being assessments like those involved in this case. Comp. St. 1929, sec. 17-435. Nowhere in that section is an appeal provided by which the district court is granted jurisdiction to review by appeal the proceedings of a city council in a city of the second class in its findings, orders and judgments in making special assessments. Nor do we find such power elsewhere in the statutes. Such provision cannot be supplied by the courts. This is probably due to legislative oversight, because the right of appeal, rather than review by error proceedings, is granted by statute in the case of review of the acts of most other tribunals. We cannot amend the statute. It is not the function of the courts to make statutory law but to interpret such laws devised by the legislature. We respectfully call the attention of the legislature to this particular situation so, if it wish, it may grant the courts the jurisdiction lacking in the respect pointed out.

The question arises in this case in this novel way. Plaintiffs, recognizing the limitations of the statutes, brought proceedings in error from the city council to the district court. In that court they procured and filed a written stipulation with defendant in error, agreeing that all of the "objectors" might join in one petition; "that the issues may be made up in the district court by the filing as in an original action of a single petition on behalf of all of said parties and the answer of the defendant." Accordingly such petition and answer were filed, as if this were an appeal (rather than proceeding in error in the district court) or as if it were an "original action" in the district court. Some weeks before the case came on for trial, the parties in open court waived a jury trial. When the case was reached for trial, the court held that it was an error proceeding and it was argued and presented as such. It was taken under advisement, briefs were filed, and the court held that there was no provision for appeals in matters of this kind, that there were no errors in the record, ordered the proceedings of the city council in making the assessment and levy affirmed, and dismissed plaintiffs' petition.

Plaintiffs make a good argument in favor of the general rule that stipulations, which have for their purpose the avoiding of delay, trouble and expense of producing competent evidence on a trial, must be respected by a court. Generally stipulations limiting and defining the issues must be respected and followed by the court. But the stipulation here is not of that type. It is in the realm of jurisdiction and not merely affecting issues. The district court obtained and had jurisdiction of the case only as a proceeding in error. The stipulation undertook to give the court jurisdiction of the subject-matter as if it were an appeal or otherwise, in the language of the stipulation, as if it were an "original action." In other words, the stipulation undertook to furnish a jurisdiction that the legislature has so far failed to provide. Jurisdiction is not supplied in that way. The well-known rule is otherwise. It is stated in 15 C. J. 802, in these words: "It is not within the power of liti-

gants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject-matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement, or waiver"—citing many cases, including the following: *Edney v. Baum,* 70 Neb. 159, 97 N. W. 252; *Cizek v. Cizek,* 69 Neb. 800, 99 N. W. 28; *Whalen v. Kitchen,* 61 Neb. 329, 85 N. W. 278; *Crawford Co. v. Hathaway,* 61 Neb. 317, 85 N. W. 303; *Armstrong v. Mayer,* 60 Neb. 423, 83 N. W. 401; *Anderson v. Story,* 53 Neb. 259, 73 N. W. 735.

The court has jurisdiction of the case as an error proceeding and it properly refused to respect the stipulation of the parties that it should be considered and tried as an appeal proceeding, or as an "original action," whatever the parties contemplated by that term. This left the matter to be disposed of as a proceeding in error.

We have examined the transcript from the city council, found in the record, to see if we can discover some error of the city council. As to what might be considered evidential matter outside of the record made by the council, the transcript shows only the joint affidavit of two parties. This was on behalf of the objectors to the levy. It contains no facts but merely the conclusions that none of the real estate has been benefited by the paving, but has been damaged by the high grade on which the paving was constructed. The schedule of the assessments seems to indicate that each tract was assessed at the same rate a front foot, but nowhere in the record can we find any indication as to whether the land was or was not of a uniform grade or elevation and so we cannot say that discrimination exists as to the benefits or damages.

Other matters are argued in the briefs but it is not necessary for us to consider them. We think the judgment entered by the district court was compelled by the record. The judgment is

AFFIRMED.

HILDUR PETERSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 6, 1936. No. 29683.

1. **Negligence**: BURDEN OF PROOF. It is incumbent upon plaintiff, in a personal injury action, to establish by a preponderance of the evidence that the injury of which he complains was caused by the negligence of the defendant, or by the joint negligence of two or more defendants.
2. **New Trial.** "When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted." *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109.
3. ———. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923.

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

Kennedy, Holland, De Lacy & Svoboda, for appellants.

John A. McKenzie, contra.

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

GOOD, J.

This is an action to recover damages for personal injuries, alleged to have been caused by the joint negligence of Billie Young, the owner and driver of an automobile, and the defendant street railway company and William R. Reddick, one of its motormen.

It appears that after this action was commenced Young died, and the action was revived in the name of the administrator of his estate. No pleadings were filed by the administrator, and default was taken as against him. The trial in the district court, from which this appeal is taken, proceeded against the street railway company and its motorman, and resulted in a verdict for plaintiff, and such defendants have appealed.

The principal contention of defendants is that the verdict is contrary to and not sustained by the evidence.

The accident, resulting in the injuries of which plaintiff complains, occurred about 5 o'clock in the afternoon of December 20, 1933, on Sixteenth street immediately north of Farnam street, in the city of Omaha. Farnam street extends east and west and is intersected by Sixteenth street, extending north and south. The point is one of the busy business sections of the city of Omaha. The defendant street railway company operates a double track street railway on Sixteenth street. The east or northbound track is somewhat east of, and the west or southbound track is somewhat west of, the center of Sixteenth street. Young was driving his automobile west on Farnam street, had crossed Sixteenth street, and a short distance west of Sixteenth street his car stopped or stalled. He got out and cranked his car, and it appears that it was in reverse gear, as the car immediately started to run backwards. Instead of backing straight east, it ran in a curved direction and crossed the pedestrian lane of traffic on the north side of Farnam street, ran northeast, curved back to the northwest, and collided with one of the street cars on the southbound or west track at a point about 50 or 55 feet north of the north line of Farnam street.

Plaintiff was traveling west along the north line of Farnam street in the lane for pedestrians and was struck by this moving automobile, and was carried or dragged over the left end of the rear bumper of the automobile. The automobile was a Ford with a rumble seat, but the lid or door to the rumble seat was closed, so that the rear of the automobile presented a turtleback appearance. Plaintiff was lying over this turtleback on the rear license bracket and the rear bumper, and she was carried or dragged in this fashion until the automobile approached within eight or ten feet of the street car. Plaintiff testifies that at this point she was thrown from or rolled off the automobile onto the pavement. She claims that the street car ran forward and struck her head and ran over and cut off the fingers of her

right hand and part of the hand. Plaintiff is corroborated in her testimony, to some extent, that she was run over by the front left wheel of the street car. A number of witnesses, however, testify that the street car was stopped prior to the collision between it and the automobile. It is conceded, and the picture of the automobile in the record shows, that the left-hand rear part of the automobile struck the street car, and it is conceded also that the street car was struck on its left front end between the lamp and the corner of the car. A number of witnesses to the accident testify that the street car was standing still and had stopped because of other vehicles ahead of it and in such close proximity to the street car track that the street car could not proceed, prior to the time of the collision. One witness testifies that the street car moved forward after the collision some six or eight feet. No one testifies that it moved any farther forward than that. The evidence also is to the effect that the automobile was moving at a speed of from 12 to 20 miles an hour, and that the street car, prior to the time it came to a stop, was not moving more than four to five miles an hour. If plaintiff was thrown from the automobile, as she claims, some eight or ten feet in front of the street car, and the automobile was moving at 12 to 20 miles an hour, and the street car from four to five miles, it is evident that the collision must have occurred before the street car could move more than two or three feet. According to plaintiff's testimony she would still be in front of the street car at the time of the collision, and, if it moved no more than six or eight feet, it would be impossible for the street car to run over her as she claims. The evidence is that the distance from the front end of the street car to a point immediately back of the front wheels is about 18 feet. True, other witnesses for plaintiff place the point where plaintiff was thrown from the automobile to the pavement as much closer to the street car, some placing it within two or three feet. In that event, the street car could not have moved more than a foot prior to the collision, and, in the view most favorable to plaintiff, if it moved six or eight feet thereafter, she

would still be in front of the street car wheel and would not have been run over by it as she claims.

One witness, who gave a very clear description of the accident, testified that the automobile moved in a curve or arc of a circle. Plaintiff in her petition alleges that the automobile ran backwards and onto the east side of Sixteenth street. In that event, it was entirely past the southbound street car track. It must be borne in mind that the motorman, when he saw this automobile running backward, did not know that it was driverless; did not see or know that plaintiff was on and being dragged by the automobile; he had no reason to anticipate or expect that any one would be riding or was being carried on the rear bumper of the automobile, and he testified that, in fact, he never saw her on the automobile at all. In any event, when he saw this automobile pass eastward and east of the track on which his street car was moving, he would have no reason to anticipate that it would curve back and come into collision with the street car, until, at least, it had curved and turned back towards the northwest. At the speed with which the automobile was moving, it would take less than three seconds from the time it came into the motorman's view until the collision occurred, and, from the time it would be apparent to him that it was curving back to the northwest and might come in collision with his street car, little more than one second could have elapsed. Under such circumstances, where the motorman had the duty of keeping a lookout in front and at the right, where vehicular traffic might interfere with the passage of the street car, we doubt if it could be said that the motorman was guilty of actionable negligence in failing to realize that the automobile would come into contact with the street car, even if it was moving as claimed by the plaintiff. The evidence on behalf of the defendants is that plaintiff remained on the automobile until it collided with the street car and was struck and wedged in between the two vehicles, and that her hand was probably mangled when the bumper of the automobile struck the bumper of the street car.

The rule of law applicable is that plaintiff must prove by a preponderance of the evidence that the injury of which she complains was negligently inflicted by the defendants, or by the joint negligence of the owner of the automobile and the street railway company and its motorman. The physical facts disclosed by the record render it impossible that plaintiff could have been injured in the manner to which she testifies. The front wheels of the street car are about 18 feet back from the front end of the car. No one testifies that the street car moved more than six or eight feet, and it was a physical impossibility for plaintiff to have been in the position in which she claims she was injured, if her other evidence is true. In this state of the record, we are forced to the conclusion that the verdict is not sustained by the evidence.

The following established rule is applicable to the situation disclosed by the record: "When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted." *Dunbier v. Day,* 12 Neb. 596, 12 N. W. 109; *Exchange Bank v. Gifford,* 102 Neb. 324, 167 N. W. 69.

It is evident that the jury must have disregarded uncontradicted evidence in the record that was material to the question before them for determination.

We think it is clear that the verdict is so clearly wrong as to induce the belief that it must have been found through passion, prejudice, mistake, or some means not apparent in the record. This court has held: "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin,* 90 Neb. 122, 132 N. W. 923. To the same effect is *Hoffman v. McKeen Motor Car Co.,* 95 Neb. 238, 145 N. W. 257.

It follows necessarily that the judgment should be and is

REVERSED.

STATE OF NEBRASKA V. MARK T. HYSLOP.

FILED NOVEMBER 6, 1936. No. 29756.

1. **Liquors: IMPORTATION.** It is a penal offense for the owner and operator of a truck who has not been designated as a carrier of alcoholic liquor by the state liquor control commission, and who has not received a permit from such commission, to transport from another state into this state a cargo of unstamped alcoholic liquors, consigned to a bonded warehouse or wholesaler of liquors in this state.
2. ———: ———. Intoxicating liquor imported into this state need not have the stamps placed thereon, when brought in by a bonded carrier with a permit, until it reaches a bonded warehouse or a duly licensed distributor.
3. **States.** The law of another state cannot make lawful in this state an act which would be unlawful under the law of this state; nor make unlawful in this state an act which is lawful under the law of this state.

ERROR to the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Exceptions sustained in part and overruled in part.*

William H. Wright, Attorney General, Milton C. Murphy and *Lloyd W. Kelly,* for plaintiff in error.

William Suhr, contra.

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

GOOD, J.

This is a proceeding brought by the state as plaintiff in error to review alleged errors in rulings made and instructions given by the district court in a criminal action. This procedure is authorized by sections 2021, 2314, 2315, and 2316, ch. 29, Comp. St. 1929.

Defendant Hyslop was prosecuted in the district court on an information containing two counts, each charging a violation of the state liquor law. The first count charged the defendant with the unlawful possession of intoxicating liquors that did not bear the mark or stamp thereon required by law. The second count charged defendant with

unlawful transportation in a truck of a quantity of alcoholic liquor without defendant having been first designated by the Nebraska liquor control commission as a carrier of alcoholic liquors, and without a permit having been issued to him for transportation of such liquors by truck. At the conclusion of the evidence, on motion of defendant the court dismissed the second count of the information on the alleged grounds that it did not charge an offense under the law of the state of Nebraska, and that the evidence was insufficient to sustain a conviction on said count. The case was submitted to the jury on count one of the information, and a verdict of not guilty was returned, whereupon defendant was discharged. The state now charges that the court committed error in sustaining the motion to dismiss as to the second count of the information and in giving a number of instructions to the jury.

The undisputed evidence shows that defendant was the owner and operator of a truck, had paid the registration fee for the operation of a ten-ton truck in the state of Nebraska, and had issued to him a registration certificate for such truck. On July 27, 1935, defendant at Chicago received from the Cloister Company 324 cases of alcoholic liquors, consigned to different bonded warehouses or licensed and bonded wholesale liquor dealers in the state of Nebraska. He had transported such liquors from Chicago into the state of Nebraska in his truck and was about to deliver to Distillers Distributing Company, of Grand Island, that portion of his cargo that was consigned to it, when he was arrested and put upon trial.

It appears that prior to his engaging in hauling intoxicating liquor into the state defendant had made application to a bonding company for a bond which would authorize him to be designated as a carrier of alcoholic liquors by truck and to have a permit therefor, and was informed that a bond for $1,000 was required. He paid the fee for and received a bond for $1,000, which was presented to the state liquor control commission. He was then informed that the bond required must be for $3,000, and, although he had

promised to apply for and secure such bond, he had neglected so to do at the time of his arrest.

The first question for consideration is: Did the court err in dismissing the second count of the information? It is contended by counsel representing the trial court that no penalty is provided by statute for the transportation of liquor under such circumstances, and that, therefore, the information did not charge, and the evidence did not show, a punishable violation of statute.

Section 1 of the liquor control act, being section 53-301, Comp. St. Supp. 1935, among other things provides: "(c) No person shall * * * transport, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this act." Defendant does not come within any of the exceptions noted.

Section 63 of the act, being section 53-363, Comp. St. Supp. 1935, among other things provides: "Any person who * * * shall violate any other provisions of this act for which penalty is not otherwise provided, shall for a first offense be fined not more than five hundred dollars, and for a second or subsequent offense shall be fined not more than one thousand dollars or be imprisoned in the county jail not more than six months, or be both fined and imprisoned, except where other penalties are specifically provided."

Section 22 of the liquor control act, being section 53-322, Comp. St. Supp. 1935, provides: "Any common carrier of merchandise owning or operating any * * * truck, or other transportation lines * * * upon application and filing of a bond in form and penalty and with such sureties as may be approved by the commission, may be designated as a carrier of such liquors, for the final release of which liquors, from a bonded warehouse in the state of Nebraska, a permit has not been issued: Provided, the consignee shall be some manufacturer or distributor, maintaining a bonded warehouse for such liquors within the state of Nebraska; and provided further, nothing in this section shall be construed to prevent or restrict any common carrier from transporting in intrastate commerce any such liquors without giving

the bond aforesaid where the consignor is a bonded warehouse of the state of Nebraska and the consignee is a licensed retail liquor dealer in this state. Any such liquor arriving at a point of entry in the state of Nebraska, may be entered, under such rules and regulations as the commission may prescribe, for transportation in bond to any bonded warehouse in the state of Nebraska."

It appears that defendant, at the time in question, had not been designated as a carrier of liquors by truck and had not received a permit. And it further appears that the liquor control commission had required that, in instances of this sort and with a truck of this capacity, a bond of $3,000 must be given, with approved sureties, before a permit would be issued. Such permit had not been issued to the defendant. We are of the opinion that the statute made the act of defendant in so transporting liquor, under the circumstances, unlawful; that the statute provides a penalty therefor, and that the court erred in sustaining the motion to dismiss the second count of the information. The state's exception to such ruling is sustained.

The state alleges error in the giving of instructions 10 to 14, inclusive. It contends, and we think correctly, that it is unlawful for any person to have in his possession in this state any cask or package of intoxicating liquors without having thereon the mark or stamp required by the state law, unless such person is a bonded carrier possessing a permit from the liquor control commission, or is a licensed manufacturer or bonded warehouseman or distributor of intoxicating liquors within this state; also that an importer of intoxicating liquors in this state is not required to have the package of such liquor marked and stamped until it reaches a bonded warehouse. We quite agree with this contention. A bonded carrier, with a proper permit, may lawfully have such liquor in his possession for transportation from the time it comes into the state until delivered to a bonded warehouseman or a duly licensed distributor of intoxicating liquors.

The tenth instruction is in part as follows: "You are in-

structed that under the law of this state intoxicating liquors may now be legally manufactured, distributed and sold under certain conditions and restrictions. That these conditions are, in so far as they affect this case, that a tax, which is levied by the law, shall be paid by the manufacturer or distributor before such intoxicating liquors shall be released and become an article of commerce within this state."

Strictly speaking, when liquors are imported into this state they become articles of commerce within this state, and it is not necessary that the stamps be placed thereon, when brought in by a bonded carrier with a permit, until they reach a bonded warehouse or a duly licensed distributor. To the extent that the instruction indicates otherwise, it is erroneous.

Another instruction informed the jury that the law of the state of Illinois, from which the liquor in question was shipped, is presumed to be the same as the law of the state of Nebraska. Such an instruction, we think, was not proper to be given. No penalty could be incurred under the law of this state except for transactions occurring within the state, and our state law has no extraterritorial effect. Likewise, the law of another state cannot make lawful in this state an act which would be unlawful under our law, or make it unlawful in this state where it is lawful under the laws of Nebraska. Criticism of other instructions seems to be without real merit.

To the extent indicated, the exceptions of the state are sustained, and in other respects are overruled.

EXCEPTIONS SUSTAINED IN PART AND OVERRULED IN PART.

A. E. VANBURG, APPELLEE, V. G. H. MAUEL, APPELLANT.

FILED NOVEMBER 6, 1936. No. 29726.

1. **Attachment.** Except where the ground of attachment is that the defendant is a foreign corporation or a nonresident of the state, no order of attachment shall be issued until an undertaking is filed and approved with one or more sufficient sureties

to the effect that the plaintiff will pay defendant all damages resulting from a wrongful attachment. Comp. St. 1929, sec. 20-1003.

2. ———: RATIFICATION. A defendant who fails to assail the validity of an attachment, but for a consideration agrees that money in possession of a garnishee be paid into court to abide the judgment, ratifies and confirms such attachment proceedings.

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

Schlytern & Kelly, for appellant.

Bruce Fullerton, contra.

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

DAY, J.

The plaintiff commenced this suit upon a promissory note and caused an attachment to be issued. Under a garnishment, money was reached in the Farmers State Bank of Davey. The garnishee answered that it had $144.05, which belonged to the defendant. The parties agreed that $110 was to be paid into court and the remainder released to the defendant. It was the conclusion that $110 was an amount ample to pay the judgment and costs if one was procured.

Thereafter, the defendant filed an application for a change of venue to the municipal court of the city of Lincoln, which was granted. The defendant then filed a motion to quash the attachment for the reason that no bond was given prior to the issuance thereof as provided by law. The bond upon which the attachment was issued was signed only by the plaintiff.

The grounds for the attachment were all those provided by statute except that defendant was not a foreign corporation or a nonresident. Except where the ground of attachment is that the defendant is a foreign corporation or a nonresident of the state, no order of attachment shall be issued until an undertaking is filed and approved with one or more sufficient sureties to the effect that plaintiff will

pay defendant all damages resulting from a wrongful attachment. Comp. St. 1929, sec. 20-1003.

No sureties signed an undertaking in this case, and the attachment should not have been issued. The municipal court sustained the motion to quash the attachment.

There is no serious contention at this time that there was a sufficient bond. There was much legalistic sparring in an attempt to amend the purported bond and to show that no bond was approved prior to the issuance of the writ of attachment.

However, it is established by the record that the money was paid into court by agreement for a consideration which was that the remainder be immediately released to defendant. A defendant who fails to assail the validity of an attachment, but for a consideration agrees that money in possession of a garnishee be paid into court to abide the judgment, ratifies and confirms such attachment proceedings. *Mosher v. Beselin*, 129 Neb. 541, 261 N. W. 126; *Eiseley v. Norfolk Nat. Bank*, 89 Neb. 382, 131 N. W. 608.

The judgment of the district court following this rule was the correct one.

AFFIRMED.

ORA HAYES, SPECIAL ADMINISTRATRIX, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 12, 1936. No. 29742.

1. **Master and Servant:** ASSUMPTION OF RISK. The defense of assumption of risk was not abolished by the federal employers' liability act. An employee assumes the ordinary risks of his employment and those unusual or extraordinary risks which he knows and appreciates or which an ordinarily prudent and careful man would have known and appreciated.
2. **Evidence.** "The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture." *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, 168 N. W. 596.
3. **Death:** PROXIMATE CAUSE. The negligent operation by plain-

tiff's intestate of the track-motor, of which he had full and complete control, was the sole proximate cause of his injuries and death.

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

Frank A. Dutton and *James H. Falloon,* for appellant.

W. P. Loomis, J. W. Weingarten and *Jean B. Cain, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and MUNDAY, District Judge.

GOSS, C. J.

Plaintiff appeals from a judgment for defendant, dismissing plaintiff's action at the close of the evidence.

Thomas Hayes, of Rulo, Nebraska, had long been a section-foreman on ten miles of defendant's road extending about seven miles in Nebraska, east of Rulo, and about three miles farther east in Missouri. He was killed in an accident while on duty and operating a track motor-car, returning from work on the Missouri end of the section at about midday. This car was of the conventional modern type used by section-gangs. It had two wheels on each side, was about seven feet long, did not extend over the rails, had a seat for the men running lengthwise through the middle of the car, leaving room on the floor for such tools and material as could be accommodated and were desired to be carried. The forward end was protected by a metal screen and metal rail, the purpose of which was to prevent tools and material from falling from the front of the car when in motion. The rear of the car was not so protected as it was frequently necessary to carry articles that extended beyond the rear of the car and danger to the car and its riders would not result if tools and material fell from the rear.

Hayes was killed on August 14, 1934. Plaintiff brought this action under the federal employers' liability act because he was engaged in aiding to carry on interstate commerce. She alleged that, while Hayes was operating the car backwards a line-bar lying under his feet worked itself off the

car, striking one end on a tie, and as a result the upper end of the line-bar struck Hayes, throwing him from the car and causing injuries from which he died. The negligence alleged is that of the fellow servants of Hayes, in failing to watch the line-bar, to take care and see that it did not fall from the car, in failing to warn Hayes, who was unaware of the danger, and in failing to be attentive to their duties both for their own safety and that of plaintiff's intestate.

The answer alleged that defendant had furnished the car described substantially as heretofore; that the proper, safe and careful way to run the car was forward with the front end of the car in the direction the car was going; that Hayes well knew and had been instructed as to said safe and proper way to operate the car and of the danger of running the car backwards; that Hayes negligently caused the car to be run backwards and himself so operated the car and was himself so seated as to be the only one on the car who could effectively watch the tools, but negligently permitted the tools to fall from the car; that his negligence was the proximate cause of his injury.

The evidence shows that Hayes and the other employees had been instructed that the motor-car should always be operated with the front end to the front except in an emergency, in which case, when operated backwards, it should not be run in excess of three to five miles an hour; that such an emergency would end as soon as the car reached a set-off or a road-crossing, when the car should be turned around; that there had been posted for years on the inside of the car-house a warning, addressed "To Operators of Motor Cars," reciting how a section-foreman had been killed by a crowbar falling off when a motor-car was being operated backwards at a speed of fifteen miles an hour; that a few months before the death of Hayes he had been personally instructed and warned, in a school of instruction, of the danger of tools falling off a motor-car when operated backwards; that the danger of tools falling off a motor-car was specifically pointed out in the printed rules governing sectionmen; and that Hayes knew these rules is shown by the

testimony of two of his men, who testified that Hayes had warned them about infractions of this particular rule.

The evidence also shows that Hayes was operating the car sitting on north side at the west end as it was operated backwards westerly toward Rulo. George Goin sat on the east and north side at the other end of the seat and back of Hayes. Floyd Ogden sat at the west end of the seat on the south side and the fourth man, Olin McWain, sat at the east end on the south side. The line-bar was about five feet long and had been deposited on the north side of the car under Hayes' feet or where, to fall off the front of the car, it had to go out from under his feet. It fell from that side, caught on a tie which was a part of the roadbed and knocked Hayes from the car, causing his death. Hayes was operating the car backwards at the rate of fifteen miles an hour. He ran the car backwards past two set-offs and one road-crossing without stopping to reverse the ends of the car.

Each of the others on the car had duties to perform in the way of watching for trains, for materials on the sides of the roadbed and watching the material and tools under his own feet. The two on the south side could not see tools on the floor on the north side of the seat. Hayes had no work to do in driving as one would have in driving an automobile. If he had been watching the tools, as was his duty, he would have seen the line-bar passing to a position where it caused the accident. Goin is the only other member of the section-gang who was on that side and who, by any chance, could have seen the line-bar. He testified that the water-keg was on the north side between him and Hayes and that Hayes was in a position to see the line-bar "as good as anybody could." Witness did not see the bar creeping off, nor did he see it fall. Afterwards it was found between the rails near the body of Hayes. There, too, was found the tie which it struck when it fell off the car.

There is no evidence of active negligence on the part of defendant, that it did not furnish him a safe place to work, or furnished him defective tools, or the like.

Defendant pleaded that the risks of Hayes' employment

were those ordinarily inhering in such employment and were open, obvious and apparent and were voluntarily assumed by him. The defense of assumption of risk was not abolished by the federal employers' liability act. An employee assumes the ordinary risks of his employment and those unusual or extraordinary risks which he knows and appreciates or which an ordinarily prudent and careful man would have known and appreciated. *Jacobs v. Southern R. Co.*, 241 U. S. 229; *Preble v. Union Stock Yards Co.*, 110 Neb. 383, 193 N. W. 910; *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499, 234 N. W. 395.

No one saw the line-bar fall from the car. About all we find in the evidence about it is that it was loaded and was found afterwards on the track in circumstances which prove that it had caused the injury. What happened and how it happened is not so proved as to support a finding of negligence on the part of the sectionmen other than Hayes. "The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture." *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, 168 N. W. 596.

The negligent operation by plaintiff's intestate of the track-motor, of which he had full and complete control, was the sole proximate cause of his injuries and death. *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S. 1; *Southern Ry. Co. v. Youngblood*, 286 U. S. 313; *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499, 234 N. W. 395.

The district court did not err in entering judgment for defendant. The judgment is

AFFIRMED.

FARMERS STATE BANK OF CLARKS, APPELLEE, V. E. H. LUIKART, SECRETARY OF DEPARTMENT OF TRADE AND COMMERCE, ET AL., APPELLANTS.

FILED NOVEMBER 12, 1936. No. 29708.

1. **Banks and Banking.** The banking department may authorize an insolvent bank to operate under restrictions and do a limited banking business with a view to restoring the solvency of the bank. Laws 1933, ch. 16.
2. ———. The approval of a plan of restricted operation under chapter 16, Laws 1933, does not restrict the right of the department to liquidate an insolvent bank. Laws 1935, ch. 16.
3. ———. The legislative intent was to provide for an administrative receivership for banks, rather than a judicial receivership. Laws 1933, ch. 18.
4. ———: INSOLVENCY: INJUNCTION. In a suit to enjoin the superintendent of banking from declaring a bank insolvent and taking possession for liquidation, the petition shall be dismissed by the court upon proof that the bank is insolvent and that its stockholders have failed to restore solvency as provided by law. Laws 1935, ch. 16, sec. 1.

APPEAL from the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Reversed and dismissed.*

F. C. Radke and *H. L. Holtzendorff*, for appellants.

H. G. Wellensiek and *E. J. Patterson, contra.*

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

DAY, J.

The Farmers State Bank of Clarks brought this suit against the banking department of the state to enjoin it from taking charge of the bank and liquidating it. The trial court issued the injunction.

This bank was closed under the moratorium of March, 1933, reopened thereafter on March 15, 1933, under the provisions of chapter 16, Laws 1933 (H. R. 167), with a contract with its depositors and with the department. This suit was filed on September 27, 1934. The trial was on December 10, 1934, after which the cause was taken under ad-

visement by the court. The attorneys filed briefs, and the decree was entered May 17, 1935.

A substantial part of the decree of the trial court entered May 17, 1935, is set out for the reason that it contains the finding of facts as well as the conclusion of the trial judge:

"The court specially finds that on March 18, 1933, the plaintiff entered into a written contract with its depositors under House Roll 167, 1933 Session Laws of the state of Nebraska, which was approved by the secretary of the department of trade and commerce of the state of Nebraska, a copy of which is attached to plaintiff's amended petition; that thereafter the plaintiff was permitted to reopen and do a limited banking business; that it has strictly complied with all the provisions of said contract; that all deposits made since the date of said contract are held in trust for the depositors, and in no way jeopardized; that the depositors' committee and 163 depositors out of a total of 203 depositors have intervened herein, and joined in the prayer of plaintiff's petition; that no depositors have petitioned or expressed dissatisfaction with the conduct of the plaintiff bank; that due to the severe heat and drought of the past summer, crops were a total failure in the vicinity of Clarks; that notwithstanding said condition, the plaintiff bank and its depositors are willing and ready to carry on with a view of restoring the plaintiff bank to solvency; that the situation is not hopeless; that the defendants attempted to take possession of the plaintiff bank at the time this action was commenced, with a view of winding up its affairs through receivership; that it is for the best interest of all parties concerned to permit the plaintiff bank to continue to operate under said contract with its depositors as prayed for; that the restraining order issued at the commencement of the trial, and continued to date, should be made permanent; that the defendants, upon sufficient showing, may have such restraining order modified or dissolved."

The evidence supports every finding of fact of the trial judge. The plaintiff bank has not only complied strictly with the law but with its agreement with the banking de-

partment. The old depositors had been paid 60 per cent. from the collection of assets of the bank. The new deposits had been held as trust funds. There is no apparent reason why the department of banking should insist upon taking charge of this bank for the purpose of liquidation. The bank operating under the provisions of chapter 16, Laws 1933, has made a profit. It has paid the old depositors 60 per cent. of their deposits and furnished Clarks a limited banking service, the only banking service in the town. Everybody interested in the bank is satisfied. Only the department is dissatisfied, and the reason for this dissatisfaction is not to be found in the record.

However, chapter 16, Laws 1933, under which the bank was operating upon a limited basis had for its purpose the restoration of solvency of the bank and not the liquidation of the bank. For such operation the department may approve a contract between the unsecured depositors and unsecured creditors and the board of directors of the bank. Such a contract was approved in this case. The contract contained this provision: "It is specially agreed and understood by the contracting parties that the operation of the bank under this contract shall continue at the discretion of the secretary of the department of trade and commerce."

Even if this condition were not in the contract, the statute itself provides: "The approval of said contract by the secretary shall release him from the duty to report the facts to the attorney general, but this act shall not restrict the right of the secretary to request the attorney general to apply for the appointment of a receiver, when in his opinion it is for the best interests of the contracting parties." Laws 1933, ch. 16, sec. 1.

The plaintiff contends that the secretary of the department must exercise his discretion in a reasonable manner and is subject to judicial review. This argument is untenable.

The legislature intended to provide for an administrative receivership of banks independent of judicial control. Section 8-190, Comp. St. 1929, as amended by section 53, ch.

18, Laws 1933, as amended by section 1, ch. 16, Laws 1935, provided that, where the superintendent of banks had taken possession and the bank deems itself aggrieved, it may within ten days apply for an injunction, and the court on hearing may set aside the declaration of insolvency. This suit was brought under this section. In 1935 the legislature amended section 8-190, Comp. St. 1929, as amended by section 53, ch. 18, Laws 1933, so that it reads as follows: "Whenever any such bank of whose property and business the superintendent of banks has taken possession or whose insolvency has been declared as aforesaid, deems itself aggrieved thereby, it may, at any time not later than ten days after such declaration of insolvency has been filed with the clerk of the district court of the county in which such bank is located, petition the district court to enjoin further proceedings, and said court, after citing the superintendent of banks to show cause why further proceedings should not be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may, upon proof by the bank, its officers, or directors, that it is solvent, that the business of the bank has been and is being conducted as provided by law, that it is not endangering the interests of its depositors and other creditors, and that the superintendent of banks has acted arbitrarily and abused his discretion either by taking possession of the bank, or by finding and declaring said bank to be insolvent and ordering its liquidation set aside such declaration of insolvency and enjoin the superintendent of banks from proceeding further, and direct him to surrender such business and property to such bank; but on proof that said bank is insolvent and that its stockholders have failed to restore solvency as provided by law, or that said bank is being operated in violation of law, and that the superintendent of banks has acted within his powers, said petition shall be dismissed by the court."

The amendment made it manifest that the legislative intention was to establish an administrative receivership of banks, and that the only question for the court to determine was the insolvency of the bank and failure to restore to

solvency. If it is established that the bank is insolvent and its stockholders have failed to restore solvency, the superintendent has acted within his powers. Such is the fact established here, and the petition for an injunction should have been dismissed.

The decree was signed May 17, 1935, and the amendment went into effect August 26, 1935. The amendment was merely a clarification of the section and not in diametrical conflict with the previous provisions. In *City of Beatrice v. Gage County,* 130 Neb. 850, 266 N. W. 777, the following quotation from Cooley, Constitutional Limitations (6th ed.) 469, appears: "If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered."

The suit should have been dismissed.

REVERSED AND DISMISSED.

THOMAS W. MOFFITT V. GERTRUDE D. REED ET AL., APPELLEES: MARY E. REED, APPELLANT.

FILED NOVEMBER 12, 1936. No. 29890.

1. **Taxation: FORECLOSURE OF LIEN: REDEMPTION.** Redemption may be made from the sale of property at a tax foreclosure sale upon the payment to the purchaser of the amount of his bid, with 12 per cent. interest per annum to the time of such redemption, together with the amount of subsequent taxes paid by defendant, with interest thereon at the statutory rate of interest on such taxes.
2. ———: ———: ———: **RENTS.** A purchaser at a tax foreclosure sale from which there is a redemption is not entitled to the rents and profits from the land pending appeal, to the date of the redemption.

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

T. R. P. Stocker, for appellant.

C. A. Sorensen, Homer L. Kyle and *Walton B. Roberts,* Guardian *ad litem,* for appellees.

William Niklaus, for Gertrude D. Reed.

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

DAY, J.

This was originally an action for the foreclosure of a tax lien brought by Moffitt against both Gertrude D. Reed, the owner of the life estate, and the remaindermen who are appellees here. The appellant here, Mary E. Reed, a sister of Gertrude D. Reed, was the purchaser at the foreclosure sale. Upon the former appeal the judgment confirming the sale was affirmed, but leave to redeem within a given period was granted the remaindermen. Subsequent to the issuance of the mandate, this court made a supplemental order which allowed three of the remaindermen a certain time to redeem "the respective interests of all parties herein," including the interests of Victor Reed Rasmussen, a minor remainderman, and Gertrude D. Reed.

Gertrude D. Reed acquired the life estate, by purchase at execution sale, from the father of the remaindermen. As the owner of the life estate, she was charged with the duty of paying taxes against the land. The taxes were not paid, and, as a result of her default, the property was sold in a foreclosure of the tax lien, which had the effect of cutting off the interest of the remaindermen and terminating the life estate. The trial court entered judgment upon the mandate, permitting an assignee as trustee for the three adult remaindermen to redeem by paying into court the amount of the judgment, together with all interest and costs, and in addition an amount equal to 12 per cent. per annum as interest on the amount of the purchase price paid by Mary E. Reed.

Mary E. Reed, subsequent to her bid and pending an appeal from a confirmation of the sale, paid certain taxes on the land. It is her complaint here as appellant that the tender by the defendants for redemption was not sufficient to cover these taxes. However, it appears that, during the pendency of this case, a receiver had been appointed by the

district court to collect the rents and profits, and that the trial court entered an order finding that Mary E. Reed was entitled to be reimbursed for the amount she had paid in subsequent taxes, and ordered the amount paid to her out of the money paid into court by the receiver as rents and profits from the property.

It appears that the purchaser, Mary E. Reed, received back not only the purchase price and 12 per cent. interest per annum from date of sale until redemption, but in addition thereto the amount she voluntarily paid for subsequent taxes. She was never in possession of the premises and never was entitled to rents and profits when an interested party redeemed. Redemption may be made from the sale of property at a tax foreclosure sale upon the payment to the purchaser of the amount of his bid, with 12 per cent. interest per annum to the time of such redemption, together with the amount of subsequent taxes paid by defendant, with interest thereon at the statutory rate of interest on such taxes. *Butler v. Libe*, 81 Neb. 740, 116 N. W. 663; *Mummert v. Grant*, 118 Neb. 651, 225 N. W. 773; *Lincoln Savings & Loan Ass'n v. Anderson*, 115 Neb. 199, 212 N. W. 210. Mary E. Reed was paid this amount. A purchaser at a tax foreclosure sale from which there is a redemption is not entitled to the rents and profits from the land pending appeal, to the date of redemption. Therefore, appellant Mary E. Reed could not complain even if it were true that the payment of subsequent taxes was erroneously ordered paid from the rents and profits by the receiver. The remaindermen were not in possession of the land and were entitled to have the taxes paid from the rents and profits. It was the duty of the owner of the life estate to pay the taxes. There is no point to an extended analysis of the adroit but untenable argument of the appellant on this question.

The right of Homer Kyle to redeem for the remaindermen is questioned. The adult remaindermen assigned the right to redeem. It appears from the record that Homer Kyle redeemed for the three remaindermen as trustee for them and

borrowed the money for such redemption upon the security of the interest in the land. Under the circumstances of this case, the question as to the right of an assignee to redeem in his own right is not pertinent.

Gertrude D. Reed has filed a brief in this court as an appellant, objecting to the redemption. It is not demonstrated, however, what, if any, interest she may have in this litigation at this time. But it is remembered that she was the owner of the life estate and that her failure to pay the taxes precipitated this lawsuit. She has not asked nor been given leave to redeem. By the decree of the district court she has been awarded the balance collected by the receiver after paying the amount of subsequent taxes paid by Mary E. Reed. She has neglected for approximately twelve years to pay the taxes which she was required to pay on this land. There is no equity in her claim that she is now entitled to the possession of this property. The right of Gertrude D. Reed to appear in this court as an appellant is challenged by the remaindermen. Definitely, she has no interest in the property, and her contentions are without merit. We must assume that she has only a sisterly interest in the appeal of Mary E. Reed.

We have referred to the redemption by three remaindermen, omitting the names because of the length and awkwardness of expression. There is, however, a fourth remainderman, a minor, Victor Reed Rasmussen. The order of the district court permitted the three remaindermen to redeem against the interest of this minor. The guardian *ad litem* for the minor has appeared in this court. The trial court entered the judgment on the mandate strictly according to its terms. However, it now appears that the three remaindermen made a redemption through Homer Kyle, their trustee, by pledging as security their interest in the property, and that they did not advance any money themselves. In this view of the circumstances, it was unjust to cut off the interest of the minor remainderman, and the decree of the lower court is modified to the extent that Homer Kyle is held to be the trustee for the minor Victor

Reed Rasmussen as well as the other remaindermen, and that the interest of the minor Victor Reed Rasmussen is hereby charged with a proportionate share of the cost of redemption. The guardian *ad litem* is allowed a fee of $50 to be taxed as part of the costs.

As so modified, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

STATE LIFE INSURANCE COMPANY, APPELLEE, V. PAULINE E. HEFFNER ET AL., APPELLANTS: FIRST NATIONAL BANK OF NORTH PLATTE, APPELLEE.

FILED NOVEMBER 12, 1936. No. 29764.

1. **Judgment**: VACATING DURING TERM. The district court has the right and power to vacate, set aside, amend or correct any judgment or order made by it during the same term at which it was rendered if it appears that its former judgment was the result of fraud, accident or mistake.
2. **Mortgages**: FORECLOSURE: SALE: CONFIRMATION: VACATION. "A court of equity, when justice requires it and its powers are seasonably invoked, may vacate an order confirming a judicial sale and discharge the purchaser who has become such through fraud, accident or mistake." *Kampman v. Nicewaner*, 60 Neb. 208, 82 N. W. 623.
3. **Judgment**: VACATING. Where a judgment is rendered against a defendant in a district court having two judges, by one of the judges thereof, an application at the same term to vacate and set aside such judgment on the ground that the same was obtained by mistake may properly be heard by whichever judge of the court is presiding at the time the application is presented.
4. **Mortgages**: FORECLOSURE: SALE: CONFIRMATION. Inadequacy of price will not prevent a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud.
5. ———: ———: MORATORIUM. "When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay under section 20-21,159, Comp. St. Supp. 1935, must be denied." *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82.

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

Hoagland, Carr & Hoagland, for appellants.

Halligan, Beatty & Halligan and *Lowell C. Davis, contra.*

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MESSMORE, District Judge.

CARTER, J.

This is an appeal from an order of the district court for Lincoln county denying the application of the appellant Pauline E. Heffner to have a prior order vacating a previous foreclosure sale set aside and from an order overruling objections to confirmation.

The record discloses that on and prior to December, 1924, Pauline E. Heffner was the owner of section 1, township 10, north of range 30, west of the 6th P. M. in Lincoln county, and that she executed a note and mortgage to the Lincoln Trust Company for $16,000 at that time. This mortgage was subsequently assigned to the State Life Insurance Company, the appellee herein. On April 4, 1925, Pauline E. Heffner sold the east half of section 1 to her son Earl Heffner, subject to the mortgage. Earl Heffner subsequently executed a second mortgage on the east half of section 1 to the First National Bank of North Platte for $5,000. Default having been made in the payments due under the first mortgage, foreclosure proceedings were commenced, and, on April 25, 1934, a decree of foreclosure was entered by the district court for Lincoln county finding the amount due on the first mortgage to be $18,436.30, and the amount due on the second mortgage on the east half of section 1 to be $5,481.50. On February 27, 1935, the clerk of the district court issued an order of sale in which he erroneously described the land to be sold as "the east half of section one" instead of "all of section one," and the sale was thus erroneously advertised. On the day of the sale, R. H. Beatty, one of the attorneys for the plaintiff, acting under instructions from plaintiff, and without knowledge of the erroneous description of the real estate being sold, directed the sheriff to enter a bid on behalf of the plaintiff for all of section 1

for $19,000. The sheriff made his return to the order of sale showing that plaintiff bid $19,000 for the east half of section 1. On April 10, 1935, and during the March, 1935, term of court, without knowledge of the error in the description of the real estate, the sale was confirmed by Judge Nisley, one of the district judges of that judicial district. On May 6, 1935, and before the closing of the March, 1935, term of court, Judge Tewell, the other district judge of that judicial district, after having the mistake called to his attention, vacated the confirmation of sale, the sale of the real estate and the sheriff's deed, and directed that a new order of sale be issued. Thereupon a new order of sale was issued, all of section 1 was advertised for sale and, on June 12, 1935, sold to plaintiff for $19,538.54. On July 6, 1935, Pauline E. Heffner filed application to have the order of May 6, 1935, setting aside the first sale and confirmation thereof vacated, and on the same day filed objections to the confirmation of the second sale. On the same day the appellant Earl Heffner filed an application for a moratory stay. On October 10, 1935, after a hearing, Judge Nisley denied the application to vacate the order of May 6, 1935, overruled the objections to the confirmation of the sale, denied the application for a moratory stay and confirmed the second sale. From the entry of this order, the defendants have appealed.

Appellants contend that the district court was without power to vacate the decree of confirmation entered on April 10, 1935, even though it was done during the same term of court at which it was entered.

In *Douglas County v. Broadwell,* 96 Neb. 682, 148 N. W. 930, this court said: "A judge of the district court has the right and power to set aside and vacate any judgments or orders made by him during the term at which the vacating order is made. Such vacating order may be made upon the court's own motion, if satisfied that an error has been made."

In *Netusil v. Novak,* 120 Neb. 751, 235 N. W. 335, we

said: "In passing, we observe that the procedure followed by the trial court is in line with the modern prevailing tendency toward practicalism which seeks to shorten and to simplify judicial procedure. It is the well-established law of this state, as well as of others, that the trial court has the right and power to vacate, set aside, amend or correct any judgments or orders made by it during the same term. Such orders may be entered upon the court's own motion as well as upon the motion of counsel."

In *Dimmel v. State,* 128 Neb. 191, 258 N. W. 271, this court said: "The district court has jurisdiction to set aside its own judgment during the term at which it was rendered, if it believes that its former conclusion is erroneous."

It is apparent from the record that, because of an error of the clerk of the district court, only one-half of the mortgaged property was advertised and sold. It is also clear from the record that plaintiff without knowledge of the error made a bid on the whole of the mortgaged premises when, as a result of the mistake, only one-half thereof was sold. Under such circumstances, it is not only within the power of the district court to vacate a confirmation of such a sale during the term at which it was entered, but it becomes the duty of the court to do so. In a case involving a like question, this court said: "A court of equity, when justice requires it and its powers are seasonably invoked, may vacate an order confirming a judicial sale and discharge the purchaser who has become such through fraud, accident or mistake." *Kampman v. Nicewaner,* 60 Neb. 208, 82 N. W. 623. We therefore conclude that the action of the trial court in vacating the first sale at the same term of court in which it was confirmed was entirely proper under the circumstances.

Appellants contend, however, that the court is without authority to vacate a judgment or order at the same term without notice having been given, and cite the case of *Schroeder v. Bartlett,* 129 Neb. 645, 262 N. W. 447, in support thereof. In that case it is disclosed by the opinion that the court not only vacated a judgment without notice,

but it proceeded to grant affirmative relief to the other party without giving notice thereof. This, of course, could not be done and the decree of the lower court was modified to the extent of striking out the additional relief granted. But, in the case at bar, the trial court merely vacated the order of confirmation without notice and did not attempt to grant any further relief. This the court had the right to do upon its own motion and without being required to give notice.

The contention is advanced that Judge Tewell was without authority to vacate an order entered by Judge Nisley. It must be borne in mind that there is but one district court in Lincoln county, although there are two district judges. In *Perry v. Baker*, 61 Neb. 841, 86 N. W. 692, this court said: "There may be several judges of the district court in a district, but there is only one district court, and the law makes no distinction between the judges. If a judge makes an erroneous ruling and afterwards in the trial of the case, with more exhaustive investigation of the question, finds his first ruling is wrong, he should not be bound by it. The principle of *res adjudicata* does not apply. The first ruling does not become the law of the case so as to bind the court in the further proceedings therein. The court remains the same whether the *personnel* changes or not."

Also, in *Dolen v. Buchanan*, 43 Neb. 854, 62 N. W. 233, it was said: "Where a judgment is rendered against a defendant in a district court having two judges, by one of the judges thereof, an application at the same term to vacate and set aside such judgment on the ground that the same was obtained upon a forged waiver of service of summons and confession of judgment, may properly be heard by whichever judge of the court is presiding at the time the application is presented."

In *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256, the question was disposed of in the following language: "The first and second assignments may be considered together. It is insisted by the appellant that Judge Griffin had no

right to overrule a decision made by Judge Jacobs in the case. But the succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it, than to perpetuate an error which would have to be corrected by this court."

The contention that one district judge is without authority to vacate an order made by another district judge at the same term of court at which it was entered is without merit.

Appellants contend that the evidence was not sufficient to warrant a confirmation of the sale. There is evidence in the record that the land in question was worth $70 an acre. At the time of the sale there was more than $27,000 against it. It was sold for $19,538.54. There is no evidence that another sale would bring a higher price and defendants' witnesses admit on cross-examination that they know of no one who would give as much as $20,000 for the land. It is the well-established law of this state that mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud. *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82. We conclude that the trial court did not err in confirming the sale.

Appellants further contend that the trial court erred in refusing a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1935. We are convinced, after an examination of all the evidence, that the value of the property foreclosed does not amount to $27,000, the approximate total of the liens against it. We have held many times that, when it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay should be denied. *Howarth v. Becker, ante,* p. 233, 267 N. W. 444; *Srajhans v. Mares,*

supra. The trial court therefore properly denied a moratorium in the case at bar.

We have examined other points raised in appellants' brief and find them to be without merit. The judgment of the trial court is therefore

AFFIRMED.

FRED REITZ, APPELLEE, V. EARL R. PETERSEN ET AL., APPELLEES: FLORA KRUGER, ADMINISTRATRIX, ET AL., APPELLANTS.

FILED NOVEMBER 20, 1936. No. 29758.

1. **Witnesses: COMPETENCY.** No person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, is competent to testify to any transaction or conversation between said deceased person and the witness. Comp. St. 1929, sec. 20-1202.
2. **Mortgages.** Mortgages are considered as recorded from the time of their delivery to the register of deeds for that purpose. Comp. St. 1929, sec. 76-217.
3. ———: **PRIORITIES.** The mere fact that a mortgage is recorded first does not necessarily give it priority over one recorded later. As between themselves that may be changed by the intent and agreement of the parties.
4. **Evidence.** A fact, relation or state of things once shown to exist may be presumed to continue as long as such fact, relation or state would naturally continue; and especially where subsequent events, disclosed in evidence, are entirely in harmony and consistent with the continuance of such fact, relation or state.

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

Kelsey & Kelsey and *Jackson & Rice*, for appellants.

Moyer & Moyer, *R. J. Shurtleff* and *Hutton & Mueting*, *contra.*

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MUNDAY, District Judge.

GOSS, C. J.

This is a controversy over the priority of mortgage liens on a quarter section of land. One of the defendants appeals

because her mortgage was awarded second place instead of first.

This suit was begun January 27, 1934, against Petersen and wife, the mortgagors, and against Flora Kruger, as administratrix of the estate of Emma L. Mueller, who had died. Plaintiff alleged that his lien was first and that of Emma L. Mueller, represented by defendant Kruger, was second. Plaintiff alleges estoppel against the Mueller mortgage. He alleges that Earl R. Petersen, the mortgagor, owning the south 100 acres of the quarter section, and desiring to purchase the north 60 acres from a third party, approached Mrs. Mueller, informed her of his situation and that it would be necessary for him to borrow enough to pay her off and $6,000 additional; that she said she had no place or investment in mind to use it, that the quarter section would be ample security for the whole sum of $13,000, that she would be willing to release her $7,000 mortgage and allow Petersen to borrow from some one $6,000 on a first mortgage on the entire quarter section, and that she would accept a new mortgage of $7,000 to be expressly inferior and subsequent to the lien of a $6,000 loan to be obtained by Petersen. Whereupon Petersen, relying upon said agreement, made application to plaintiff for a loan of $6,000, representing to plaintiff that it would be secured by a first lien and that the $7,000 mortgage on the south 100 acres would be released by Mrs. Mueller; that when the transaction was consummated on March 1, 1930, the $7,000 new mortgage, drawn by the officers or employees of a bank, through inadvertence and mistake, did not expressly recite that it was inferior and subsequent to the $6,000 mortgage; that an officer or employee of said bank delivered the original $7,000 mortgage and a release thereof to Petersen with full knowledge that Petersen would exhibit said papers for the purpose of procuring a first mortgage loan from some person, and probably plaintiff, on the quarter section.

The administratrix sets up Mrs. Mueller's mortgage, traverses the allegations of the petition, alleges that on March 1, 1930, that mortgage purported to be a first mortgage, and

alleges that Petersen and wife are incompetent to deny that the Mueller mortgage is first. She further alleges that plaintiff or his agents acting for him discovered prior to March 5, 1930, that the Mueller mortgage was on record in the office of the register of deeds prior to plaintiff's mortgage and by some means unknown to this defendant they caused the record to be changed so as to allow plaintiff's mortgage to be filed first. Defendant Kruger further alleges that the taking of the note and mortgage by Mrs. Mueller on March 1, 1930, constituted merely an extension for the term of two years of the debt due her from Petersen; that this defendant is entitled in equity to a lien upon the south 100 acres by virtue of the original mortgage and is entitled to a lien upon the north 60 acres by virtue of the mortgage of March 1, 1930.

The answers of Petersen and wife to the petition and cross-petition are general denials. Plaintiff filed a reply to the answer of the administratrix. It is chiefly an amplification of the allegations of the petition as to the issues of priority.

Prior to March 1, 1930, defendant Earl R. Petersen owned the south 100 acres of the quarter section involved and Mrs. Emma L. Mueller, of whose estate defendant Kruger is administratrix, held a $7,000 mortgage lien on that 100 acres. This mortgage was dated February 26, 1918, and was due March 1, 1933. It was released March 1, 1930. The release was recorded March 6, 1930, at 11 a. m. On March 1, 1930, the north 60 acres of the quarter section was deeded to Petersen; that same day Petersen and wife made and delivered to Mrs. Mueller their mortgage on the entire quarter to secure loan of $7,000, and made and delivered to Reitz, plaintiff, their mortgage on the entire quarter section to secure a loan of $6,000. The $7,000 Mueller mortgage was actually filed for record in the office of the register of deeds of Madison county, Nebraska, on March 3, 1930, at 9 a. m., and the $6,000 Reitz mortgage was actually filed for record in the office of the register of deeds of Madison county, Nebraska, on March 6, 1930, at 9 a. m.

The note made by Petersen and wife to Mrs. Mueller for $7,000 on March 1, 1930, specifically states, and the statement is partly typewritten, as follows: "This note is secured by first mortgage on the SW¼ sec. 9, town 23, range 4, in Madison county, Nebraska." The $6,000 Petersen note to Reitz does not purport to be secured by a first mortgage on the land. That note contains the following: "This note is secured by mortgage on the SW¼ sec. 9, twp. 23, r. 4, west, in Madison county, Nebraska."

The Mueller mortgage was actually filed before plaintiff's mortgage. Neither mortgage contains any recital as to their priority. These facts of record, considered alone, would make the Mueller mortgage a first lien on the quarter section. We must look to the other evidence to find justification for the judgment of the trial court giving plaintiff's mortgage priority.

E. H. Shumacher, 39, had been connected with the First National Bank of Tilden for 16 years and had been its cashier for six or seven years. He had known Mrs. Mueller about 10 years. She had a checking account, was a stockholder, and had a safe deposit box in the bank where she kept her papers and occasionally advised with the witness as to her business affairs. Probably not over 30 days prior to March 1, 1930, Mrs. Mueller called the bank on the telephone and asked that the witness stop at her house, which he did when he went to dinner. We quote his exact language, when asked to give their conversation: "Mrs. Mueller said to me that Earl Petersen had called at her home and informed her he was buying sixty acres of land adjoining the one hundred acres that he already owned, the one hundred acres being covered by this $7,000 first mortgage, and that Mr. Petersen had asked her if she could furnish him with $6,000 additional funds as the purchase of this additional sixty acres involved about that amount; and that she had told Mr. Petersen that she didn't have the $6,000. Then Mr. Petersen asked her if she would accept the payment of the $7,000 mortgage and that she said she would rather not. Then Mr. Petersen asked her if she would take a second mortgage

subject to $6,000 on the entire one hundred and sixty acres, on the hundred acres that he already owned and the sixty acres that he was buying. Mrs. Mueller asked my advice concerning this transaction. I told her I would not consider doing that if I were her. Then she told me she had already informed Mr. Petersen she would make this kind of a deal with him. Of course, there was nothing further for me to advise her since she had already agreed to make the transaction. That was about all of the conversation."

The witness further testified that the $7,000 mortgage of Earl R. Petersen and his wife, Olive A. Petersen, to Emma L. Mueller, dated March 1, 1930, was drawn up in his bank and their signatures were witnessed by him and he took their acknowledgment as a notary public in the bank on that day; that on the same day he witnessed the signature of Emma L. Mueller to her release of the 1918 mortgage for $7,000 on the 100 acres, which also was drawn in the bank on the same day and acknowledged before him as a notary public; that the original, or 1918, note and mortgage of the Petersens to Mrs. Mueller were stamped as paid by the bank's perforating stamp on the same day; that after the Petersen $7,000 mortgage to Mrs. Mueller was executed it was sent by the First National Bank to the register of deeds for record.

The trial court held plaintiff's witnesses rather strictly to the rule that oral testimony could not be received from any witness having a direct legal interest as to any transactions or conversations with Mrs. Mueller. Comp. St. 1929, sec. 20-1202. As we try the case *de novo* here, we exclude all such testimony in instances where to consider it would violate that rule.

On March 1, 1930, after the Mueller mortgage was sent to the register of deeds with no instructions, Shumacher wrote a letter to the register about that instrument, but he was not permitted to go further in his testimony than to identify his signature. However, Rose K. Brogan, the register of deeds, who was called by defendant Kruger as a witness, testified that she had received in the 9 o'clock morning

mail on March 3, 1930, the Mueller mortgage and had filed it as of 9 a. m. that day. Then in the next mail of the same day she received a letter, which is in the record, from E. H. Shumacher, cashier of the First National Bank of Tilden, dated March 1, 1930, telling the register of deeds that "Today we sent you for record a mortgage of $7,000, Earl R. Petersen to Emma L. Mueller. You will also receive for record, probably from the Tilden National Bank, a mortgage from Mr. Petersen to another party covering the same land. Please record the $6,000 mortgage first as the mortgage we sent you is intended as a second mortgage." Not having then received the $6,000 mortgage, Mrs. Brogan testified she called the Tilden National Bank and asked them if it was true that the Mueller mortgage she had was to be a second mortgage and if they had a $6,000 mortgage which was to be a first mortgage. They said it was true, that the $6,000 mortgage was in the mail and if she would call Moyer & Moyer they perhaps would have it by that time. She then called Earl Moyer. As a result of the information she obtained through the Shumacher letter, of the information she obtained from the Tilden National Bank, and of the information she obtained from Moyer, she changed the filing date of the Mueller mortgage so as to show the Reitz mortgage to be first, when it was actually received for filing on March 6, 1930, and the Mueller mortgage to be second, also as of March 6, 1930. Of course, she was not authorized to make this change and it was ineffective, of itself, to fix the priority of the mortgages.

Section 76-217, Comp. St. 1929, requires such instruments to be considered recorded as of the time when delivered to the register of deeds for that purpose. *Judkins-Davies v. Skochdopole*, 122 Neb. 374, 240 N. W. 510, is authority for a rule that the mere fact that a mortgage was first received for record by the register of deeds under section 76-217, Comp. St. 1929, does not prevent a mortgage received for record later being awarded priority when shown by competent evidence to have been intended by all

parties in interest to be prior. Along with other evidence, oral evidence of intent of the parties was considered in deciding the priority.

In the case at bar the intent of Mrs. Mueller is shown a short time before the deal was closed to have been to take a second mortgage on the quarter section in place of her then existing mortgage on 100 acres. She must have known and realized that her decision to do this would take a few weeks for Petersen to act upon and to bring it to completion. When she consulted Shumacher as her banker and he advised against it, she was resolute and decisive about it. She announced to him that she had agreed with Petersen to do it and intended to make the change in her security. When the time came to close the transaction she was present and did her part. It was no fault of her's nor of Petersen that the contract was not so stated that, after she was dead, there would be no power to defeat the record made by them in their written instruments. That was the fault of inept conveyancing. This, however, was worth all it cost, which, according to the record, was evidently nothing. At least plaintiff testified that no charge was made him.

Intent is a fact. "A fact, relation or state of things once shown to exist may be presumed to continue until the contrary appears." *Lincoln Joint Stock Land Bank v. Bexten*, 125 Neb. 310, 250 N. W. 84. That, of course, is a general statement. When applied to a fact or oral agreement of parties, such as is involved here, it probably should be restricted to this—that such a fact or agreement is presumed to continue at least for the ordinary time it would take to carry it into effect. See 9 Ency. of Evidence, 906 *et seq.* The evidence of the agreement here produced through Shumacher, a competent witness, shows that Mrs. Mueller, by her own admission, had agreed with Petersen that she would subordinate her mortgage to a first mortgage to be secured by him elsewhere. She was a woman of character and was resolute in her adherence to her promise. When the time came to carry it out she cooperated with Petersen in doing so. As far as either of them knew, the agreement

had been fully performed. That it was not efficiently done was not their fault but an oversight of the agencies they employed. She delivered all papers executed or held by her and he did likewise. She took her new mortgage and held it to the date of her death in the belief that she had done exactly as she had promised and that Petersen had done the same. In such a case it may well be said that the fact, the relation of the parties, the state of things proved through Shumacher's evidence, continued to exist. That presumption has not been overcome by evidence. This bound her in her lifetime and binds her administratrix.

The conclusion we have reached makes it unnecessary to decide any other point raised by the parties. The judgment of the district court is

AFFIRMED.

JENNIE WHITEHORN, APPELLANT, V. ROYAL ARCANUM, APPELLEE.

FILED NOVEMBER 20, 1936. No. 29724.

1. Evidence: DECLARATIONS AGAINST INTEREST. In an action against a fraternal benefit association for the amount of a benefit certificate, where the issue is as to the good standing of the member at the time of his death, a statement made by the deceased prior to his death, tending to show his understanding of his standing in the association, is admissible in evidence in favor of the association.
2. Insurance: CONTRACT: SUSPENSION. The by-laws of a fraternal benefit association providing for the payment of assessments each month by a member and for suspension if the assessment is not paid as required are self-executing.
3. ———: ———: ———: REINSTATEMENT. "A suspended member of a fraternal benefit association can only be reinstated in strict conformity to the by-laws in force at the time, and has no rights under his certificate until so reinstated." *Fairbanks v. Sovereign Camp, W. O. W.*, 130 Neb. 654, 266 N. W. 60.
4. ———: ASSESSMENTS: PAYMENT: CUSTOM. If assessments are duly paid by the local council or lodge for a member of a fraternal benefit association as a loan, at his request, the fact that the member does not return such loan to the lodge or its

secretary, as agreed, will not establish a custom to extend time of payment on the part of the association.

5. ———: ———: ADVANCEMENT: PRESUMPTION. If the local council of a fraternal benefit association advances assessments for a member and afterwards is reimbursed by him, the presumption, in absence of evidence, is that it was at the request of the member and as a loan to him to enable him to comply with his contract.

6. ———: FORFEITURE: WAIVER. "Under such circumstances, the association cannot be held to have waived the right to declare a forfeiture when so provided in the contract, if payments are not forwarded to the association within the time specified therein." *Chandler v. Royal Highlanders*, 101 Neb. 223, 162 N. W. 642.

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

Fradenburg, Webb, Beber, Klutznick & Kelley, for appellant.

Olaf W. Osnes, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and MUNDAY, District Judge.

GOOD, J.

This is an action upon a fraternal benefit certificate, in which plaintiff is named as beneficiary. Defendant denied liability, alleging that plaintiff's husband, who had been a member of the defendant order, had been suspended and had ceased to be a member for several months prior to his death. At the conclusion of all the evidence, the trial court, on motion of defendant, directed a verdict for it. Plaintiff has appealed.

The Royal Arcanum is a fraternal benefit association, organized under the laws of Massachusetts, with its headquarters in Boston. The supreme governing body of the order is known as the supreme council. The constitution and laws promulgated by the supreme council provide for grand lodges or councils and for local councils. One of these local councils located at Omaha, Nebraska, is known as Union Pacific Council No. 1069. William B. Whitehorn, deceased husband of plaintiff, became a member of this

local council, and a benefit certificate was issued to him in which his wife, the plaintiff, was named as beneficiary. The face amount of the certificate was $3,000. The form of certificate issued to Whitehorn provided for monthly payments or assessments. There were also quarterly dues payable to the local council. For some years prior to his death the monthly assessment was $4.86. Whitehorn paid his assessments up to and including January, 1933, but failed to pay his February assessment. This was advanced and paid for him by the local council. He did not reimburse the local council for this advancement and did not pay the March assessment, nor did the local council advance it for him, and on March 31, 1933, Mr. Whitehorn was suspended from membership in the order and was never reinstated and never made application for reinstatement. The evidence shows that no assessments were levied against him after March, 1933, and that no payments were made therefor.

It appears that on the 17th day of August, 1933, Mr. Whitehorn left a check for $37.02, payable to the defendant, with some employee of the Elks Club in Omaha, and that the collector for the local council received this check and retained it until after Mr. Whitehorn's death. Plaintiff contends that there had been a custom to permit the payment of assessments at irregular intervals and after the time when they were actually due, and that Mr. Whitehorn did not know of the claimed suspension and relied on the custom of defendant in receiving payments long after they were due and at irregular periods, and that defendant, therefore, waived the right to insist upon strict enforcement of the rule for suspension.

It is conceded that the rules of the order provide for the payment of monthly assessments during the month for which they are made, and that if, at 10 o'clock p. m. on the last day of the month, the payment is not made, then the member is automatically suspended. It is also provided that after the member has been suspended he may be reinstated by making application therefor, paying all arrearages, dues and assessments, and, under certain conditions, is required

to pass a satisfactory medical examination. The by-laws provide that a local council may, if it so elects, pay the assessments of a member, or advance them for him, but such action is not required.

The evidence shows that the payments of assessments made by Mr. Whitehorn had been at irregular intervals, and that sometimes he would be two or three or four, and possibly more, months in arrears. The evidence also shows that the local council advanced his assessments; that the amount payable to the supreme body was remitted each and every month for him; that he was kept in good standing, and that he would reimburse the local council from time to time for the payments which it had advanced. It appears that the local council had a general fund, in addition to the assessments which were required for the insurance feature, and it was from this fund that advances were made for members. Inferentially, it appears that early in 1933 the local council was running low in its general fund; Whitehorn did not pay his February assessment, and the local council advanced it for him. He had not reimbursed the local council for the advancement so made. He failed to pay his March assessment, and the local council did not advance it for him. The record clearly shows, beyond question, that Whitehorn was suspended on the 31st day of March, 1933. It also appears that he was never thereafter reinstated and never made application for reinstatement. Under the rules and by-laws it would have been necessary for him to submit to a medical examination as a condition to reinstatement. Plaintiff contends that Mr. Whitehorn was not notified of his suspension. The evidence fails to show that he was notified at the time that he was suspended. There is no by-law or rule requiring notice. The by-laws provide that *ipso facto* suspension occurs if payment of assessment is not made before 10 o'clock p. m. on the last day of the month for which assessment is made. There is evidence, however, that at least as early as June, 1933, Mr. Whitehorn conversed with another member and an officer of the local council about his suspension, in which he stated,

in effect, that within a short time the rate of his assessment would be increased, and he indicated that he did not desire reinstatement.

It appears that in August, 1933, Whitehorn and his wife contemplated a visit to Chicago and that prior to leaving he drew his check for $37.02, which would have been sufficient to pay his assessment for the months of February to August, inclusive, and his local council dues. This check was left at the Elks Club in Omaha with one of the employees, who gave Mr. Whitehorn a receipt therefor. The employee of the Elks Club was not a member or officer of the Royal Arcanum, but the collector of the local council kept a desk and maintained desk room at the Elks Club, and, as stated, it was the custom of members to pay their assessments to some of the employees of the Club who deposited them, together with the member's receipt book, with the collector, who would receive the payments and receipt therefor in the member's book. These payments were, ordinarily, turned over to the collector on the same day that they were deposited with the employees of the Elks Club. In this instance the collector did not receipt in the book for the $37.02 payment, but wrote to the supreme council for information as to what should be done with the check under the circumstances, and in a few days received an answer, stating that Mr. Whitehorn had been suspended and that it would be necessary for him to make application for reinstatement and to submit to a medical examination before reinstatement would be made. The collector, in the meantime, retained this check. Mr. and Mrs. Whitehorn made their trip to Chicago, and he died there on the 31st of August, 1933. The check, of course, was not returned to Mr. Whitehorn but was returned to Mrs. Whitehorn some time after his death.

Plaintiff contends that the evidence of the member and official of the local council, as to his conversation in June with Mr. Whitehorn, was not admissible but was hearsay evidence. We think the contention is untenable.

In *Ogden v. Sovereign Camp, W. O. W.*, 78 Neb. 804, 111

N. W. 797, it was held: "In an action against such association for the amount of a beneficiary certificate, where the issue is as to the good standing of the assured at the time of his death, the statements of the deceased tending to show his understanding of his standing in the order are admissible in evidence in favor of the association."

Plaintiff apparently relies on *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198, 220 N. W. 255. A careful examination of the opinion in that case we think discloses clearly that it is not in point. In the instant case plaintiff is not the personal representative of the deceased; she is suing in her own right and not in her representative capacity. Mr. Whitehorn clearly knew that he had been suspended and was charged with knowledge that the by-laws of the order required him to make an application for reinstatement and to pass a medical examination. He failed to comply with the requirements for reinstatement. These requirements are clearly set out in the by-laws, and the law charges him with following them strictly, as only by compliance therewith could he be reinstated.

In *Van Dahl v. Sovereign Camp, W. O. W.*, 130 Neb. 181, 264 N. W. 454, it was held:

"The by-laws of a fraternal benefit association, providing for the payment of assessments made during the month on a certain day and for suspension, without notice, of members in default, are self-executing, and provide a reasonable and necessary penalty for the enforcement of payment of assessments to a fraternal insurance fund.

"A member of a fraternal benefit association, who has been suspended for nonpayment of assessments, can be reinstated only in strict conformity with the by-laws in force at the time of reinstatement, and has no rights under his certificate until an actual reinstatement has taken place." A like rule was announced in *Fairbanks v. Sovereign Camp, W. O. W.*, 130 Neb. 654, 266 N. W. 60.

Plaintiff seems to lay stress upon the proposition that the collector of local council No. 1069 retained the check of Mr. Whitehorn until after his death, and that this amounts

to a waiver. We think the rule is that mere retention alone of one's check, in the absence of any other facts and circumstances indicating its acceptance, does not effectuate payment.

In *National Life Ins. Co. v. Goble,* 51 Neb. 5, 70 N. W. 503, it was held: "In the absence of an express agreement or other circumstances avoiding the operation of the rule, the remittance of a bank draft is not a payment in fact until the draft has been received, presented, and honored." Mr. Whitehorn's check was never presented for payment and never paid.

Plaintiff also contends that, since the local council had previously advanced payment of assessments for Mr. Whitehorn, the custom must be continued. In *Chandler v. Royal Highlanders,* 101 Neb. 223, 162 N. W. 642, it was held:

"If such association adopts a custom of receiving payment of dues after the day named in the contract for such payments, and thereby leads the assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association thereby waives the right to forfeit the policy for delay of payment which is tendered in accordance with such custom.

"But if payments are duly made for the insured by the local lodge or its secretary as a loan to the insured, at his request, the fact that the insured does not return such loan to the lodge or its secretary as agreed by him will not establish a custom to extend time of payment on the part of the association.

"If the lodge or its secretary advances the payments when due for the insured, and afterwards receives payments thereof from him, the presumption, in the absence of evidence, is that it was at the request of the insured, and as a loan to him to enable him to comply with his contract.

"Under such circumstances, the association cannot be held to have waived the right to declare a forfeiture when so provided in the contract, if payments are not forwarded to the association within the time specified therein."

Applying the rules of law established by this court to the facts disclosed by the record in this case we are compelled to hold that Mr. Whitehorn was regularly suspended, was never reinstated, was not a member at the time of his death, and plaintiff had no right of action against the defendant.

The trial court properly directed a verdict for the defendant. Judgment

AFFIRMED.

ROBERT A. GOODALL, APPELLEE, V. W. T. STANOSHECK ET AL., APPELLEES: THOMAS I. DUTCH, INTERVENER, APPELLANT.

FILED NOVEMBER 20, 1936. No. 29752.

Specific Performance. A contract for the sale of securities which are not procurable upon the market and have no market value may be specifically enforced.

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

Beeler, Crosby & Baskins, for appellant.

Brome & Thomas, G. H. Seig, Hubka & Hubka, Rinaker & Delehant and *M. S. Hevelone, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and MUNDAY, District Judge.

DAY, J.

This is a suit for specific performance of an oral contract between Goodall and Stanosheck and the State Bank of Odell for the delivery of certificates for bonds of the Duchess Hotel Company. An injunction was also sought enjoining the defendants from transfering the certificates to any other person. Dutch intervened and claimed to be the owner of five of the certificates, subject to a lien of Stanosheck.

The bank owned five certificates for bonds of the face value of $5,000. The plaintiff alleges that he contracted with Stanosheck as cashier of the bank for the purchase of these certificates. This contract was never approved by the board of directors of the bank, and the trial court held that the plaintiff was not entitled to specific performance as to these certificates. There is no appeal from the judgment in this respect, so we need not concern ourselves further with that phase of the case.

The court decreed specific performance against Stanosheck for five certificates of the face value of $5,500. The intervener, Thomas I. Dutch, appeals from this part of the judgment. The intervener and his wife, Bess W. Dutch, were the owners of a hotel at Ogallala. They executed a trust deed and named Clarke, Lewis Investment Company as trustee. A suit to foreclose the trust deed was started upon 21 bonds of the total face value of $20,500, and the trustee became a depositary for the outstanding bonds and issued depositary certificates to the holders. While the foreclosure suit was pending, on August 30, 1934, the plaintiff negotiated with Stanosheck for the purchase of the certificates in question. At the time of the negotiation, Stanosheck did not own the certificates but was able to acquire them, and Goodall paid the agreed price of $2,750. Stanosheck acquired the certificates, but in this suit claims that he acquired them, not with Goodall's money, but with his wife's money over which he had control. This is a brief resumé of the transaction, omitting some of the details.

Dutch in his petition of intervention claimed the ownership of the certificates for the reason that he had caused the owners of the certificates to forward them to the bank with sight drafts for a specified amount to be delivered to him at an agreed price. He further claims that Stanosheck did not have any contract or agreement with the owners to purchase the same. He alleges in his petition that as early as the 15th of May, 1934 (and the evidence indicates that it was in April), he negotiated with Stanosheck to advance the money as a loan to purchase these certificates, and that

these certificates were purchased by Stanosheck for him pursuant to the agreement.

The only issue before this court in the present state of the record is the ownership of these certificates. Did Dutch or Stanosheck own them, or did Dutch have any rights in them superior to the right of Goodall or Stanosheck?

In the first place, it is necessary to determine if the intervener, Dutch, had acquired any rights to these certificates. According to the record, Dutch interviewed Stanosheck in the latter part of April, 1934, for the purpose of interesting Stanosheck in financing his hotel which was being foreclosed upon by the bondholders. It seems to have been the understanding after that interview that Dutch would call upon the bondholders and have *all* the certificates sent to the bank, and that Stanosheck would then see what amount it would take to purchase these certificates and finance the property. Dutch claims that, as a result of this conversation he wrote or called upon the owners of all the certificates in controversy, and that these five certificates of the face value of $5,500 were forwarded to the bank with sight drafts in payment thereof at the rate of 50 cents on the dollar, which would total $2,750. These were not all of the outstanding certificates and were the only ones which were sent in to the bank under this arrangement. Definitely, the evidence is that Stanosheck never agreed to advance any money until all of the certificates were collected so that he could know how much it would require to finance the hotel.

These certificates came to the bank with sight drafts as early as June, 1934, and they remained in the bank for collection without Dutch's making any payment or any arrangement for credit to pay these sight drafts prior to August 30, 1934, upon which date Stanosheck negotiated with Goodall. Goodall paid Stanosheck $2,750 for these certificates. Immediately thereafter Stanosheck took up these drafts and remitted to the owners of the certificates the amount thereof, using money from an account of his wife's over which he exercised control and from which he was

accustomed to make investments. Soon thereafter this controversy arose, and Stanosheck refused to deliver the certificates to Goodall, but tendered a return of the money which was refused.

About September 10 Dutch sent Stanosheck three certificates and one bond of the face value of $4,000, which he had procured as collateral. He also sent him a fire insurance policy on the hotel with a mortgage clause with loss payable, if any, to the bank. It is contended that this completes the transaction for a loan from Stanosheck to Dutch for the purchase of these certificates. However, the conclusion is inevitable that at the time Stanosheck acquired these certificates they were not acquired under any agreement to loan Dutch the money to pay for them. The money was remitted by the bank with letters signed by Stanosheck which contained statements of which the following is typical: "The original prospective purchaser of these bonds (or certificates) failed to raise the funds & meet the requirements, hence the delay in closing this transaction as we advised some time back—a Mr. Goodall of the same city has provided the funds & authorized remittance. Please confirm and forward the last two above mentioned certificates at your earliest convenience." This is significant inasmuch as Stanosheck indicates at least a mild disposition to support the claim of the intervener.

The record presents only a question of fact in the case and that not difficult of determination. The intervener, Dutch, did not make a definite arrangement for the purchase of these certificates, and they were not purchased by Stanosheck upon Dutch's credit; Stanosheck acquired them with his wife's funds, acting as her agent, and entered into a valid oral contract for the sale of the certificates to Goodall.

These certificates representing the bonds were not procurable on the open market and had no market value. They had a special value to the plaintiff as well as the intervener. A contract for the sale of securities which are not procurable upon the market and have no market value may be

specifically enforced. *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329; *Hirschman v. Casey*, 121 Neb. 471, 237 N. W. 584.

This was the finding of the trial court which is approved.

AFFIRMED.

ELLEN MARIE RASMUSSEN, APPELLANT, V. SOREN RASMUSSEN, APPELLEE.

FILED NOVEMBER 20, 1936. No. 29762.

Judgment: SUIT TO VACATE: VENUE. A proceeding to vacate and set aside a judgment for the reason that it is void must be brought in the court in which the judgment was rendered.

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

McGrath & McGrath, for appellant.

Hotz & Hotz, contra.

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

CARTER, J.

This is an action brought by plaintiff to vacate and set aside an adoption proceeding by which the defendant purported to adopt plaintiff's child. The trial court denied the relief asked for and dismissed the petition. From this order, plaintiff appeals.

It appears from the record that plaintiff is the daughter of Soren Rasmussen, the defendant. On November 14, 1930, she became the mother of an illegitimate child, Georgine Elizabeth Rasmussen. On January 13, 1931, a decree of adoption was entered by the county court of Douglas county by which the defendant became the adoptive parent of the child. It is the contention of the plaintiff that the adoption proceedings were void for the reason that the consent to adoption executed by the plaintiff was not acknowledged as required by statute; that no service of summons was had

upon the plaintiff as required by statute; that the signature of plaintiff to the consent to adoption was obtained by the defendant by fraud and duress; and that it is contrary to the best interests of the child for the decree of adoption to stand and remain in force.

The question to be first determined is whether the district court has jurisdiction in such an action. It is apparent that the cause of action is primarily to vacate the decree of adoption rendered in the county court of Douglas county, and that the prayer of the petition that the custody, care and control of the child be given to the plaintiff is but an incident thereto.

We have come to the conclusion that a judgment may be vacated and set aside only by the court which rendered it. 15 Standard Ency. of Procedure, 203. In *Smithson v. Smithson*, 37 Neb. 535, 56 N. W. 300, this court held that the district court for Douglas county was without jurisdiction to vacate a void decree entered by the district court for Fillmore county.

A noted text-writer states the rule as follows: "The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made." 1 Black, Judgments (2d ed.) sec. 297.

In *Trimble & Blackman v. Corey & Son*, 78 Neb. 639, 111 N. W. 376, this court said: "The proceeding is had under the provisions of sections 602 and 603 of the Code, where the district court is vested with power to vacate or modify its own judgments or orders after the term at which such judgment or order was made for fraud practiced by the successful party in obtaining the judgment or order. Manifestly the power of the district court to vacate or modify its own judgments or orders can only be exercised by the court in which the judgment or order was entered."

Also, in *State v. Westover*, 107 Neb. 593, 186 N. W. 998, this court said: "An action to set aside a judgment must be

brought in the court which rendered the judgment, otherwise the records of one court would be under the control of other courts of coordinate jurisdiction. A judgment is a matter of record, and can only be changed, set aside or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment. If this were not so, chaos would result. *Ryan v. Donley,* 69 Neb. 623, 630; *Trimble & Blackman v. Corey & Son,* 78 Neb. 639; *Carlson v. Ray,* 104 Neb. 18."

The contention is made that the county court of Douglas county has lost jurisdiction of the case for the reason that the term at which it was entered has long since been closed. We do not believe that this contention has merit where a judgment absolutely void is involved. Every court possesses inherent power to vacate a void judgment, either during the term at which it was rendered or after its expiration. *Foster v. Foster,* 111 Neb. 414, 196 N. W. 702. This rule applies not only where there is a want of jurisdiction over the parties, but also where jurisdiction of the subject-matter is lacking. *Kaufmann v. Drexel,* 56 Neb. 229, 76 N. W. 559.

While it is true that one court may enjoin the levy of an execution based on a void judgment of another court, or act to cancel the apparent lien of a void judgment on the property of a defendant, yet it must be borne in mind that this is not a direct attack upon the purported judgment itself. It in no sense assails the court in which the judgment is rendered but is simply a proceeding *in personam.* "Equity in granting such relief merely deprives the judgment-creditor of the benefit of the judgment and of any equitable advantage derived thereunder." 15 Standard Ency. of Procedure, 260.

Assuming, but not deciding, that the decree of adoption is void as alleged by the plaintiff, we must necessarily come to the conclusion that the district court was without jurisdiction and that the trial court properly dismissed the action.

AFFIRMED.

VERA HOLLIBAUGH, APPELLANT, V. SCHOOL DISTRICT NO. 89, DAWES COUNTY, APPELLEE.

FILED NOVEMBER 20, 1936. No. 29760.

1. **Schools and School Districts: TRANSPORTATION OF PUPILS: "FAMILY."** The evident intent of the legislature in providing for the transportation of children under section 79-1902, Comp. St. 1929, as amended by section 79-1902, Comp. St. Supp. 1931, of the compulsory education act, was to construe the definition of the word "family" in its broadest sense, and had in mind all persons living under one roof and under one general head as a family, and did not contemplate a restriction of the meaning of such word.
2. ———: ———: ———. For the purpose of interpreting said section, the word "family" is meant a collective body of persons who live in one house under one head and manager, and includes all the individuals who live under the authority of another in the household.

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

Fisher & Fisher, for appellant.

Porter & Skaggs, contra.

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

MESSMORE, District Judge.

This is an appeal from the district court for Dawes county, wherein said court found for appellee, and that appellant and her son do not constitute a family under the circumstances of the case, denying appellant's right to recover mileage for the transportation of her son to a public school.

The evidence discloses that appellant, the widow of a deceased son of one C. G. Hollibaugh, Sr., and her son lived in the same house with the said C. G. Hollibaugh under an arrangement, as testified to by appellant, that she would receive board for herself and children, if she would keep house for her father-in-law. She testified further to furnishing other necessities of life for herself and children

besides the food and lodging she received from her said father-in-law, and that she performed general housekeeping duties, such as the cooking, taking charge of the rooms and doing the washing for those who were under the same roof with her and her children.

This state of facts calls for an interpretation of that part of section 79-1902, Comp. St. 1929, as amended by section 79-1902, Comp. St. Supp. 1931, all of said section appearing under the heading "Compulsory Education." The provision follows: "Provided, that when no other means of transportation is provided and when the child or youth lives more than three miles from the public schoolhouse which he or she is authorized to attend by the nearest practicable traveled road where no free transportation is furnished such child or youth, a transportation rate of five cents per family for each day of actual attendance for each one-half of a mile or fraction thereof covering the distance of the residence from the schoolhouse in excess of the three-mile limit shall be paid such family monthly by such district on the basis of the record of attendance of such child or youth to be reported monthly by the teacher to the school board of such public school district; and no pupil shall be exempt from school attendance on account of distance from the public schoolhouse."

The briefs of both appellant and appellee give some very fine definitions of a family. While we are interested in what constitutes a family for the purpose of interpreting this section of the statute, the primary consideration to be given this case is the intent of the legislature relative to the section quoted. It was the evident intent of the legislature to provide transportation under the compulsory education law for children of families at a certain rate where other means of transportation were not furnished. This would not mean that the legislature intended to draw fine distinctions as between the relationships of persons living under one roof, but to provide the manner and payment of transportation going from one household to a public school.

Appellant lived in the home of her father-in-law and car-

ried on the duties primarily of a housekeeper, as shown by the evidence, and while she may have had the management and control of her two children, as most any mother in similar circumstances would have, she was subservient to an arrangement made by her father-in-law conditioned on her performance of certain duties imposed on her for the benefit of all those who lived under the same roof.

The lower court decided that she was a member of the family of her father-in-law for the purposes of this statutory provision. The word "family" requires no technical definition under the provisions of the statute. All the individuals who live under the authority of another, including the servants, constitute a family. A family is a collective body of persons who live in one house under one head or manager. In its broadest sense such definition would naturally apply to a statute where the taxpayers of the school district are paying for the transportation of minor children under certain conditions to afford them the opportunity to acquire an education.

There is no denial that C. G. Hollibaugh, Sr., actually carried on the business necessary for those who lived under the same roof with him. The finding of the lower court that appellant was a member of her father-in-law's family was made in its ruling on the motion for a new trial. The other parties involved in the original action are not before this court; we have just the appeal of appellant for consideration.

The legislature, in providing for the transportation of children under the compulsory education act, where other transportation is not provided, at a certain rate for the children of a family living more than three miles distant from the schoolhouse, had in mind all those persons living under one roof and one general head, and did not contemplate a restriction of the meaning of the word "family," but meant a definition of such word in its broadest sense.

The judgment of the lower court is

AFFIRMED.

FIRST STATE BANK OF GOTHENBURG, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

FILED NOVEMBER 20, 1936. No. 29763.

1. Mortgages: FORECLOSURE: GROWING CROPS. "Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty." *Aldrich v. Bank of Ohiowa*, 64 Neb. 276, 89 N. W. 772.
2. ———: ———: ———. "The owner of the land sold at judicial sale is entitled, not to the use of the land, but to a temporary reentry for the sole purpose of harvesting his crop." *Jensen v. Gurley Grain Co.*, 128 Neb. 266, 258 N. W. 549.

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

Quintard Joyner and *Cook & Cook*, for appellant.

D. E. Harper and *R. E. Bannister, contra.*

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

This is an appeal from the district court for Dawson county in an action wherein that court ruled in favor of appellee in that it was entitled to the annual crop growing on the real estate at the time of the foreclosure of the mortgage as against appellant as mortgagee and purchaser of the real estate at foreclosure sale.

Appellant makes clear that the decision of the lower court is supported by the rule announced by this court in *Jensen v. Gurley Grain Co.*, 128 Neb. 266, 258 N. W. 549, but contends that such rule follows a line of cases starting with the Ohio case of *Cassilly v. Rhodes*, 12 Ohio, 88, and followed in *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, *Monday v. O'Neil*, 44 Neb. 724, 63 N. W. 32, and *Aldrich v. Bank of Ohiowa*, 64 Neb. 276, 89 N. W. 772.

One of the contentions of appellant is that in both Ohio and Nebraska the so-called appraisement law, which provides that property should not be sold at a judicial sale for

less than a certain percentage of its appraised value, constitutes the reason for the courts' decisions, and that the appraisal law is no longer on the statute books of Nebraska, and that, in so far as that statute was responsible for the holding in the earlier cases, it is now definitely and forever eliminated, criticizing this court for holding that growing crops are personalty for the purpose of a judicial sale.

The evidence shows the wheat was planted some time subsequent to October 9, 1934. Appellee and its tenant were defendants in the foreclosure suit. The eleven months' stay of sale would expire November 4, 1934, when appellant would be entitled to have an order of sale issued and the premises sold. The wheat would mature about June or July, 1935, nine or ten months after it was sown and eight or nine months after the stay of sale had expired. Under this set of facts appellant contends, in relating the time, that the tenant was entitled to his share of the wheat, but that appellee, the owner of the premises at the time the tenant sowed the wheat, would not be entitled to its share and that such landlord's share would go to the purchaser at foreclosure sale.

We believe that the rule as laid down in *Jensen v. Gurley Grain Co., supra,* does not discuss nor did such decision refer to the appraisement law long since done away with. What this court actually held in the last-cited case was that a mortgagor is not entitled to continue in possession of land after foreclosure sale because of growing crops thereon, but may reenter temporarily for the sole purpose of harvesting the crops. There is no inconsistency in this statement of the court. Such decision does not state that the purchaser is deprived of the use of the land under any circumstances, but does state specifically that the owner of the land at the time the crop was planted and after a foreclosure sale may reenter the land temporarily for the purpose of removing that crop, which is plain and explicit.

This brings us to the rule announced in *Jensen v. Gurley Grain Co., supra,* which followed the rule laid down in *Aldrich v. Bank of Ohiowa, supra,* to the effect that annual

crops growing on the land do not pass to the purchaser at foreclosure sale, and for the purpose of saving the debtor's rights thereto are regarded as personalty.

The argument of appellant and the criticism of the holdings of the Ohio court and this court on the question at issue are not sufficient, in our mind, to cause this court to change the rule, which has worked well. The lands of the state have been in use even through stays, moratoriums and the delays of lawsuits. It has lent increased income to the citizens of the state and is just and fair.

Appellant knew at the time the mortgage was made that the rule laid down in *Jensen v. Gurley Grain Co., supra,* was the law of the state. Thousands of mortgages have been taken with this knowledge. No apparent hardship has been worked as against those loaning money with a thorough understanding of the rule. No particular benefits greater than those as announced by the rule could accrue to the citizens of this state by a change therein. The argument of appellant was splendid and well put, but we are convinced that the equities of the rule as announced in the last-cited case are superior to and outweigh those that might be presented against it.

The judgment of the lower court is

AFFIRMED.

DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA AS RECEIVER AND LIQUIDATING AGENT OF THE CITIZENS STATE BANK OF CEDAR RAPIDS, APPELLANT, V. F. G. WALKER ET AL., APPELLEES.

FILED NOVEMBER 27, 1936. No. 29926.

1. **Pleading**: DEMURRER. A demurrer to a pleading admits all facts well pleaded.
2. **Petition** analyzed and *held* to state a cause of action.

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

Seymour S. Sidner, Clarence G. Miles and *F. C. Radke,* for appellant.

Wagner, Wagner & Albert and *R. D. Flory, contra.*

Heard before GOSS, C. J., EBERLY, DAY and CARTER, JJ., and MESSMORE, District Judge.

GOSS, C. J.

The district court sustained a demurrer to the petition of plaintiff and dismissed the cause, whereupon plaintiff appealed.

The department of banking brought the suit as receiver and liquidating agent of the Citizens State Bank of Cedar Rapids, Nebraska, and alleged that on October 26, 1934, the department declared the bank insolvent and proceeded to liquidate it for the benefit of the depositor-creditors of the bank; that on October 18, 1928, defendants, together with six other stockholders of the bank, held a special meeting of the stockholders for the purpose of quieting rumors about the bank, of inspiring public confidence and of persuading the then depositors to continue to deal with the bank, signed a notice (set out in full) guaranteeing to each and every depositor the full amount of each and every deposit then in the bank or thereafter made, the guaranty binding upon the heirs, executors and administrators of each of the signers; that this statement was posted in the bank lobby, and was published many times in the local paper, from shortly after October 18, 1928, until after January 1, 1931; that said statement was known to and relied upon by all depositors and others dealing with the bank down to October 28, 1931, when the operation of the bank was suspended and possession of its assets taken over by the department; that on the evening of that date a special meeting of the bank stockholders was held at which all defendants and others were present (representing 227 of the 250 shares of the capital stock) and unanimously adopted the following motion: "Moved that we liquidate the bank under our own management, asking permission of the depositors and the department of trade and commerce for

three years' time to pay the deposits in full, but paying sooner if possible; that a committee of five be appointed to assist and an agent be appointed to effect the liquidation." That the defendants, for the purpose of having the assets turned over to them for liquidation as provided for by statute, in consideration of protecting themselves against the liability under the guaranty agreement of October 18, 1928, in consideration of keeping control of the bank assets and for the further consideration of protecting themselves on their constitutional stockholders' liability, on November 10, 1931, executed and delivered to the department of trade and commerce and to the bank an agreement as follows:

"Whereas, the capital stock and surplus of the Citizens State Bank, Cedar Rapids, Nebraska, is the sum of $27,-261.23:

"Whereas, until about two years ago the deposits of said bank amounted to approximately $275,000 and since that time, due to poor business conditions and a consistent withdrawal, the net deposits in said bank are now only about $93,000:

"Whereas, said bank, although now in a solvent condition, can no longer be operated at a profit, and due to conditions may not be able to convert its assets into cash as rapidly as may be required to meet the demands of its creditors and depositors in the usual course of business:

"Whereas, it is the express intention of the stockholders, directors, and officers of said bank to pay each and every depositor and creditor in full and to that end to convert all of its assets into cash and distribute the same ratably and equitably among said depositors and creditors; and

"Whereas, the undersigned depositors and creditors desire to have said Citizens State Bank of Cedar Rapids, Nebraska, liquidated by its officers and directors in the usual course of business and desire to avoid any possibility of a receivership.

"Now therefore it is agreed by and between the Citizens State Bank of Cedar Rapids, Nebraska, hereinafter called the bank, and the stockholders, directors, and officers of

said bank, hereinafter called the stockholders, and all of the undersigned depositors and creditors of said bank, hereinafter called the depositors,

"Witnesseth that for an— in consideration of the premises and for and in consideration of the waiver of certain deposits of the stockholders, and for and in consideration of the guaranty of payment in full to all depositors by the stockholders, and for and in consideration of the agreement of the bank to liquidate its assets in the usual course of business without delivering possession of its property and assets to the department of trade and commerce, for and in consideration of the mutual waiver by depositors of their right to demand immediate payment of their money on deposit,

"1. The bank agrees that it will diligently proceed to collect and convert all of its assets into cash and do any and all things necessary to cause an orderly liquidation of the same.

"2. The bank agrees to keep a full, complete and itemized record of each and every transaction of the bank, showing the manner of collection, sale, or liquidation of the same, and at least, twice each year to make a summarized statement of all of its acts and doings and keep the same on file for the inspection of the depositors.

"3. The bank agrees that it will not accept any new deposits.

"4. The bank further agrees to pay the depositors and unsecured creditors at least twenty per cent. of the amount of their claims on or before the 5th day of January, 1932, and to pay the balance thereof in full, without interest, as follows: Fifteen per cent. on or before the 1st day of September, 1932; twenty per cent. on or before the 1st day of March, 1933; fifteen per cent. on or before the 1st day of September, 1933; fifteen per cent. on or before the 1st day of March, 1934; fifteen per cent. on or before the 1st day of December, 1934.

"1. The depositors agree to waive any and all rights that they may have to demand payment of any and all sums due

to them except at the time or times fixed, or to be fixed, in accordance with this agreement and to that end said depositors waive the right to draw checks, sight drafts, and other instruments or orders of exchange against said bank.
"2. The depositors agree and do hereby waive any rights that they may now have or that may accrue to them in the future to request the appointment of a lawful receiver of the bank.
"3. The depositors further agree and do hereby waive any rights they may have to institute legal proceedings necessary for the collection of stockholders' double liability until all remedies under this agreement have been exhausted.
"1. The stockholders agree that they will diligently endeavor to effect a speedy and orderly liquidation of the assets of the bank and will do all things necessary to insure the successful performance of the agreement on the part of the bank to be performed.
"2. The stockholders further agree and by these presents do, jointly and severally, guarantee the full and complete performance of all of the terms of this agreement on the part of the bank to be performed and do especially guarantee a full and complete payment and satisfaction of any and all claims of the depositors at the time or times fixed, or to be fixed, and in the manner prescribed and set forth herein and for that purpose and to that end the said stockholders and each of them do hereby bind their separate estate for the payment thereof, and do further bind their heirs, executors, administrators and assigns.
"3. The stockholders hereby agree to waive payment of deposits in the sum set opposite their names until after all other depositors are paid in full.
"Deposit waived as stockholders as follows:

"This contract and agreement is made in many copies, all of which shall be considered to be original copies and it is especially agreed by all of the parties hereto that the execution of one copy by any of the parties shall be as binding as though said party had executed and delivered all of the copies.

"In witness whereof, we have hereunto set our hands this 10 day of Nov. 1931.

"(Signed by:) F. G. Walker
C. F. Orshek
Peter J. Korth
Henry Vanderloop
H. M. Ripp
H. H. Schueth
H. T. Jackson
E. G. Snyder
J. A. Kleve
J. W. Cox
J. N. Bowers
C. I. Casper
F. P. Wright"

The petition further alleges that on November 10, 1931, the bank was insolvent under the terms of the statute and that the written agreement was not for the purpose of reopening the bank or reestablishing its financial status so that it could do business with the public as a going commercial bank or for any other purpose whatsoever except for the purpose of liquidating the bank in the method provided by statute and in the agreement, under defendants' own management and control in the furtherance of their own objects and purposes as above set forth; that 235 of the depositors as of October 28, 1931 (which did not include any of defendants), owning 79 per cent. of all depositors' claims, signed the contract; that those depositors who did not sign the agreement relied on the agreement and the statute and waived their right to insist upon immediate payment of their deposits and to request a receiver for the bank; that defendant assumed complete control of the bank and of its assets, proceeded to liquidate them, and partially, at least, to perform the agreement; that all of defendants were directors, owning 209 of a total of 250 shares of the capital stock, two were president and vice-president and another was the managing officer of the bank; that all of the directors except one signed the agreement, and defendants

were in full charge and control of the bank, of its policies and affairs, and although the bank never signed the contract yet it was delivered to and remained with the department, and was delivered to the bank in its bank offices, was recognized and adopted and partially performed by the bank and thereby became its contract; that notwithstanding other depositors were not required, under the statute or contract, to sign the agreement, defendants at all times after November 10, 1931, did consent to be bound by its terms unless the bank's performance of the agreement should be frustrated by nonsigning depositors or creditors, and defendants at all times regarded the agreement as in full force and effect and permitted the department of trade and commerce to so regard it until the bank was declared insolvent and was taken over by the department of banking for liquidation on October 26, 1934; that none of the nonsigning depositors interfered at any time and the only reason defendants were prevented from further operating under the agreement was because of their failure and misdoings; that the bank was permitted by defendants to breach the contract by failing to proceed diligently to collect and convert its assets, by accepting new depositors, by failing to pay depositors and creditors the percentage of their deposits and claims in the amounts and at the times set forth in the agreement, by permitting the bank to pay some of the creditors a larger percentage than was paid to others; that defendants Schueth, Walker, Orshek, Kleve, Vanderloop, Snyder and Wright received payment of their deposits as these stood on November 10, 1931, and defendant J. N. Bowers received $28.09 of his deposit, contrary to their agreement to waive payment of their deposits until all other depositors had been paid in full; that those violations of the agreement made it necessary for the department to step in and take charge of the bank; that on October 17, 1934, the deposits in the bank remaining due and unpaid were $52,638.50.

The petition further alleges that signers of the guaranty, C. I. Casper and H. M. Ripp, are dead, their estates have

been administered and closed and all claims against them have been barred.

The petition credits $9,108.73 admitted to have been collected by plaintiff from the assets of the bank and from J. W. Cox and E. G. Snyder on their double liability as stockholders; and plaintiff prays a joint and several judgment for $43,529.77, with interest at the rate of 6 per cent. per annum from October 17, 1934, against defendants.

To the petition defendants severally demurred as follows:

"I.

"The petition of the plaintiff does not allege facts sufficient to constitute a cause of action in favor of the plaintiff and against any one of the defendants.

"II.

"The petition discloses on its face that there is a misjoinder of parties defendant in that the legal representative of the estate of C. I. Casper, deceased, and H. M. Ripp, deceased, are not made parties defendant herein.

"III.

"The contract upon which said cause of action is predicated, and marked Exhibit 'A' in said petition, contravenes 8-140 Compiled Statutes of Nebraska 1929, and is against public policy, and void.

"IV.

"The contract Exhibit 'A' attached to said petition, upon which said cause of action is predicated, was not executed and delivered, and never became effective.

"V.

"The contract Exhibit 'A' attached to the petition, upon which said cause of action is predicated, violates the provisions of 8-1,102, Compiled Statutes 1929, and is null and void.

"VI.

"The contract Exhibit 'A' attached to the petition, upon which said cause of action is predicated, contravenes 8-189, Compiled Statutes 1929, and does not comply with said statute, and is null and void.

"VII.

"The petition discloses that the said contract was conditioned that the Citizens State Bank, of Cedar Rapids, Nebraska, assume the obligations the contract intended to impose and further discloses that the said bank did not execute the said contract.

"VIII.

"The petition on its face discloses that the contract Exhibit 'A' attached to said petition, was of no force or validity until all the depositors of the Citizens State Bank, of Cedar Rapids, Nebraska, joined in its execution, and further discloses that less than 80% of the depositors joined in its execution.

"IX.

"The alleged agreement set forth in paragraph 2 of said petition as the consideration for the contract Exhibit 'A' attached to the petition, contravenes 8-140 and 8-1,102, and is null and void, and furnishes no basis as a consideration for the contract upon which plaintiff predicates his cause of action."

The demurrer, which was held good by the trial court, is general in the first paragraph. The other eight paragraphs are special. The order sustaining the demurrer does not specify the ground or grounds on which it was sustained nor have we been favored by any opinion or reasons given by the trial court for the action taken.

The second point alleged a misjoinder of parties-defendant, in that the legal representatives of the estates of two of the signers of the contract were not made parties-defendant. The petition alleged that these estates had been probated and all claims had been barred. To have sued these estates would have been fruitless.

The third point of the demurrer is that the contract upon which the action is predicated contravenes section 8-140, Comp. St. 1929, and is contrary to public policy and void. This section prohibits a bank paying more than 4 per cent. interest on deposits (after April 1, 1926) and made it a crime for any officer of the bank to give, or de-

positor to receive, any further consideration as an inducement, in addition to the legal interest, for making or retaining any deposit in the bank. Such a composition or contract as was made here had no reference to or connection with the matters denounced by the section. There was no allegation or reference in the petition to any interest being paid on any deposit of the bank. The inducement to the depositors of the bank was not "in addition to the legal interest" as phrased by the statute. The purpose of the section is to prevent the payment of more than 4 per cent. interest on deposits in a state bank, and to make it unlawful for any officer of such a bank to induce the making or retaining of a deposit by any service or by any consideration of value. The result that was contemplated by the contract here was the very result that is contemplated by another section—by section 8-149, Comp. St. 1929. It was not contrary to any public policy of which we have knowledge.

The fourth point of the demurrer is that the contract was never executed nor delivered and never became effective. A demurrer admits all allegations well-pleaded. Among these allegations of the petition were that the contract was executed by defendants (and others) and delivered to the department and to the bank. That it became "effective" as a practical matter is shown by the fact that these defendants are alleged to have taken over the bank and to have proceeded to make the contract operative. From November 10, 1931, to October 26, 1934, these defendants exercised dominion over the bank, its assets and deposits, without interference from the department, from any depositor or from any creditor. Nearly all the stockholders, directors, officers and depositors signed the contract. They and the rest of each group acquiesced in and assented to the terms of the contract for nearly three years and only after the department took over the bank, because of the violation of the terms of the contract, were they heard to object.

The fifth point of the demurrer is that the contract violated the provisions of section 8-1,102, Comp. St. 1929.

That section relates to priority of deposits "not otherwise secured." We perceive no applicability to the situation here. While referred to in the brief of defendants, it seems not to be argued.

The sixth point of the demurrer is that the contract contravenes section 8-189, Comp. St. 1929, and does not comply with that statute. That section provides that, when the officers, stockholders or owners of any insolvent bank shall give a bond of a surety company authorized to transact such business, the bond approved by the department of trade and commerce, conditioned upon the full settlement of all the liabilities of such bank by such officers, stockholders or owners within a stated time, then the department shall turn over all the assets of such bank to the officers, stockholders or owners for liquidation, reserving the right, if the bank is not being liquidated in a manner satisfactory to the department, to take immediate possession of the bank for the appointment of a receiver. We do not see how the procedure here "contravened" that section of the statute. The contract did not pretend that any surety bond had been given. No one was deceived or injured by reason of the method pursued by agreement of the parties, well understood by both of them involved here and by all of the contracting parties. They undertook to do the same things and accomplish the same results that are authorized by the section. But in lieu of a surety bond, as therein provided, defendants and their associates offered their joint and several liability and the department accepted it. Thus they made a contract different from that provided for by statute but, so far as we have discovered, not prohibited by any statute. Whether it was a matter of good judgment for defendants to make such a contract or of good practice for the department to accept such a means of indemnity to assure the proper liquidation of a bank are questions quite aside of the legality of such a contract and whether, after it has been deliberately entered into and followed for years, one of the parties shall be permitted to avoid its terms. We are of the opinion that the contract, not being prohibited

by statute, is in the circumstances binding on all parties to it.

The seventh point of the demurrer is that the petition discloses that the contract was conditioned that the bank assume the obligations the contract intended to impose and the petition discloses that the bank did not execute the contract. The petition alleges that all of defendants and signers of the contract were directors of the bank, owning 209 out of 250 total shares, that two of defendants and signers were respectively president and vice-president of the bank and another was its managing officer; that all of the directors of the bank except one signed the contract, that defendants were in full charge and control of the bank, of its affairs and of its policies, "and although the said bank never signed the contract, yet the said contract, which was signed by the said defendants and by 235 of the depositors of said bank, was delivered to and remained with the said department and said bank in its bank offices and was recognized and adopted by said bank and partially performed by said bank and thereby became its contract." We think the facts pleaded and thus admitted by demurrer show that the bank adopted the contract, pursued it for nearly three years and could not be permitted to say now, nor can others take advantage of this point now, that the contract was not binding on the bank.

The eighth point of the demurrer is that the contract was of no validity because all of the depositors did not join in its execution. The answer to that is similar to the argument heretofore made in respect to the failure of other groups to execute the contract 100 per cent. Nearly 80 per cent. of the depositors signed and the rest are alleged to have accepted, adopted and followed the contract.

The ninth and last point of the demurrer is that the contract contravenes sections 8-140 and 8-1,102, Comp. St. 1929. This consolidates points raised in paragraphs three and five of the demurrer and is therefore repetition. It has already been considered here.

This leaves the first point of the demurrer, which is a

general demurrer to the effect that the petition does not state a cause of action. Out of the abundance of caution defendants fully covered all phases of this by their other special points of the demurrer. These have already been treated fully in this opinion.

On full and careful consideration of the whole case, we are of the opinion the petition stated a cause of action against defendants. The judgment of the district court is reversed, with directions to proceed in harmony with this opinion.

REVERSED.

DAY, J., dissenting.

The department of banking of the state of Nebraska as receiver and liquidating agent of the Citizens State Bank of Cedar Rapids brought this action against the defendants, who were some of the officers of said bank, upon a contract for the liquidation of the bank. The purpose of the contract was that the officers of the bank might liquidate, rather than the department of banking. A demurrer to the petition was sustained by the trial judge. The sole question for the determination of this court is whether said ruling was erroneous. The contract is set out in the opinion.

The briefs argued and the opinion states that most of the stockholders and most of the depositors executed the contract according to its terms, but it is apparent from the petition that the contract was not executed by all the stockholders, and that under the terms of the contract it could not be effective with stockholders owning 41 shares of stock not parties to the agreement and with only 79 per cent. of the depositors agreeing to the contract. It is evident that the bank could not be liquidated by the officers if any one of the 21 per cent. of depositors objected.

The fact that 79 per cent. of the depositors and a majority of the stockholders agreed to this has no significance because this bank was to be liquidated under a contract and not under the provisions of section 8-149, Comp. St. 1929. There was no attempt on the part of the banking depart-

ment, the stockholders, or the depositors to liquidate the bank under the provisions of the above statute. In such a case it is not sufficient that "nearly all the stockholders, directors, officers and depositors signed the contract." In the absence of execution, a binding contract cannot result.

It appears that the judgment of the trial court in sustaining the demurrer was proper.

UPDIKE INVESTMENT COMPANY, APPELLEE, V. EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., APPELLANT: EUNICE ROTH, APPELLEE.

FILED NOVEMBER 27, 1936. No. 29755.

1. Insurance: POLICY: CONSTRUCTION. Where the language employed in a policy of insurance is susceptible of more than one construction, that most favorable to the insured will be adopted.
2. ———: ———: ———. Where the insuring clause of an insurance policy clearly covers a risk, and a subsequent limiting clause does not exclude it, such risk will be deemed covered by the policy.
3. ———: ———: ———: "ACCIDENT." The term "accident," as used in a Standard Workmen's Compensation and Employers' Liability Policy, unless defined or limited by the terms of the policy, means "an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured." *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213, 147 N. W. 465.
4. ———: NOTICE OF ACCIDENT. A provision in a Standard Workmen's Compensation and Employers' Liability Policy that the employer, upon the occurrence of an accident, shall give immediate written notice thereof to the insurer does not require notice to be given until such facts have developed as would suggest to a person of ordinary and reasonable prudence that liability may arise, and the requirement of notice is met by giving notice within a reasonable time after the injury presents an aspect of a possible claim for damages.

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

Kennedy, Holland, De Lacy & Svoboda, for appellant.

Walter H. Justin, Brogan, Ellick & Shoemaker and *James J. Fitzgerald, Jr., contra.*

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MUNDAY, District Judge.

GOOD, J.

This action is brought under the provisions of the uniform declaratory judgments act for construction of a policy of insurance, issued by defendant Employers Liability Assurance Corporation, Ltd., hereinafter called the corporation. The trial court rendered judgment for plaintiff and defendant Roth. The corporate defendant has appealed.

This is the second appearance of this cause in this court. Plaintiff had judgment, which was reversed on appeal to this court, because of the lack of necessary parties. The opinion on the former appeal is reported in 128 Neb. 295, 258 N. W. 470.

January 31, 1927, the corporation issued to plaintiff a policy of insurance which was denominated on its face as "Standard Workmen's Compensation and Employers' Liability Policy." The following provisions appear in the policy: The corporation "does hereby agree with this employer * * * as respects personal injuries sustained by employees * * *

"One. (a) To pay promptly to any person entitled thereto, under the workmen's compensation law and in the manner therein provided, the entire amount of any sum due, and all instalments thereof as they become due, * * *

"One. (b) To indemnify this employer against loss by reason of the liability imposed upon him by law for *damages* on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained."

"Three. To defend, in the name and on behalf of this employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding *damages or compensation* therefor, although such suits, other proceedings, allegations or de-

mands are wholly groundless, false or fraudulent. (Italics supplied.)

"Four. To pay all costs taxed against this employer in any legal proceeding defended by the corporation, all interest accruing after entry of judgment and all expenses incurred by the corporation for investigation, negotiation or defense. * * *

"Seven. This agreement shall apply only to such injuries so sustained by reason of accidents occurring during the policy period limited and defined as such in item 2 of said declarations. * * *

"This Agreement is subject to the following conditions:

"F. This employer, upon the occurrence of an accident, shall give immediate written notice thereof to the corporation with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. * * * Nothing elsewhere contained in this policy shall relieve this employer of his obligations to the corporation with respect to notice as herein imposed upon him. * * *

"The obligations of paragraph one (a) of the policy to which this endorsement is attached include such workmen's compensation laws as are herein cited and described and none other.

"Chapter 198, Laws of 1913, incorporated in chapter 35, article VIII, Revised Statutes 1913, as amended by chapter 85, Laws of 1917, chapter 91, Laws of 1919, and chapter 122, Laws of 1921, state of Nebraska, and all laws amendatory thereof which may be or become effective while this policy is in force."

Defendant Eunice Roth was an employee of the plaintiff for a long time prior to the 17th day of October, 1927. In 1931 she instituted an action against the plaintiff for personal injuries which she alleged were sustained by her in the first 17 days of October, 1927, by reason of the negligence of plaintiff. She alleged that she was required to work in a place which subjected her to cold drafts of air that impaired her health and caused the injuries of which

she complained. When this action was instituted, plaintiff informed the corporation and requested it to defend the action for defendant in that action, plaintiff herein. The corporation refused to defend on the following grounds: (1) That the insurance contract only covered injury resulting from an accident; (2) that Eunice Roth's petition did not allege an accident; (3) that said petition did not set forth an injury as mentioned in said policy; (4) that no notice was given by the plaintiff of the claim of said Eunice Roth, and that notice was not given as required by the terms of the policy. The corporation also denied liability because no notice was given of any accident or injury until commencement of action by Eunice Roth.

From a careful examination of the above quoted policy provisions, it is apparent that they cover two kinds or types of liability which are expressed in paragraphs one (a) and one (b). The first of the two provisions provides for losses arising on account of personal injuries under the workmen's compensation law, and the second provides for losses from personal injuries arising under the common law. We think the provisions under sections one (b) and three are sufficient to create a liability on the part of the insurer for such a claim as made by Eunice Roth, unless such claim is excluded by reason of paragraph seven. In fact, the corporate defendant does not seriously contend otherwise; but it does contend that the last mentioned paragraph limits the foregoing paragraphs and covers only loss sustained by reason of accident, and that the claim made by Eunice Roth does not arise out of an accident.

The corporate defendant cites and relies upon two cases from New Jersey and one from Illinois, namely: *Maxson v. New Jersey Manufacturers' Casualty Ins. Co.*, 10 N. J. Misc. 1164, 162 Atl. 427, *United States Radium Corporation v. Globe Indemnity Co.*, 13 N. J. Misc. 316, 178 Atl. 271, and *Belleville Enameling & Stamping Co. v. United States Casualty Co.*, 266 Ill. App. 586.

In the first of the New Jersey cases cited, the employee's death was occasioned by a diseased condition of his lungs,

due to fine particles of metallic and mineral substances thrown into the air as a result of the work in which he was engaged; that is to say, polishing and boring steel tubing in which an emery wheel was used. The court said that the gravamen of the complaint was that the employing company was liable because of its failure to provide a reasonably safe place in which to work, and in failing to install adequate mechanical means of keeping the air free of the offending substances. In other words, negligence was alleged. There was a recovery against the employer. The court, however, said that the policies "were issued with the intent of protecting the insured against loss by reason of injuries to employees due to accidents arising out of and in the course of employment, and they are so labeled. The workmen's compensation act of 1911 and the amendments and supplements thereto are specially referred to; also the compulsory insurance act. There is no provision in either of the policies which indicates any intent on the part of the defendant company to assume, in addition to the requirements of the statutes, and in behalf of the insured, any common-law liability based on the steel company's negligence. The compulsory insurance act distinctly provides that compensation payments arising under section two of the 1911 act only are involved, while the title clearly sets forth the purpose and the relation to that act." We think this case is not applicable to the situation disclosed by the record.

In the second of the New Jersey cases cited, *United States Radium Corporation v. Globe Indemnity Co., supra,* the employee was injured by radium poisoning and recovered against the employer, and the employer brought action against the insurance company. In the opinion it was said that the cause was submitted upon a stipulation, in which it was stipulated that the employee died from an occupational disease and that this, in effect, excluded the idea of an accidental injury. The Illinois case relied upon, *Belleville Enameling & Stamping Co. v. United States Casualty Co., supra,* appears to sustain the contention of the corpo-

rate defendant. However, in that opinion there is no discussion of the meaning of the word "accident," nor does it appear that the term "accident" was defined in the policy.

We think the decision in the instant case must be controlled to a great extent by well-settled principles of insurance law. One of these is that, where the language employed in a policy of insurance is susceptible of more than one construction, that most favorable to the insured will be adopted. See *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78; *Harr v. Highland Nobles*, 78 Neb. 175, 110 N. W. 713; *Arendt v. North American Life Ins. Co.*, 107 Neb. 716, 187 N. W. 65; *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397; *Jensen v. Lincoln Hail Ins. Co.*, 125 Neb. 87, 249 N. W. 94; *George W. Deer & Son v. Employers Indemnity Corporation*, 77 Fed. (2d) 175. Another of the principles applicable is that, where the insuring clause of an insurance policy clearly covers a risk, and a subsequent limiting clause does not clearly exclude it, such risk will be deemed covered by the policy. *Coad v. London Assurance Corporation*, 119 Neb. 188, 227 N. W. 925.

The term "accident" has many meanings, and when used in a contract of indemnity insurance, unless otherwise stipulated, it should be given the construction most favorable to the insured. It is true that, generally, accident insurance policies provide for risks only where the insured suffers an accidental injury by external violent means. There is in the policy in question no attempt to define the term "accident." Consequently, the meaning of the word most favorable to the insured should be accepted.

In *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213, 147 N. W. 465, it was said (p. 217): "The word 'accident' is susceptible of and has received many definitions, varying with the connection in which it is used. It is: 'An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; cas-

ualty; mishap.'" This definition is quoted from Webster's New International Dictionary. In the opinion it was further said: "As used in an indemnity policy such as this, we are of opinion that the word 'accident' means an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured." Since this is an ordinary meaning of the word and is more favorable to the insured, under the principles above quoted such definition must be accepted as the meaning of the term, as used in paragraph seven of the policy in question. We think it necessarily follows that the claim made by Eunice Roth in her petition may be properly designated as an accident and that it is covered by the insurance policy.

The record discloses that no notice of the accidental injury to Eunice Roth was given to the defendant corporation until action was brought by her more than three years after the time when she received the alleged injury of which she complains, but the record also discloses that no one having direct management of the assured had any notice that Miss Roth had received any injury, for which the assured would be liable, until about a week before the action was brought, and then only an intimation that the assured might be liable, and this intimation was not taken seriously by the officer of the assured. However, it appears that the father of Miss Roth was a secretary of the assured, but his duties were to record the minutes of the meetings and keep the books; he had no managerial duties, and whatever information he may have had as to a possible action is not fully disclosed, and, were it disclosed, we think it would be insufficient to place any duty or obligation on the assured to give notice to the defendant. It may be conceded that such a provision in a policy is reasonable and enforceable in a proper case.

However, this court has held on numerous occasions that notice is not required until such facts have developed as would suggest to a person of ordinary and reasonable prudence that liability may arise, and the requirement of notice

is met by giving notice within a reasonable time after the injury presents an aspect of a possible claim for damages. See *Chapin v. Ocean Accident & Guarantee Corporation, supra,* in which the notice was not given until about a year after the alleged action. A like holding appears in *George v. Aetna Casualty & Surety Co.*, 121 Neb. 647, 238 N. W. 36. In that case almost a year elapsed, but under the circumstances the notice was held to have been given within sufficient time. See, also, *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation,* 102 Neb. 349, 167 N. W. 211. In the latter case injury occurred May 20, 1911, and assured did not learn of any claim, and gave the company no notice, until 1914. We think, under the circumstances, that notice in the instant case was given as promptly as the situation required.

No error prejudicial to the rights of defendant corporation has been disclosed. It follows that it was the duty of the corporation to assume the defense in the action brought by Eunice Roth against the plaintiff.

The judgment of the district court appears to have made sound declarations of the rights of the parties and is

AFFIRMED.

NEWTON E. BUCKLEY V. STATE OF NEBRASKA.

FILED NOVEMBER 27, 1936. No. 29816.

1. **Embezzlement: INFORMATION.** An indictment charging the crime of embezzlement, under the provisions of section 28-544, Comp. St. 1929, is sufficient when the material elements of the crime are set forth in the language of the statute.
2. **Criminal Law: EMBEZZLEMENT: EVIDENCE.** In a prosecution for embezzlement, where books and records are voluminous and of such a character as to render it difficult for a jury to arrive at a correct conclusion as to what they show, an expert accountant may be allowed to testify to the result of an examination made by him when it appears that all of such books and records are in the courtroom, subject to inspection by the accused, properly identified and with a sufficient foundation laid for their admission in evidence, if offered.

3. ———: ———: ———. Under an indictment charging a trust company officer with embezzling its funds on a certain date, evidence tending to show embezzlement of different amounts at different times before that date, and the manner in which he conducted the business of the trust company, is admissible for the purpose of aiding the jury in determining the defendant's guilt or innocence of the crime charged.
4. ———: ———: ———: INSTRUCTIONS. But, where such testimony is admitted in evidence, the defendant is entitled to an instruction, if requested, properly limiting the purpose for which it was offered.
5. ———: CONVICTION: CONFLICT OF EVIDENCE: REVIEW. "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State*, 115 Neb. 277, 212 N. W. 606.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Shuman & Overcash and *Halligan, Beatty & Halligan*, for plaintiff in error.

William H. Wright, Attorney General, and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and MUNDAY, District Judge.

CARTER, J.

In this case the state prosecutes the defendant, Newton E. Buckley, on a charge of embezzlement. The jury returned a verdict of guilty and the trial court sentenced the defendant to serve 18 months in the state penitentiary. From the overruling of his motion for a new trial, the defendant brings the case to this court for review.

The defendant first contends that the indictment was insufficient to charge a crime under the laws of Nebraska for the reason that an allegation of an intent to defraud was not incorporated therein. The only allegation of intent to defraud contained in the indictment is as follows: "And the said Newton E. Buckley did then and there unlawfully and

feloniously convert to his own use and embezzle said sum of money." The question is whether this allegation is sufficient.

The material part of the statute under which this prosecution was brought is as follows: "If any officer * * * of any incorporated company * * * shall embezzle or convert to his own use, * * * without the assent of his or her employer or employers, or the owner or owners thereof, any money, * * * belonging to any other persons, body politic or corporate, * * * which shall have come into his or her possession or care, in any manner whatsoever, * * * every such person so offending shall be punished in the manner provided by law." Comp. St. 1929, sec. 28-544.

It will be noted that the charge is in the words of the statute. This court has repeatedly held that, where an indictment or information charging embezzlement sets forth the crime in the language of the statute or the equivalent thereof, it is sufficient. *Matters v. State*, 120 Neb. 404, 232 N. W. 781. We have also held that, where an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient. *McKenzie v. State*, 113 Neb. 576, 204 N. W. 60. While intent to defraud the owner of the property alleged to have been embezzled is an element of the crime of embezzlement which must be charged and proved, it is sufficiently charged in an indictment containing the following: "Did then and there unlawfully and feloniously convert to his own use and embezzle said sum of money." The word "embezzle" includes within its import the fraudulent appropriation of the funds of another to one's own use. The word "embezzle" is defined by Webster's New International Dictionary as follows: "To make away with; to steal; * * * to appropriate fraudulently to one's own use, as property entrusted to one's care." The word "embezzlement" is defined by an authoritative text as follows: "Embezzlement may be defined broadly as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has

lawfully come." 20 C. J. 407. The information in this case sufficiently charges a crime, the material elements of which are defined by statute. The objection of the defendant to the indictment filed against him is very technical. Super-technical rules in the drawing of complaints, informations and indictments have been abandoned by this court in recent years where it appears that the defendant was not misled and understood the charge against him. *Trosper v. State,* 128 Neb. 165, 258 N. W. 62. We conclude therefore that the indictment filed in the case at bar charged all the elements of the crime of embezzlement as required by the statute.

The record in this case shows that during all the times herein mentioned the defendant was the secretary-treasurer of the Goodman-Buckley Trust Company of North Platte, Nebraska. The other officers of the trust company consisted of Edward R. Goodman as president; Grace S. Goodman as vice-president; Nell E. Buckley as assistant secretary-treasurer; and Edward R. Goodman, Grace S. Goodman, Nell E. Buckley, R. D. Rasmusson and Newton E. Buckley, the defendant herein, as directors. The evidence shows that Grace S. Goodman and Nell E. Buckley were sisters. It also appears that in 1923 Edward R. Goodman moved to Denver, Colorado, and that thereafter Newton E. Buckley was the managing officer of the Goodman-Buckley Trust Company.

It further appears from the record that the defendant operated a real estate and insurance business as his personal business under the trade-name of Bratt, Goodman & Buckley. The Goodman-Buckley Trust Company at all times carried on its business at the offices maintained by Bratt, Goodman & Buckley. Bratt, Goodman & Buckley owned the office fixtures and equipment, provided the clerical help and paid all operating expenses of the Goodman-Buckley Trust Company, for which they were to receive $360 annually. In addition to the two above concerns, Edward R. Goodman and Newton E. Buckley carried on a partnership business under the name of Goodman & Buckley. They had

also incorporated a holding company known as the Goodman-Buckley Company, the officers of which were identical with those of the Goodman-Buckley Trust Company. All of these concerns appear to have beeen treated more or less by Goodman and Buckley as one business. When one was short of cash, funds would be transferred to it from one of the others. The business of these companies and firms became so involved that they, as well as the individuals involved therein, took voluntary bankruptcy in November, 1933.

In August, 1932, the defendant was personally indebted to the First National Bank of North Platte in the sum of $8,421.66. The bank, through its cashier William H. Munger, was pressing him for payment of this indebtedness. Defendant then informed Munger that the Goodman-Buckley Trust Company owed him money and if he could obtain a loan for the trust company it would be able to pay him and that he would then pay the bank. Munger was the guardian of the estate of Frank A. Mooney, an incompetent, and had funds of that estate available for loaning purposes. He thereupon loaned the Goodman-Buckley Trust Company $6,000 and accepted two real estate mortgages belonging to the trust company as security for the loan. The $6,000 was deposited in the First National Bank to the credit of the Goodman-Buckley Trust Company. Buckley then drew a check against the Goodman-Buckley Trust Company in the amount of $4,200 in favor of Bratt, Goodman & Buckley, the trade-name of his personal business, and caused it to be credited to the account of Bratt, Goodman & Buckley. He immediately paid the First National Bank $4,316.84 from the account of Bratt, Goodman & Buckley and gave the bank his personal note for the balance due. The defendant is charged with embezzling the $4,200 represented by the check he drew against the Goodman-Buckley Trust Company in favor of Bratt, Goodman & Buckley, his personally owned and operated business.

The evidence shows that the $6,000 borrowed from Munger, as guardian of the estate of Frank A. Mooney,

was authorized by the board of directors of the Goodman-Buckley Trust Company, and it is thus shown in the minutes of the board of directors. The minutes do not show any authorization for the transfer of the $4,200 from the Goodman-Buckley Trust Company to Bratt, Goodman & Buckley. The check stub of the $4,200 check describes it as a "temp. loan." The records of the Goodman-Buckley Trust Company also showed at the time the $4,200 check was given that Bratt, Goodman & Buckley had a credit of $2,675. On the same date the records of Bratt, Goodman & Buckley showed that it had a credit of $2,175 with the Goodman-Buckley Trust Company.

The defendant, as a defense, contends that on August 19, 1932, the date of the transaction in question, the Goodman-Buckley Trust Company was indebted to him for seven months' expense of operation at the rate of $30 a month. He further contends that his salary as secretary-treasurer of the trust company was $100 a month, that he had drawn no salary since May 31, 1931, and that on August 19, 1932, the trust company was owing him $1,400 in back salary. The total indebtedness claimed by the defendant from the Goodman-Buckley Trust Company was therefore $4,285, an amount in excess of the amount that it is charged he embezzled. The contention of the defendant is that he took the money to pay himself what he had coming and without any intent to commit a wrong.

Defendant contends that the court erred in admitting in evidence the voluntary petition in bankruptcy sworn to by the defendant on November 28, 1933. The purpose of this evidence was to show that the defendant made no claim therein for back salary. This evidence is competent upon the question of whether the defendant was, at the time of the alleged embezzlement, in good faith claiming that the Goodman-Buckley Trust Company owed him a sum of money in excess of the amount alleged to have been embezzled. There was no error in the admission of this exhibit.

Defendant further claims that the court erred in ad-

mitting in evidence an audit of the books of Bratt, Goodman & Buckley set up by a public accountant. The record shows that the audit was made from trial balances, ledger accounts and other voluminous records that were in court, properly identified and with a proper foundation laid for their use at the time. Under such circumstances, an audit showing the conclusions of an accountant as to what such records show is properly admissible in evidence. *Hogoboom v. State*, 120 Neb. 525, 234 N. W. 422. Defendant contends that the testimony of the accountant that the books of Bratt, Goodman & Buckley showed its business to be insolvent was improperly admitted for the reason that it did not take into consideration other property of the defendant other than the business he operated under the name of Bratt, Goodman & Buckley. The trial court, however, limited the testimony of the accountant to the records present in the courtroom. In this we think the trial court was correct. Defendant had the right and did produce evidence that the audit did not include all the property of the defendant. This, of course, had a tendency to impeach the conclusion that defendant was insolvent, but it could not make the audit inadmissible as evidence for whatever it was worth in the estimation of the jury. We conclude that the trial court ruled correctly with reference to the audit and the testimony of the accountant.

Defendant further complains of the admission of certain evidence which tended to show that defendant was in hard financial circumstances shortly prior to the date of the alleged crime. Such evidence is competent even though it has a tendency to show that the defendant may have been guilty of other criminal offenses. Under such circumstances, the defendant is entitled to an instruction, if one is requested, limiting the purpose for which the evidence is admitted. In the instant case no such instruction was given or requested. This contention is therefore without merit.

It is further contended by the defendant that the evidence is insufficient to sustain a verdict of guilty. This argument

is based on the proposition that the state has failed to show beyond a reasonable doubt the intent of the defendant to defraud the owner of the funds alleged to have been embezzled. It must be borne in mind that the intent with which an act is done is purely a mental process and hard to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances.

The record shows that the defendant was being pressed for funds at the time of the alleged embezzlement; that the books of Bratt, Goodman & Buckley, defendant's personally-owned business, did not show the indebtedness of the Goodman-Buckley Trust Company to it in the amount now claimed to be due; that defendant subsequently failed to list any such indebtedness when he filed his petition in bankruptcy; that defendant failed to inform other officers and directors of the trust company of the amount of indebtedness that he claimed to be due him; that the stub of the $4,200 check, made under defendant's direction, showed that it was a temporary loan; that the minutes of the board of directors did not authorize the payment of $4,200 to himself; and that the family relationship of the other officers of the trust company to him should be a subject of consideration in determining whether an oral assent had been given to the defendant as claimed by him. There is also evidence in the record that the salaries of the president and secretary-treasurer were discontinued on May 31, 1931. We think that these facts are such that it falls within the province of the jury to determine with what intent the act was done. The rule is well expressed in *Matters v. State, supra,* as follows: "The record presents a conflict of evidence upon material questions. It was for the jury to determine the credibility of the witnesses and the weight to be given to their testimony. In *Williams v. State,* 115 Neb. 277, the rule is announced in the following language: 'This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so

lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.' Other cases adhering to this rule are *Curtis v. State*, 97 Neb. 397; *Denker v. State*, 106 Neb. 779; *Smith v. State*, 109 Neb. 579; *Ingoldsby v. State*, 110 Neb. 495." We conclude that we are unable to say as a matter of law, under the record of this case, that the verdict is not sustained by sufficient evidence.

Defendant contends that the evidence shows that the directors of the Goodman-Buckley Trust Company assented to the transfer of the $4,200 to him. The record shows that two of the directors testified that they orally assented to the transfer of funds to the defendant to pay the indebtedness that was due him at the time. The amount due him at that time, as shown by the books of the trust company, was $2,675. The evidence does not show an assent to the transfer of any funds in excess of the amount shown on the books, with which it will be presumed they were familiar. In addition to this, we think the trial court properly instructed the jury that the assent of the trust company could be made to the payment of a debt due the defendant but that it was not within the power of the trust company to assent to a loan to one of its officers, such a loan being within the prohibition of section 8-206, Comp. St. 1929.

The jury determined that the defendant wrongfully appropriated $1,315 of the funds of the Goodman-Buckley Trust Company to his own use with an intent to defraud the trust company of that amount. The evidence is sufficient to sustain this verdict. Under such circumstances, it is not within the province of this court to interfere with the verdict of the jury. The judgment is

AFFIRMED.

AMERICAN CENTRAL LIFE INSURANCE COMPANY, APPELLEE, V. CHARLES C. BROWN ET AL., APPELLANTS: CHARLES H. BROWN ET AL., APPELLEES.

FILED NOVEMBER 27, 1936. No. 29725.

1. **Mortgages**: FORECLOSURE: MORATORIUM. "When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay under section 20-21,159, Comp. St. Supp. 1935, must be denied." *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82.
2. ———: ———: SALE: CONFIRMATION. "Mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." *Srajhans v. Mares*, *supra*.

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

E. E. Richards, for appellants.

Paul L. Martin and *Winfield R. Ross*, *contra.*

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

This is an appeal from a confirmation of the district court for Deuel county, setting aside a moratorium granted by said court and refusing to extend the moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1935, and confirming the sale of the premises under foreclosure proceedings.

Appellee's action was originally instituted November 26, 1932, for the foreclosure of interest coupons and consisting of three causes of action. A decree was entered by the court May 29, 1933, and there was found due appellee under its first cause of action the sum of $1,498.62, subject to $10,500 of principal indebtedness, under its second cause of action the sum of $526.09, subject to $3,500 of principal indebtedness, and under its third cause of action the sum of $433.55, subject to $3,500 of principal indebtedness. The decree bears interest at 10 per cent. per annum and the

unforeclosed principal indebtedness bears interest at 6 per cent. per annum until maturity and at 10 per cent. per annum thereafter. The statutory stay of nine months was taken.

On March 1, 1934, appellant Charles C. Brown filed an application for a moratory stay under the provisions of the moratorium act of 1933. Laws 1933, ch. 65. On April 28, 1934, an order was entered on the application, fixing the 1934 rent in the sum of $1,200, evidenced by a promissory note secured by a first crop mortgage. The order further provided that in case the note and mortgage were not delivered within 30 days an order of sale might issue by the clerk of the district court without further order from the court. Appellant failed to comply with said order and an order of sale was issued July 17, 1934. The sheriff sold the real estate August 20, 1934, the sale price being $1,676.78 under the first cause of action, subject to $10,500 of principal indebtedness, $588.63 under the second cause of action, subject to $3,500 of principal indebtedness, and $485.09 under the third cause of action, subject to $3,500 of principal indebtedness.

It might be stated that the interest coupons foreclosed in the first cause of action bore due dates of June 1, 1931, December 1, 1931, and June 1, 1932, with payments for delinquent taxes for the years 1930 and 1931, the interest coupons foreclosed in the second cause of action bore due dates of July 1, 1931, January 1, 1932, and July 1, 1932, with payments for delinquent taxes for the years 1930 and 1931, and the interest coupons foreclosed in the third cause of action bore due dates of September 1, 1931, March 1, 1932, and September 1, 1932, with payments for delinquent taxes for the year 1931.

The evidence discloses that the sale was made subject to valid first liens not included in the foreclosure action in the aggregate principal sum of $17,500, without added accrued interest, and delinquent taxes in the sum of $815.65.

Appellee offered the affidavit of C. E. Pollard, its fieldman, to the effect that the fair and reasonable value of the

land in question was $16,000 and that the sale was made subject to prior liens which with interest to July 30, 1935, amounted to $22,398, together with delinquent taxes for 1932, 1933 and 1934.

As against this evidence five affidavits were offered by the appellant Brown relative to the value of the land, showing a substantially increased value over and above the value set out in the affidavit of the witness Pollard.

The evidence further discloses that appellants paid no interest since March 1, 1931, nor any taxes after those for the year 1929 except the 1930 taxes on the land involved in the third cause of action. Appellants continued in possession of the 640 acres and took whatever income and profits that accrued therefrom, and received the benefit under the 1933 moratorium act, violating the terms of the moratory order.

It is true that appellants incorporated in their objections to confirmation a request for a moratorium under section 20-21,159, Comp. St. Supp. 1935, which seems to have been ignored by the court.

Some complaint is made of the discrepancy in the testimony of the contending parties about the value of the land. The court, as trier of the facts, believed the witness for appellee. According to such testimony the sale price was not so inadequate that it would prevent a confirmation of the foreclosure sale, nor was it so inadequate as to shock the conscience of the court or amount to evidence of fraud. As this court has committed itself recently, when it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay should be denied. *Howarth v. Becker, ante,* p. 233, 267 N. W. 444; *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82. The court therefore properly denied a moratorium and confirmed the foreclosure sale.

Appellants, however, are given the right to redeem the premises until such time as the mandate issues from this court.

The judgment of the trial court is

AFFIRMED.

AMERICAN CENTRAL LIFE INSURANCE COMPANY, APPELLEE, V. CHARLES C. BROWN ET AL., APPELLANTS: CHARLES H. BROWN ET AL., APPELLEES.

FILED NOVEMBER 27, 1936. No. 29751.

1. Mortgages: FORECLOSURE: MORATORIUM. "When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay under section 20-21,159, Comp. St. Supp. 1935, must be denied." *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82.
2. ———: ———: SALE: CONFIRMATION. "Mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." *Srajhans v. Mares*, *supra*.

APPEAL from the district court for Garden county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

E. E. Richards, for appellants.

Paul R. Martin and *Winfield R. Ross*, *contra.*

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

MESSMORE, District Judge.

This is an appeal from a decree of the district court for Garden county confirming proceedings and sale had under a foreclosure action and vacating a moratorium order formerly entered in this matter.

The foreclosure action involved two causes of action, the first against 160 acres of land and the second against 320 acres of land, foreclosing interest coupons under the first cause of action due August 1, 1931, February 1, 1932, and August 1, 1932, and also payments of 1930 and 1931 real estate taxes, the principal debt of $3,500 with accrued interest thereon from August 1, 1932, not being involved in said cause of action. The second cause of action was for the foreclosure of interest coupons due June 1, 1931, December 1, 1931, and June 1, 1932, and delinquent tax payments for 1930 and 1931, the principal debt of $7,500 and

interest accrued thereon after June 1, 1932, not being involved in said cause of action.

Defendant took the statutory stay of nine months. Thereafter an order of sale was issued. Then defendant filed an application for a moratory stay under the provisions of the moratorium act of 1933. Laws 1933, ch. 65. The mortgaged property was sold March 19, 1934, by the sheriff for the sum of $545.25 under the first cause of action and $1,108.98 under the second cause of action, which were approximately the sums due under the respective causes of action, the lands remaining subject to the first liens for the principal indebtednesses hereinbefore mentioned and not in foreclosure.

On April 16, 1934, a hearing was had on motion for confirmation of sale and defendant's motion for a moratory stay. The court appointed a receiver to take charge of the real estate and defendant was ordered to pay the receiver one-third of all small grains and corn raised on the mortgaged premises, while plaintiff's motion for confirmation was taken under advisement. No rent was paid the receiver. A second application by defendant for a moratory stay was filed June 1, 1935, under the provisions of the 1935 moratory act. Laws 1935, ch. 41. Plaintiff objected to the granting of said application, setting forth that the defendant had failed and refused to pay the receiver the rentals for 1934 and 1935 in accordance with the terms of the moratory order of April 16, 1934. On September 4, 1935, a hearing was had on plaintiff's motion for confirmation of sale and on defendant's application for a moratorium. The court thereupon vacated the moratorium order of April 16, 1934, and ordered that further continuance of said moratory stay under the moratory act of 1935 be denied, and confirmed the sale.

Evidence was offered by the appellee through C. E. Pollard, its fieldman in charge of loans and real estate belonging to appellee in western Nebraska and adjoining states, who fixed the fair and reasonable value of the 160-acre tract at $3,200 and that it was encumbered for $4,400, and

the fair and reasonable value of the 320-acre tract at $7,000 and that it was encumbered in excess of $9,700, such encumbrances not including the delinquent taxes for 1932, 1933 and 1934.

Appellants offered the affidavits of several witnesses who fixed the value of the real estate involved in the first cause of action from $7,600 to $8,250 and the land involved in the second cause of action from $16,800 to $20,400.

The trial court believed the testimony offered by appellee as to the value of the land, together with all the other circumstances in the case as disclosed by the record; that appellants had paid no interest since February, 1931, nor any taxes after those of 1929, but had retained possession of the 480 acres of mortgaged property, applying the rents, profits and income therefrom to their own use.

We conclude that, if the sale price was inadequate, such inadequacy would not prevent the confirmation of the foreclosure sale, unless it was so inadequate as to shock the conscience of the court or amount to evidence of fraud. The evidence does not disclose that the sale price was inadequate and does not disclose fraud. This court has recently held that, when it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay should be denied. *Howarth v. Becker, ante,* p. 233, 267 N. W. 444; *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82. The trial court therefore properly denied a moratorium and confirmed the foreclosure sale.

Appellants, however, are given the right to redeem the premises until such time as the mandate from this court issues.

The judgment of the trial court is

AFFIRMED.

FRANK MERCURIO, APPELLEE, V. CALVIN DUNCAN ET AL., APPELLANTS.

FILED NOVEMBER 27, 1936. No. 29738.

1. Waters: ACCRETION. An accretion to land is a gradual and imperceptible increase thereof, through the operation of natural causes, as by alluvium added to land on the bank of a river by the contiguous waters.
2. ———: AVULSION. An avulsion is a sudden and rapid change by a boundary stream, from any cause, of its channel, whereby it abandons the old bed and seeks a new one.
3. ———: ACCRETION. When the banks of a running stream are changed by accretion, the riparian owner's boundary still remains the stream.
4. ———: AVULSION. When a boundary stream which, from any cause, suddenly and rapidly changes the channel and seeks a new bed, the boundary remains the center of the old channel.
5. Evidence examined and *held* to sustain the decree of the trial court that the land in question was created by accretion.

APPEAL from the district court for Richardson county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed.*

Joseph C. Reavis, John C. Mullen and *James E. Leyda,* for appellants.

Benjamin S. Baker, F. A. Hebenstreit and *Edward Shafton, contra.*

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

MUNDAY, District Judge.

For cause of action plaintiff alleges in his petition that he is the owner of section 22, township 3, range 17, in Richardson county, Nebraska, and all of the accretions extending east from this real estate to the west bank of the Missouri river, and that the defendants claim some interest therein adverse to the plaintiff's ownership.

Plaintiff asks that this claim of the defendants be declared null and void and plaintiff's title quieted against the same.

There were several answers of different defendants, but

only one was contested. This answer admits that plaintiff is the owner of said section 22, in Richardson county, Nebraska, but alleges that the defendants own and occupy certain land extending east from said section 22, and that the land owned by them lies east of and beyond the east boundary of Richardson county, and that said land, so claimed by them, is not within the territorial jurisdiction of the trial court. The answer also alleges that the Missouri river is the state boundary between the land of the plaintiff and the defendants; that in the spring of 1915 an ice gorge formed north of the land in question and that the river then changed its course by avulsion, and ever since that date has been flowing along the east side of defendants' land; that there are no accretions to the land of plaintiff; and denies generally the other allegations of the petition. The reply is a general denial.

From a decree quieting title in all the disputed land in the plaintiff, the defendants have appealed.

Thus, the issue is whether or not the land east of section 22 was formed by the Missouri river by accretion by a gradual receding to the east of this river, or whether there was a sudden change in the river's channel that was an avulsion. If the land east of section 22 was formed by accretion, the judgment of the trial court is correct. If there was an avulsion of the Missouri river, it is not. However, there is a question, as to evidence, that will be considered later.

The determination of this appeal and the rights of the parties are in the main questions of fact. The law is clear and well settled in this state on the question of law involved in this action.

1 C. J. 730, defines accretion as: "A gradual increase of land by imperceptible degrees; the gradual and imperceptible accumulation of land; the imperceptible accumulation of land by natural causes; the increase or growth of property by external accessions, as by alluvium naturally added to land situated on the bank of a river or on the seashore; the increase of real estate by the addition of portions of

soil by gradual deposit through the operation of natural causes to that already in the possession of the owner; portions of soil added to that already in the possession of the owner by gradual deposit." See, also, *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104.

An avulsion has been defined in 6 C. J. 876: "The sudden and rapid change of the channel of the stream which is the boundary, whereby it abandons its old and seeks a new bed." See *Nebraska v. Iowa*, 143 U. S. 359; *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550.

The results of the two processes are quite different. In accretion the riparian owner's boundary still remains the stream, while in avulsion where a new bed is suddenly formed there is no change of the boundary.

The case of *Nebraska v. Iowa, supra*, states the law in this regard applicable to this case. The third paragraph of the syllabus in 36 L. Ed. 186, is: "Where the boundaries between states or nations are, by prescription or treaty, found in running water, accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel."

A careful study of the record discloses that there was an ice gorge in the Missouri river in 1915 north of said section 22 near section 10 of the same township. So far there is no dispute; but as to what happened to the channel of the Missouri river at the time of this ice gorge in 1915 at section 10, there is much dispute and variance between the testimony of the witnesses.

It seems clear that at one time the Missouri river flowed from the north from near section 10 to the south, with its channel near the center of section 22, and that at the time of the trial the river flowed east from section 10 and south and a considerable distance east of the old channel in section 22.

Some of appellants' witnesses stated that the east bank of the old channel was visible at the time of the trial, and that at the time of the ice gorge the channel of the Missouri

river was suddenly changed to the east and extended south and southwest, and that the river did not again enter the original channel until near section 27, south of section 22; that there was no land formed by accretion on the west bank of the Missouri river after the ice gorge disappeared. It seems that there is a high water chute leading from the present channel of the Missouri river at about section 10 to down near section 22 and in which there was much water at times, when the Missouri river is flooded.

But the evidence is by no means clear that this high water chute was the original channel of the Missouri river near the time of the ice gorge in 1915, nor that the channel of the Missouri river, at or near that time, suddenly changed to the east.

Plaintiff had many apparently reliable witnesses, who had lived in that community near sections 10 and 22 for many years, who testified that the Missouri river after the ice gorge went back to its original channel and continued to run by section 22 as it had before the ice gorge, and that since the ice gorge the river slowly and gradually moved to the east, leaving the land adjoining section 22 on the east, which land is now in dispute. None of these witnesses are impeached and their testimony seems to stand under cross-examination. Even some of the appellants' witnesses stated that the river after the ice gorge gradually moved to the east. From our study of the entire record, we believe the trial court was right in holding that the land in dispute was accreted land of the Missouri river. The trial court had all the witnesses before it and could better know and determine the truth and as to whether or not any of the witnesses was mistaken. We can see no useful purpose in further reviewing or setting out the evidence in this opinion.

Complaint is made by the appellants that the trial court would not permit them to show the size of certain trees on Clark island. The place where these trees were situated was some distance northeast of the land in controversy. This evidence was immaterial and there was no prejudicial error in its exclusion.

The appellants also contend that the title to an excessive amount of land was quieted in the plaintiff and which was more than the evidence justified. We do not think so. The court found that the land adjoining a part of section 22 on the east was formed by accretion and correctly quieted title to the same in the plaintiff.

Although none of the defendants claimed title to any of the land in controversy, and were mere squatters, still the burden of proof was on the plaintiff to prove by a preponderance of the evidence all the material allegations of his petition. We think he has so established his case.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

STATE, EX REL. PAUL F. GOOD, ATTORNEY GENERAL, RELATOR, V. ISAAC STANLEY COOPER, RESPONDENT.

FILED DECEMBER 11, 1936. No. 29084.

Attorney and Client. It is such unprofessional conduct as to merit disbarment for an attorney, representing a defendant in a criminal prosecution, to procure or induce a material witness for the prosecution to absent himself from the county of trial and conceal his whereabouts so that his attendance may not be had at the time set for the trial of such criminal cause.

Original proceeding by the state, on the relation of the attorney general, to disbar the respondent. *Judgment of disbarment.*

William H. Wright, Attorney General, and *Paul P. Chaney,* for relator.

Charles F. Stroman, for respondent.

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

PER CURIAM.

This is a proceeding instituted by the attorney general

in the name of the state of Nebraska for the disbarment of Isaac Stanley Cooper, a duly licensed attorney and counselor at law of the state of Nebraska.

The charge against defendant is that he wilfully, unlawfully and maliciously did attempt to obstruct and hinder the due administration of justice in a case then pending in the district court for York county, Nebraska. To the information defendant answered, admitting certain formal allegations, and entered a plea of *nolo contendere* to that part of the information which charges the commission of the unlawful acts by the defendant.

The record discloses that defendant was convicted in the district court for York county for contempt of court for the same acts for which it is sought to disbar him in this action. This cause is submitted to this court upon a motion by the state for a judgment upon the record and, by stipulation of the parties, the defendant's record of conviction for contempt and the evidence taken upon that hearing are made a part of the record in this case.

From the record it appears that one Marsden was being prosecuted in the district court for York county on a criminal charge, and that defendant herein was acting as his attorney; that one Keading was a material witness for the state in that prosecution, and that defendant unlawfully induced said witness to depart from the county of York and secrete his whereabouts so that he could not be used as a witness at the time the cause was set for trial. Such conduct cannot be condoned. Defendant induced a material witness for the state to absent himself so that his testimony would not be available in the prosecution against defendant's client. This is a flagrant breach of professional duty as an attorney at law and merits disbarment. The motion of the state for judgment on the record is sustained.

It is therefore ordered and adjudged that defendant's license to practice law in the state of Nebraska be and hereby is canceled and set aside and his name stricken from the roll of attorneys and counselors at law of the state of Nebraska. Under the rules of procedure for disciplining at-

torneys by this court and No. 14 of such rules, defendant may, if he so elects, at the expiration of one year, apply for reinstatement.

JUDGMENT OF DISBARMENT.

LINCOLN NATIONAL BANK & TRUST COMPANY, APPELLANT, V. SCHOOL DISTRICT NO. 41 OF BROWN COUNTY, APPELLEE.

FILED DECEMBER 11, 1936. No. 29753.

Appeal: REVIEW. "In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings." *In re Estate of Buder*, 117 Neb. 52, 219 N. W. 808.

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

W. A. Selleck and *R. A. Baker*, for appellant.

Ben H. Burritt, contra.

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MUNDAY, District Judge.

PER CURIAM.

This is an action at law upon a school district warrant. The plaintiff alleges in its petition, in addition to formal allegations, the issuance of a school district warrant on April 18, 1924, to one Martha Miller; the registration thereof by the then school district treasurer on April 24, 1924; that this warrant was subsequently sold, transferred and assigned to plaintiff who then became and is now the owner and holder thereof in due course; that on September 30, 1929, Harry Luehrs, the treasurer of said district, paid to plaintiff the sum of $32; that there is yet due and owing thereon the sum of $53 with interest at 6 per cent. from date thereof. Then follows a prayer for judgment.

For its answer, the defendant district admitted the exe-

cution and delivery of the warrant described in plaintiff's petition to the payee named in said warrant, but specifically denied each and every other allegation contained in said petition. In the second paragraph of the answer the defendant pleaded the statute of limitations. Plaintiff filed no reply.

The journal entry of the final judgment discloses that on April 17, 1935, this cause was submitted to the court upon the pleadings and the evidence, and was taken under advisement by the court. That on "the 5th day of September, 1935 * * * the above entitled cause came on for final determination upon the pleadings and the evidence. * * * The court being fully advised in the premises finds generally for the defendant, School District No. 41, of Brown County, Nebraska, and finds that the plaintiff has failed to establish the allegations contained in its petition as against the defendant." Plaintiff's action was then dismissed.

The record discloses that plaintiff failed to file the statutory motion for a new trial, and it cannot be contended but that defendant's answer, considered as a pleading, constituted a complete defense to plaintiff's petition.

We have long been committed to the rule: "In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings." *In re Estate of Buder,* 117 Neb. 52, 219 N. W. 808. See, also, *Shoff v. Ash,* 95 Neb. 255, 145 N. W. 271; *Lau v. Lindsey,* 3 Neb. (Unof.) 681, 92 N. W. 642.

It therefore follows that, as the terms of the answer stated a complete defense to plaintiff's demand, it fully supports the finding and judgment of the district court, which must be affirmed.

AFFIRMED.

MYRNA VAUGHAN, APPELLANT, V. HUGH J. VAUGHAN, APPELLEE.

FILED DECEMBER 11, 1936. No. 29779.

Divorce: CUSTODY OF CHILD. Record examined and judgment of the district court affirmed as to custody of minor child.

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

R. B. Hasselquist and *Donald S. Krause,* for appellant.

O'Sullivan & Southard and *O'Brien & Powers, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

GOSS, C. J.

Plaintiff appeals from a judgment denying her the custody of a minor son and dismissing her petition asking such modification of a former award of his custody to a third party.

January 9, 1934, the court decreed an absolute divorce in favor of plaintiff, found that both parties to the suit were fit persons to have custody of their six-year old son, and awarded his custody to an aunt, Mrs. E. E. Linde, until the further order of the court, directing defendant to pay for his maintenance $20 a month. March 12, 1934, plaintiff filed a supplemental petition, asking, among other things, that she be granted the care, custody and control of the child. May 9, 1934, the court decreed that the best interests of the child would be served by remaining in the custody as theretofore awarded. July 7, 1934, appellant filed a petition to modify the decree and prayed that she be given the absolute care, control and custody of the child. October 1, 1935, after a full hearing, the court found that it was for the best interests of the child to remain in the custody of the aunt, denied a modification, dismissed the petition and left the custody of the child with the aunt until the further order of the court.

The evidence shows that May Linde, who is custodian of

the boy, is 37 years old and is a sister of defendant. Her family consists of herself and her husband and three children, all girls, aged 14, 12 and 6, respectively, and of defendant Vaughan. The oldest girl is in high school, the youngest goes to Dundee school and the 12-year old girl takes Jackie (son of the parties hereto) to St. Margaret Mary school, three blocks from where the Lindes live. Mr. Linde is a bookkeeper with fair pay. When Mrs. Linde took custody of Jackie on January 12, 1934, the family promptly moved into the Vaughan home at 619 North Forty-eighth street, Omaha—a four-room house—but on October 1, 1934, they removed into a seven-room house at 705 North Forty-ninth street, where they lived at the time of the hearing in September, 1935. There was complaint by plaintiff in the evidence that the quarters were too small for so large a number in the other house, but that is evidently answered by the fact that the Lindes moved into a larger house.

Plaintiff resides with her mother, Mary Paulsen, who is 65, and a sister who has a position at which she works in the daytime. They live in the north part of the city. All parties seem to contemplate that the child should go to a parochial school. Sacred Heart school is seven or eight blocks from the Paulsen home.

The controlling principles in such cases is that the custody of a child should be placed where the best interests of the child will be conserved. That was determined by the court in the original decree of divorce rendered January 9, 1934, when the custody was awarded to Mrs. Linde. It was again so decreed on May 9, 1934. The question was tried and decided for the third time when on October 1, 1935, the court decreed that it was for the best interests of this minor child that he remain in the custody of Mrs. Linde until the further order of the court.

While we try such appeals *de novo*, the judgment of the trial court, who saw and heard the witnesses and who by frequent appearances of the parties has become more or less familiar with them and their atmosphere, is entitled to be considered. From the evidence we do not find that

conditions have changed since the award of custody was made in the first instance. Both parents seem to be worthy of the custody of the child, and, in the circumstances of the severance of the marriage tie, it is fortunate that this minor child has been placed by the court in so excellent a home where there are other children and such a good environment. We think the judgment of the district court should be affirmed and that the custody should not be disturbed until the further order of the trial court.

This being the first and only appeal of plaintiff, we allow the sum of $75, to be taxed to the appellee as costs as a fee for her attorneys in this court.

The judgment is

AFFIRMED.

SIDNEY FAITH, APPELLEE, V. HAMILTON COUNTY ET AL., APPELLANTS: NEW AMSTERDAM CASUALTY COMPANY, APPELLEE.

FILED DECEMBER 11, 1936. No. 29949.

Master and Servant: WORKMEN'S COMPENSATION LAW: PLEADING: AMENDMENT. Before judgment in compensation court, an innocent mistake of employee in his claim and testimony, as to the date of his compensable injury, may be corrected by an amendment of his petition and a change in his testimony to show the correct date.

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

Chambers & Holland, for appellants.

Craft, Edgerton & Fraizer and *T. E. Sullivan, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

ROSE, J.

This is a proceeding under the workmen's compensation law. Sidney Faith, plaintiff, a laborer, presented a claim

against his employer, Hamilton county, and its compensation insurance carriers, Employers Mutual Casualty Company and New Amsterdam Casualty Company, three defendants. All of them denied liability to plaintiff for compensation.

The cause was tried at Aurora, Hamilton county, before a judge of the compensation court who found the issues in favor of plaintiff and the New Amsterdam Casualty Company and dismissed the proceeding as to the latter. Judgment for compensation was entered against Hamilton county and Employers Mutual Casualty Company, and they appealed to the district court where the findings and judgment were the same as in the compensation court. The cause was presented to the supreme court on appeal from the district court.

As a ground of reversal it is argued that plaintiff did not sustain the burden of proving an accident arising out of and in the course of his employment and resulting in a compensable injury. Under the pleadings the preponderance of the evidence proves the following facts:

As a common laborer plaintiff was an employee of Hamilton county. While engaged in the duties of his employment, on a pile of lumber, unloading bridge timbers from a freight car, he attempted to pull a plank with a hook which slipped from his hold in the wood. Unbalanced by the accident, he fell backward to the ground, six feet or more, and was injured. The accident and injury resulted in a hernia requiring an operation which was performed September 1, 1934. Plaintiff was in the hospital until September 12, 1934. He was totally disabled for eight weeks. His claim consisted of the following items: Hospital expenses, $52; surgeon's charge, $65; plaintiff's weekly wage on half-time, $4.50, or $36 for the eight weeks; total, $153. The accident and resulting disability arose out of and in the course of his employment. The judge of the compensation court and the district court found the facts as thus summarized and entered judgment in favor of plaintiff and against defendants,

Hamilton county and its insurance carrier, Employers Mutual Casualty Company, for $153. The record does not disclose any substantial ground for findings of a different import.

The real controversy hinges on the date of the accident. On this issue the petition of plaintiff and the evidence refer both to July 27, 1934, and August 2, 1934. On July 27, 1934, the New Amsterdam Casualty Company was the insurance carrier. On August 2, 1934, Employers Mutual Casualty Company was the insurance carrier, and it contends that the preponderance of the evidence fixes July 27, 1934, as the date of the accident, when it was not an insurer.

In the compensation court plaintiff first pleaded and testified that the accident occurred on the earlier date. Before judgment, however, it was discovered upon an examination of the records at the railroad station that there was then no railroad car of county bridge lumber in Aurora; also, that one was unloaded on Thursday, August 2, 1934. In this situation plaintiff amended his petition to plead an innocent mistake and to allege the later date. Testimony on his behalf was changed to correspond to the change in the petition. At first plaintiff did not realize he would have a temporary total disability and he did not note in writing the date of the accident. For several days he continued to work for his employer. Later, while in the hospital, he began to consider data for his claim, and evidently made a mistake as to the date. Plaintiff and his wife testified positively that he worked half of each week, Thursday, Friday and Saturday, and that the accident occurred on a Thursday. A calendar in the record shows that August 2, 1934, fell on a Thursday and that July 27, 1934, did not. While, in the meantime, two or three cars of lumber were delivered at Aurora, the proper inference from the testimony and from the evidential circumstances is that the car unloaded August 2, 1934, was the only one on which plaintiff could have been working on Thursday, when injured. It seems clear

that, as to date, the mistakes of plaintiff in his original petition and in his testimony at first were innocently made and that the corrections were properly permitted.

In this view of the evidence, the findings are the same as in the courts below. For services of counsel in the supreme court plaintiff is allowed an attorney's fee of $50 to be taxed as costs.

AFFIRMED.

IN RE ESTATE OF ANNIE KOTHE.
MARIE GONSCHIOR, APPELLEE, V. HENRY DREWES, SR., ET AL., ADMINISTRATORS, APPELLANTS.

FILED DECEMBER 11, 1936. No. 29696.

1. **Courts: APPEAL.** Where an heir at law takes an appeal from a judgment of the county court on the final report and petition for final settlement of account by administrator, the latter stands as plaintiff, and it is his duty to file petition in the district court within 50 days from the rendition of the judgment in the county court.
2. **Executors and Administrators: APPEAL.** Where a party appealing from a judgment of the county court in a probate proceeding gives a bond and files a transcript of the proceedings in the district court within the time prescribed by statute, the latter court becomes possessed of the action.
3. **Appeal.** Where objection, that an appeal bond given in the county court was not approved by the county judge, is raised for the first time in the supreme court, it will be disregarded.
4. **Executors and Administrators: APPEAL: BOND.** Where, on an appeal from a probate proceeding to the district court, an appeal bond is given within the time but is defective, the proper practice is to move the district court to compel the appellant to give a proper bond within a time to be fixed by the district court, and, upon failure to comply with the order, that the appeal be dismissed.

Opinion on motion for rehearing of case reported *ante*, p. 531. *Former opinion vacated and judgment of district court affirmed.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ.

GOOD, J.

The opinion appearing *ante*, p. 531, 268 N. W. 464, was adopted by this court after the original submission of this cause. Motion for rehearing was filed, and, by direction of this court, a reargument of the cause has been had on such pending motion.

The cause originated in the county court where the administrators of the estate of Annie Kothe, deceased, filed reports of their doings, together with a final report and petition praying final settlement of their accounts. Marie Gonschior, sole heir at law, filed objections to the report. After a hearing thereon and decree in the county court, Gonschior appealed to the district court. In the district court the administrators moved for a nonsuit because the heir at law had not filed a petition in that court within 50 days after rendition of the judgment in the county court, and also a motion to dismiss the appeal on the ground that the appeal bond was insufficient to give the district court jurisdiction. The defects assigned with respect to the appeal bond were that the bond was signed by only one surety, and that such surety was an attorney for Miss Gonschior. These motions were overruled. After hearing and judgment in the district court, the administrators have appealed to this court, and the only errors assigned here relate to the overruling of the motions to nonsuit and to dismiss.

Section 21-1306, Comp. St. 1929, provides: "In all cases of appeal from the county court * * * the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court."

The administrators contend that the heir at law is the plaintiff and, under this statute, was required to file a petition in the district court within the time designated,

and that having failed to do so motion for nonsuit should have been sustained. We think this contention is unsound. The proceeding in the county court was instituted by the administrators in filing their final report and petition seeking its approval and allowance and for their discharge. They invoked the jurisdiction of that court and sought relief by their action. Pursuant to statute, notice was given of the hearing. The heir at law appeared, filed objections, contested the application of the administrators for discharge, and objected to allowance of their report on numerous grounds. While opposing litigants in that case were not designated as plaintiff and defendant, yet the administrators were the ones who instituted the proceedings and therefore stand as the plaintiffs. The heir at law resisted the demands of the administrators and occupies the position of defendant. We are of the opinion that, under the statute, it was the duty of the administrators to file petition in the district court and that such duty did not rest upon the heir at law. The motion for nonsuit was properly denied.

The administrators contend that the court erred in overruling their motion to dismiss the appeal. In this court they assigned as a ground of such error that the bond was not approved by the county court. That ground, however, was not presented to the district court, and no ruling was had thereon in that court. This court is one of review only, to determine if the district court committed error. It did not, and could not, commit error upon a question that was not submitted to it. Where such question is raised for the first time in this court, it will be disregarded.

In an appeal from the judgment of the county court in a probate proceeding, the statute requires an appellant to give a bond and to file a transcript, and, upon filing such transcript in the district court, that court becomes possessed of the action. Comp. St. 1929, sec. 30-1606. This court has frequently held that where a bond is given, even if defective, still the court has obtained jurisdiction,

and that the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and condition as required by law; that the district court should order such bond to be given within a definite period and, upon failure to comply with the order of the court, the action may be dismissed.

In *Jacobs v. Morrow*, 21 Neb. 233, 31 N. W. 739, among other things this court said (p. 236): "Where a bond has been duly approved by the officer whose duty it was to approve the same, it will be presumed that it conformed in all respects to the requirements of such officer, and it will not be void, even though some of the formalities of the law have not been complied with, provided the bond is filed within the time fixed by statute. The appellate court may permit or require a new bond to be filed, and will not dismiss an appeal where it is possible by an amendment to correct or replace an erroneous bond."

Rube v. Cedar County, 35 Neb. 896, 53 N. W. 1009, was an action in which a taxpayer appealed from the allowance of a claim by the county board, and the appeal bond did not comply with the statutory requirements. This court held that the proper procedure was that the district court should give opportunity to file a new and sufficient undertaking in the district court.

In *Galligher v. Wolf*, 47 Neb. 589, 66 N. W. 645, where, in an appeal from the justice court to the district court, the appeal bond was insufficient, this court held that the proper practice was for the appellee to move to require either change or renewal of the bond, and that the district court should make an order, fixing the time within which the new bond should be given, and direct a dismissal of the action for noncompliance with such order.

In *Chase v. Omaha Loan & Trust Co.*, 56 Neb. 358, 76 N. W. 896, wherein there was an appeal from the county court to the district court, it was held: "When an insufficient appeal bond is filed, the appropriate practice is to move in the appellate court for an order requiring a renewal of the bond by a time to be designated by the

court, and in default thereof that the appeal be dismissed."

In *Gannon v. Phelan,* 64 Neb. 220, 89 N. W. 1028, there was an appeal from the county court to the district court, and this court held:

"If the appellee is dissatisfied with the form of the bond, the appropriate practice is to move in the appellate court for an order requiring a new bond to be filed within a time designated by the court, and in default thereof that the appeal be dismissed.

"In such case it is error to peremptorily dismiss the appeal without giving to appellant the opportunity to give a new bond."

In *State Savings & Loan Ass'n v. Johnson,* 70 Neb. 753, 98 N. W. 32, this court held: "An appeal bond signed only by the judgment debtors, if approved by the justice rendering the judgment, is sufficient to confer jurisdiction on the appellate court to have the defect corrected."

In *Northrup v. Bathrick,* 78 Neb. 62, 110 N. W. 685, an appeal was taken from the county court to the district court, and this court held:

"It is error for the district court to dismiss an appeal from the judgment of a county court for an insufficient bond, where the bond given contains all the statutory provisions and is signed by a surety and approved by the county judge.

"If such bond is defective appellant should be allowed to provide a new and sufficient bond."

In *In re Estate of Hoagland,* 128 Neb. 219, 258 N. W. 538, there was an appeal from the county court to the district court in a probate proceeding. This court held: "The term 'proceeding,' as employed in sections 20-852 and 20-853, Comp. St. 1929, includes the 'filing of an appeal bond' to obtain a review of a judgment of the county court in a probate proceeding, and the right of amendment of such bond is within the purview of, and governed by, the sections referred to herein."

The previous rulings of this court upon the propositions

here involved clearly show that this jurisdiction is committed to the rule that, where a defective appeal bond in a probate proceeding is filed within the time prescribed by statute, the proper procedure for the appellee is to move to require a proper bond to be given within a time designated by the district court, and, upon failure to comply with the order, that the appeal may be dismissed. The appeal bond given in the instant case is admittedly defective. It was sufficient, however, to give the district court jurisdiction. The motion of the administrators was for a dismissal and was not to require the appellant to give a bond in form and substance as required by statute. The motion was not made until the case was called for trial. Had the administrators made a proper motion, it no doubt would have been sustained. The rulings of the trial court on the motions were in conformity with the former holdings of this court.

It is true, as pointed out in the former opinion, that there are many cases arising from appeals in misdemeanor actions, wherein this court has held that the giving of a bond in such cases, in the form and on the conditions substantially as required by statute, is necessary to give the appellate court jurisdiction, but such has not been the rule in civil cases and probate proceedings.

The record in this case does not disclose error prejudicial to the administrators. Our former opinion is vacated, and the judgment of the district court, with respect to the rulings complained of, is

AFFIRMED.

IN RE ESTATE OF ANNIE KOTHE.
MARIE GONSCHIOR, APPELLANT, V. HENRY DREWES, SR., ET AL., ADMINISTRATORS, APPELLEES.

FILED DECEMBER 11, 1936. No. 29700.

1. **Executors and Administrators: COMPENSATION.** Administrators will not be deprived of their commissions and compensations

because of an unusual delay in the settlement of an estate, where there appear reasonable grounds for such delay.

2. ———: APPEAL: ISSUES. On an appeal to the district court from the allowance of final report of an administrator in the county court, the cause must be tried on the same issues raised in the county court.
3. ———: CLAIMS: ALLOWANCE. The allowance by the county court of a claim, duly filed against the estate of a decedent, amounts to a judgment and is final unless appealed from.
4. ———. Irregularities or errors in the settlement of the estate of one decedent will not, ordinarily, be inquired into upon a hearing in the estate of another decedent.
5. ———. COMPENSATION. Evidence examined and *held* to sustain the allowance of fees to administrators and of fees to attorneys for adminiministrators.

Opinion on motion for rehearing of case reported *ante*, p. 537. *Former opinion vacated and judgment of district court affirmed.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ.

GOOD, J.

From a decree of final settlement in the county court in the estate of Annie Kothe, deceased, Marie Gonschior, sole heir at law, appealed to the district court. After trial and decree in the district court, Gonschior perfected this appeal, and the administrators perfected a separate appeal. Opinions have heretofore been adopted in each of the cases and appear *ante*, pp. 531, 537, 268 N. W. 464, 468. In this cause Gonschior filed a motion for a rehearing, pending which, by order of the court, the cause has been reargued.

The administrators of the estate of Annie Kothe, deceased, filed their final report and petition for final settlement, and on a hearing and decree in the county court Marie Gonschior, the sole heir at law, appealed to the district court. After a trial there, the district court entered judgment for the sole heir at law against the administrators in the sum of $2,416.40, and, being

dissatisfied with the amount of judgment in her favor, Gonschior has appealed to this court.

Among the items in the final report of the administrators, to which objections were made, were the following: Failure of the administrators to account for $75 for oats listed in the inventory; $50 paid to one McCullough for appraising property for income tax purposes; $25 paid to one Jones, stenographer, for transcribing notes in income tax hearing; $12 for witness fees on inheritance tax hearing; $4.40 paid to one of the administrators as witness fee for testifying on his own reports. The court found that each of these items was not properly chargeable against the estate and rendered judgment in favor of Gonschior on each of the items.

The county court allowed the administrators as fees and commissions the total sum of $2,250. In the district court this amount was found to be excessive; that $500 was a reasonable allowance for the fees and commissions, and judgment was rendered in favor of Gonschior for $1,750 on this item. The heir at law contends, however, that, because of the delay and failure of the administrators to account for certain items, and in permitting certain claims to be allowed against the estate that should not have been allowed, the administrators were not entitled to any fees whatever.

In this view we are unable to concur. It appears that Henry Drewes, Sr., and A. M. Berry were appointed jointly as administrators. Mr. Berry had formerly been county treasurer. After he was appointed as an administrator he became mentally incompetent, and the record shows that he has been committed to a hospital for the insane. Mr. Drewes appears to have been a farmer, with limited experience in accounting and bookkeeping. Most of the duties of administering the estate devolved upon him. From his evidence in the record, we are impressed that he was perfectly honest in his undertakings and doings, but he failed to keep a regular account of all of his receipts and doings as administrator. It appears that he

was largely guided by his counsel, W. H. Barnes, of Fairbury, and that, on receiving any item of income for the estate, he took it to Mr. Barnes, who deposited it in a bank account in the name of the administrators. Unfortunately Mr. Barnes, who was a reputable attorney of Jefferson county, was ill during the last year or two of his life and passed away prior to this hearing; Mr. Drewes was not able to have his testimony, and his own memory was faulty and defective. We think that his failure to account for the item of oats was an oversight, and not an intent to defraud the estate.

Complaint is made of the long delay. Annie Kothe died December 2, 1929, and petition for final settlement was not filed until June, 1933. Objection to the report was filed in July, 1933, and partial distribution of the estate was ordered in July, 1933. In December, 1934, additional objections to the reports were filed by the heir, and final decree was not entered in the county court until December 10, 1934. It thus appears that there was an unusual delay which is not fully explained. However, it does appear that among the assets of the estate of Annie Kothe was a real estate mortgage for $6,000, which could not be collected except by foreclosure proceedings; that a foreclosure action had been commenced and had not reached final determination when this hearing was had in the county court. It also appears that there were a number of claimants for the estate of Annie Kothe, and that at one time the state claimed that she died intestate and without heirs, and claimed that her estate should escheat to the state. It does not clearly appear when it was finally determined that Gonschior was the sole and only heir of Annie Kothe, deceased.

In view of these facts, the illness and death of Mr. Barnes, the unfortunate mental condition of Mr. Berry, one of the administrators, may, we think, fairly account for the delay in the settlement of the estate. Under such circumstances, we think the administrators should not be deprived of compensation. The amount finally allowed

by the district court was somewhat in excess of the statutory fee, but it clearly appears that there were extraordinary services rendered by the administrators. The evidence as to the value of their services is somewhat in conflict, but is ample to sustain the finding of the district court.

The heir at law claims that no allowance should have been made to the administrators in excess of their commissions, because no petition or claim was filed by the administrators for extraordinary services, and that such a claim should have been filed, specifying each item of the particular service for which extra compensation was asked. We have carefully examined the objections filed in the county court, and we do not find that this question was raised in that court. It is a familiar rule that appeals of this character to the district court must be tried on the same issues as trial was had in the county court. Since this question was not presented in the county court, it was not one requiring attention by the district court. If the heir at law had desired to litigate that question, it should have been included in the objections made in the county court.

Objection is made to the allowance of attorney's fees. The county court allowed fees in settlement of the estate to the attorneys representing the administrators in the total sum of $1,750. The heir at law contends that no allowance should be made for attorney's fees on account of the way the estate was handled, but we cannot agree with this contention. The district court found that the allowance made by the county court for attorney's fees was excessive to the extent of $500; reduced the amount from $1,750 to $1,250, and rendered judgment in favor of the heir at law in the amount of the excess, to wit, $500.

A large amount of evidence was taken on the question of the value of the services performed by the attorneys for the administrators. Most of the evidence was given in response to hypothetical questions, and the amounts

testified to differed very greatly. The hypothetical questions propounded on behalf of the heir at law were not complete, in that they did not take into account all the services rendered by the attorneys, and, on the other hand, the hypothetical questions propounded by the attorneys for the administrators included many items of which there was no proof that such service was performed. However, it fairly appears from the evidence that the value of the services rendered was not far from $1,250, and the finding by the district court of that amount is amply sustained by the evidence.

Complaint is made concerning the allowance of a number of claims against the estate of Annie Kothe for nursing. The record shows that these claims were presented and filed in the regular way; that the administrators filed objections thereto; that hearing was had on each of the claims and allowances made thereon by the county court. No appeal was taken from these allowances. It is a familiar rule that an allowance of claim against a decedent's estate in the county court is, in effect, a final judgment, and unless appealed from is conclusive.

Annie Kothe was the widow of John Kothe, deceased, who predeceased her by a period of six days. He left a will in which Annie Kothe was the sole legatee and devisee. Complaint is made in this case of fees and allowances that were made in the estate of John Kothe, deceased, and also that the inventory in this case fails to show that it included all of the estate of John Kothe on the final settlement of his estate. Evidence upon these points was taken in the district court, but on the conclusion of the hearing the trial court struck out all evidence relating to the estate of John Kothe, deceased. In this we think that the court ruled correctly. That estate was completely administered and the administrators discharged. No appeal was taken from the acts of the administrators in that estate. If there were any irregularities in the administration of the estate of John Kothe, deceased, they cannot be reviewed in this proceeding.

The record seems to be free from prejudicial error. Our former opinion is vacated and withdrawn, and the judgment of the disrict court is

AFFIRMED.

CONTINENTAL INSURANCE COMPANY, APPELLEE, V. CHARLES SMRHA, DIRECTOR OF DEPARTMENT OF INSURANCE, ET AL., APPELLANTS: CAPITAL FIRE INSURANCE COMPANY, ET AL., INTERVENERS, APPELLEES.

FILED DECEMBER 11, 1936. No. 29874.

1. **Constitutional Law**: TAXATION: CLASSIFICATION. A classification of persons, corporations or property for taxation purposes must be based upon real and substantial differences in situation and circumstances surrounding the members of the class, and, to be valid, the law must operate uniformly upon every member of the class.
2. ———: ———. An annual tax imposed upon fire insurance companies engaging in or carrying on business in the state, based upon gross premiums received by each for insurance written within the state, is a "privilege" or "franchise" tax in view of the provision, in the statute creating it, for the revocation of the company's certificate to transact business in the state upon failure to pay the tax.
3. ———: ———: UNIFORMITY. A "privilege" or "franchise" tax, to be valid, must operate equally and uniformly upon all members of the class brought within its operation.
4. **Statutes**: CONSTITUTIONALITY. Chapter 99, Laws 1935, is unconstitutional for the reason that it does not comply with the requirements of equality and uniformity contained in section 1, art. VIII, and section 18, art. III of the Nebraska Constitution.

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

William H. Wright, Attorney General, and *Daniel Stubbs,* for appellants.

Kenneth S. Finlayson, Jackson B. Chase, Chambers & Holland, Allen, Requartte & Wood, Mockett & Finkelstein, Arthur C. Pancoast, Arthur F. Mullen and *Paul P. Massey, contra.*

Rosewater, Mecham, Shackelford & Stoehr and *Seymour L. Smith, amici curiæ.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CARTER, J.

This is a suit in equity to enjoin the director of insurance and the treasurer of the state of Nebraska from enforcing the provisions of chapter 99, Laws 1935, for the reason that the act is unconstitutional. The trial court held the act to be unconstitutional and appellants thereupon perfected their appeal to this court.

The act in substance provides that every fire insurance company now or hereafter engaging in or carrying on business in this state shall pay to the state treasurer annually a tax equal to 2 per cent. of the gross fire premium receipts, after deducting return premiums and considerations paid for reinsurance, on all fire premiums collected on policies of fire insurance on properties situated within the corporate limits of all incorporated cities and villages in the state during the year next preceding as shown by their annual statement. The act further provides that no certificate shall be issued to any such company authorizing it to do or continue in business in this state while any such tax remains due and unpaid. The balance of the act provides for the distribution of the funds collected to cities and villages maintaining a fire-fighting organization in proportion to their populations, for the relief of sick, injured or disabled firemen.

Appellees contend that the act is violative of section 1, art. VIII, and section 18, art. III of the Constitution. That part of section 1, art. VIII, that is material here provides as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property."

That part of section 18, art. III, to which reference is made is as follows: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

It will be noticed that the tax in question is levied upon fire insurance companies writing fire insurance policies on properties within the corporate limits of all incorporated cities and villages in the state. The inquiry at once presents itself as to the reason for the distinction or difference here made by which a certain class, from all those directly concerned in the subject-matter, is segregated, and upon that class the burden of the tax laid, while no such tax is laid upon others likewise concerned. An examination of the act leads us to believe that the only basis for the classification is the fact that fire insurance companies derive a direct benefit from the maintenance of fire-fighting departments, companies or organizations by the incorporated cities and villages of the state. Does such a classification for taxation purposes comply with the uniformity provisions of our state Constitution?

There can be no question that fire insurance companies derive benefit from the maintenance of fire-fighting departments in our incorporated cities and villages, even though such benefits may be reflected in the insurance rates charged in those localities. The evidence shows, however, that persons owning property within the corporate limits of our cities and villages who carry no fire insurance are also benefited as much, if not more, than an insurance company. The evidence also shows that property owners who are insured for less than the full value of their property are also directly benefited. The property of the state, county and municipality located within the corporate limits of cities and villages also receive direct benefits. In addition to all this, the public generally is benefited by the protection afforded from large conflagrations which not only damage

and destroy property but also subject the public itself to injury and death. There can be no question that the duty of a fire department is the same towards all combustible property within the municipality. It owes no greater duty towards property insured for its full insurable value than it does to property that is only partly insured or not insured at all. This subject is well stated in *Lowry v. City of Clarksdale*, 154 Miss. 155, 122 So. 195, wherein the court said:

"If then the legal duty of the fire-fighting department is as much owed towards uninsured property as towards that which is insured, and if, as we know, the personal element in an extreme emergency would favor the uninsured, it must be obvious that the answer above adverted to becomes no answer at all in point of substantial reason for the attempted distinction or classification; and no other answer as good as that mentioned has been advanced. For instance, among these answers it is in effect argued that although the duty to all species of combustible property insured and uninsured is the same, yet there is in the status of owners as owners, as distinguished from insurers as such, a sufficiency of distinction that upon this difference in status the classification may be legally upheld. It is true that such a difference might serve for a classification for some purpose, but the argument and every similar argument overlooks the requirement that the reason upon which the classification is grounded must be a reason which has a just and substantial relation to the particular object to be accomplished—an object which is a public one, for it is fundamental that no tax may be laid to raise funds for a mere private or personal purpose. The contemplated public object to be accomplished here is the improvement of the service in the fire-fighting department, and since that improvement moves in its benefits and advantages as much and in exactly the same way towards the uninsured owner of property of a certain value as it does towards an insurance company carrying a policy in an equal amount in value on another piece of property, there is no actual difference between the two in relation to the object to be ac-

complished. And every argument advanced to sustain this tax runs likewise into a corner.

"Under those arguments, if the tax here in question may be imposed upon fire insurance companies, then upon like principles it may be extended and these companies could be required to pay the entire expense of a city fire department, and by a parity of reasoning there could be added all the costs of construction, extension, and operation of the water-works department, since a modern fire-fighting department is essentially dependent upon an adequate water supply. By like, or even better, reasoning, the banks and jewelers of a city could be required to pay the entire costs of the police department on the grounds that banks and jewelry stores are distinct beneficiaries of police protection against burglaries and robberies; and so on as to many other features of municipal administration."

In *State v. Merchants Ins. Co.*, 12 La. Ann. 802, the court in a like case said: "But in the case before us there is no property improved or assessed; all is conjectural and arbitrary; one class of corporations is taxed an invariable sum for the benefit of another class; there is no possibility of ascertaining whether the tax is a *quid pro quo*; the fire companies are not compelled by the law to do anything for the insurance companies; a bounty is secured to the fire department by confiscating the money of the defendants, without providing that any service shall be rendered to the defendants by the fire department; and even if this could, for a moment, be regarded as an assessment for benefits conferred, its inequality is glaring; every owner of buildings and other combustible property in New Orleans, who is either wholly or in part his own underwriter, is presumed to be benefited by the fire department in the same way as the insurance companies are. Why should the companies alone pay taxes for this common benefit? Again: large amounts of property in New Orleans are insured abroad in offices which have no public agencies here; those offices are likewise as much benefited by the fire department as the New Orleans offices are; and yet they can be made to pay

no tax under this law which is personal to the companies domiciled or represented in New Orleans."

In *State v. Hall,* 129 Neb. 669, 262 N. W. 835, this court has recently said: "The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated."

The record conclusively shows that the classification attempted on the basis of benefits received and objects to be accomplished does not rest upon any real differences in situation and circumstances from others within the class. In the absence of some real and substantial distinction which bears a reasonable, just and proper relation to the objects sought to be accomplished, a tax levied upon a part of those within the same class cannot be sustained. The classification and the object to be accomplished must be germane.

We necessarily conclude that the classification made on the basis of benefits derived from the purpose for which the tax fund was appropriated does not meet the requirements of uniformity as to class required by section 1, art. VIII, and section 18, art. III of the Constitution.

The principal contention of the appellants, however, is that the inclusion in the act of the provision that "no certificate shall be issued to any such company, authorizing it to do or continue in business in this state while any such tax remains due and unpaid" makes the tax a franchise or privilege tax, and that, as such, it meets constitutional requirements. It is the settled law that a state may, subject to constitutional restrictions, tax a foreign corporation for the privilege of doing business within the state. 61 C. J. 340.

In *Equitable Life Assurance Society v. Thulemeyer,* 52 Pac. (2d) (Wyo.) 1223, the court held that such a provision in a similar act constituted the tax a privilege or franchise tax.

In *Pittsburg Life & Trust Co. v. Young,* 172 N. Car. 470, 90 S. E. 568, the court said: "It is well settled, then, that a tax for the privilege of carrying on business in a state, or a franchise tax, may be imposed by the latter upon a foreign corporation, and the amount of it may be fixed on the basis of a percentage of its gross receipts from business or property, provided the business is transacted in the state from which receipts are derived or the property is located there. *So. B. and L. Ass'n v. Norman,* 98 Ky. 294 (s. c., 31 L. R. A. 41; 56 Am. St. Rep. 367, and note at p. 374); *Pacific Exp. Co. v. Seibert,* 142 U. S. 339."

In *State v. Continental Ins. Co.,* 67 Ind. App. 536, 116 N. E. 929, the court said: "The primary purpose of said section 10216, *supra,* is to raise revenue. It is based on the theory that a foreign fire insurance company permitted to come into the state should contribute to the public revenue in proportion to the benefits actually received. The plan is eminently fair and just. Part of the penalty provided for nonpayment of this tax is the revocation of the license to do business within the state. These statutes are interrelated and should be construed together. The one provides for the entrance of a foreign fire insurance company into the state, and the other for its expulsion therefrom. The tax may properly be called a graduated privilege tax. It is a semi-annual tax imposed upon a foreign corporation for the privilege of exercising its corporate franchises and carrying on business in a corporate capacity within the state. The consideration for the tax is the insurance business done within the state during the six months, ascertained at the expiration of that period and expressed in the gross amount of premiums received."

We therefore conclude that the tax in question is a privilege or franchise tax. In view of the result arrived at in this opinion, we will not discuss the effect of the inclusion of domestic and nonincorporated fire insurance companies within the class upon which the franchise or privilege tax was to operate.

It must be borne in mind that the corporation franchise

tax involved in the case at bar is not a property tax but an excise levied upon the privilege of doing business in the state and may therefore be computed according to any method the legislature may see fit to adopt, provided that constitutional requirements of equality and uniformity are not violated. A statute imposing such a tax which applies equally to all corporations in like conditions and makes a reasonable and not a purely arbitrary classification meets constitutional requirements. As we have stated, the tax is levied upon the privilege of doing business in the state and the validity of the excise is in no way dependent upon the purpose for which the fund thus collected is used. In other words, all corporations of the same class seeking the privilege of doing business in the state are entitled to equal treatment.

In the case at bar it will be noted that the tax in question is levied against all fire insurance companies desiring to do or to continue in business in this state. This in itself is certainly a proper classification, but, in the computation of the tax, all fire insurance companies seeking the privilege of doing business in the state are not treated equally or uniformly. It will be noted that the tax of 2 per cent. is upon premiums collected upon policies of fire insurance written upon properties within the corporate limits of cities and villages. The evidence shows that many insurance companies operate primarily within cities and villages, while others devote the greater part of their activity in rural districts of the state. The record also discloses that most fire insurance companies write insurance in both the rural districts of the state and in the incorporated cities and villages thereof in varying proportions. Can it be said that a privilege tax that requires a fire insurance company doing business in cities and villages to pay 2 per cent. of the premiums collected for policies written on urban properties, while the company writing insurance on rural properties only is not subject to any tax, is equal and uniform? We fail to see any reasonable basis for the distinctions thus made. The tax before the court is state wide in its operation

and the limitations of the provisions of the act to those companies writing policies of fire insurance on urban properties is without the differences of situation and circumstance that are required to uphold the levy of the tax against a part of the class upon which it was to operate in view of the object to be obtained.

In *State v. Pierce Petroleum Corporation*, 318 Mo. 1020, 2 S. W. (2d) 790, the court said: "The tax is not a property tax, but an excise levied upon the privilege of transacting business in this state as a corporation. *State v. Tax Commission*, 282 Mo. 213, 221 S. W. 721. It may therefore be computed according to any method the legislature sees fit to adopt. That method may or may not take into consideration the value of the privilege taxed. It is only necessary that the resulting tax be not obnoxious to the constitutional requirements of uniformity and equality. 2 Cooley on Taxation (4th ed.) sec. 860. And those requirements are fully satisfied if the statute imposing the tax applies equally to all corporations in like conditions, and makes a reasonable and not a purely arbitrary classification. *City of St. Charles v. Schulte*, 305 Mo. 124, 264 S. W. 654; *Witham v. Stewart*, 129 Ga. 48; *Wheeler v. Weightman*, 96 Kan. 50; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684."

That part of section 18, art. III of the Constitution, hereinbefore quoted, is applicable to the case before us. "A law, which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation." *State v. Berka*, 20 Neb. 375, 30 N. W. 267. It necessarily follows that a law is not general but special which does not operate uniformly upon the class within the relations or circumstances provided for.

This court has recently held that section 18, art. III, prohibits the legislature from passing legislation which does not operate equally and uniformly upon all members of the class brought within its operation. *State v. Hall, supra; Petersen Baking Co. v. City of Fremont*, 119 Neb. 212, 228

N. W. 256; *Speier's Laundry Co. v. City of Wilber, ante,* p. 606, 269 N. W. 119. If the tax before us is a privilege tax, and we think it is, the class attempted to be taxed is all fire insurance companies desiring to do business within the state of Nebraska. The legislature having failed to legislate uniformly upon the class designated, the act is violative of section 18, art. III of the Constitution.

Appellees contend that the act is violative of other constitutional provisions which will not be considered in view of the result at which we have arrived.

The judgment of the district court is correct and is

AFFIRMED.

ROSE, J., not participating.

GOOD, J., participating on briefs by stipulation.

RAY PESTER, APPELLEE, V. PAUL H. DEAN, APPELLANT.

FILED DECEMBER 11, 1936. No. 29744.

1. **Vendor and Purchaser:** CONTRACT: RESCISSION. When a vendor in a contract for the sale and purchase of real estate, which does not provide for the forfeiture of an advance payment or of a note given in lieu thereof in the same transaction and as a part of the purchase price, at a time when the vendee is in default under the contract, rescinds the contract by selling the real estate to another before the time fixed in the contract for final performance by vendee, such vendor cannot retain the advance payment or collect a note given in lieu thereof, in the absence of an agreement between the parties that he may do so.
2. ———: ———: ———: DAMAGES: PLEADING. In such a case the vendor is entitled to recover damages or retain the same from the advance payment, but such damages must be set up in the pleadings.

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

Squires, Johnson & Johnson, for appellant.

Evans & Lee, contra.

Heard before GOSS, C. J., GOOD, EBERLY and CARTER, JJ., and MUNDAY, District Judge.

MUNDAY, District Judge.

This action was brought in May, 1933, by Ray Pester against Paul H. Dean upon a promissory note dated November 7, 1929, in the sum of $2,000 with interest thereon at 10 per cent. per annum from December 1, 1929. The note was secured by a chattel mortgage on corn belonging to Dean.

The defendant, Dean, filed his answer alleging that on the date the note was executed the plaintiff was the owner of certain real estate and that on said date plaintiff entered into an agreement with the defendant with reference to said real estate. Said agreement provided in part that Dean would pay $11,200 for said real estate, payable as follows: Cash in hand $2,000, receipt whereof is hereby acknowledged; balance as follows: The second party to give mortgage on the above land to secure two notes, one for $2,000 running for 15 months from December 1, 1929, and one for $4,000 running for 27 months from December 1, 1929, both bearing 6 per cent. interest, said interest being payable March 1, 1931, and March 1, 1932; that the first party is to assume and pay the interest which will accumulate on the amount of the two mortgages from December 1, 1929, to March 1, 1930; that first party is to accept as a part payment of the purchase price a second mortgage in the sum of $1,000 running for a term of five years from March 1, 1930, bearing 6 per cent. interest, payable annually. The contract also provided as follows:

"The first parties to the contract are to make and deposit a deed to the above described land which deed is to remain with the contract until it is fulfilled. The second party is to make the final payment of $2,200 on or before April 1, 1930, to be secured by a first and second mortgage on the above described property. The party of the second part further agrees to pay the taxes on said mortgage and the debt secured thereby, and to carry $..... insurance on

said property, payable in case of loss to said first party. The party of the first part is to furnish to the party of the second part, or assigns, a warranty deed and a good and merchantable abstract of title on or before December 1, 1929, assign all insurance on said buildings. Possession to be given to the property on March 1, 1930, but the deed to the land is not to be turned over to the second party until the final payment is made on the land. Pay all taxes assessed against said land, and if there is a mortgage on said property, pay interest thereon up to March 1, 1930. * * * It is mutually agreed that time is an essential element in this contract and it is further agreed that in case either of the parties hereto shall fail to perform the stipulation of this contract, or any part of the same, the failing party shall pay the other party of this contract the sum of $2,000."

The defendant further alleged that he signed said note as part of the same transaction and for the sole and only purpose of carrying out the terms and conditions of said agreement; that the plaintiff neglected and refused to carry out the terms and conditions of the agreement in any respect, and among other things alleged that the plaintiff failed to tender or give possession of said premises to the defendant; failed and refused to pay the taxes due March 1, 1930; failed and refused to pay the interest on the indebtedness, then a lien against said premises, that was owing March 1, 1930; that the plaintiff on March 7, 1930, sold and conveyed the premises to one Sherbeck for $11,200, and that said deed was recorded with the register of deeds of Custer county on March 9, 1930; that by reason of the failure of plaintiff to carry out the terms of said agreement said note became null and void and of no force and effect, and the same was without consideration, and that there was no liability upon the note by the defendant.

The reply of plaintiff was in the nature of a general denial, but admitting the note was given in lieu of cash as part payment of purchase price of the land and as part of the consideration for the purchase price of the land involved

in the transaction. The reply also alleged that defendant had failed to carry out the terms of the contract; that it was agreed between the parties that plaintiff was to pay taxes and other payments from money received from defendant when he paid the $2,000; that the defendant informed plaintiff before and after December 1, 1929, that he would not carry out terms of contract; that plaintiff paid taxes about March 1, 1930, and completed all terms of the contract; that the $2,000 note was liquidated damages to plaintiff. The reply admitted that plaintiff sold real estate in question to Sherbeck on March 7, 1930, but that Sherbeck agreed to convey the property back by deed upon demand.

A jury was waived and the case tried to the court. The court found for plaintiff, and defendant has appealed.

The case seems to have been tried on the allegations in the answer and reply. The appellant contends that the plaintiff rescinded and breached the contract and that there was therefore a failure of consideration for the note.

The appellee claims that rescission was not pleaded. In order to allege rescission of a contract, it hardly seems necessary to use the word "rescission," if facts are pleaded that show a rescission. The answer is not a model, but we think it states facts sufficient to admit evidence of rescission of the agreement.

After the agreement was made it was left in escrow with one H. S. Kinsey, vice-president of the Arcadia State Bank. Mr. Kinsey was to act for both parties in making up notes, deed and to look after abstract of title. The plaintiff executed deed immediately. The defendant sent the abstract to his attorneys immediately. The abstract of title was not ready December 1, 1929, and neither of the parties paid much attention to the transaction thereafter. Time was the essence of the contract, but the parties by their action waived it. The evidence does not show that the title was ever approved by defendant's attorneys, nor does it show just what took place as to approving the title. The defendant did not make any payments or execute any notes. The

plaintiff did not pay the taxes or interest on time. Nor did either party demand anything further of the other, except as shown in the conversation between the parties, hereinafter mentioned. About December 15, 1929, as claimed by plaintiff, and about March 1, 1930, as claimed by defendant, the parties met but had practically no conversation. Both agree that defendant said he was not going ahead with the contract and was not going to take the land. This was about all that was said. It does not appear that the parties met again until the trial of the case. The following is the statement by plaintiff to questions asked by the trial judge, referring to this conversation: "The Court: Did you consider the contract terminated when he told you that—you said he told you that he wasn't going ahead with the deal—did you consider the contract breached then? A. Well, yes. The Court: And that that was the end of the deal? A. Yes; I did. The Court: That was what you thought? So then you went and tried to sell it to somebody else, did you? A. Yes, sir."

The next step seems to be this suit, which was filed May 24, 1933.

The parties stipulated that on March 7, 1930, plaintiff sold the real estate to one Sherbeck for a consideration of $11,200. This sale was before the last payment was to be made by defendant, and the consideration was for the same amount as the defendant was to pay for the land.

No mention is made of the note in suit in the contract for sale of the land. The parties agree that the note was executed and delivered to the plaintiff in lieu of the $2,000 cash payment provided for in the contract, and was a part of the original consideration for the real estate. The note was made the same day as the contract, and the other notes were to be made on December 1, 1929. The final payment by the defendant, as provided by the contract, was to be paid April 1, 1930.

As applicable to this state of facts, the defendant says that the plaintiff's act in selling the land constituted a rescission of the contract and put the parties *in statu quo*, and

that therefore the plaintiff cannot recover on the note given for part of the purchase price of the land.

Nowhere does it appear that the note in suit was other than a substitute given in lieu of the cash payment mentioned in the contract. The note seems to have been given as part of the same transaction as the agreement. The plaintiff testified: "Q. This note shows $2,000 for value received, and I wish you would state to the court whether or not this is part of some transaction. (No answer.) Q. This was given as part of some transaction that was entered into on that day, November 7, 1929, was it not? A. Yes. Q. I wish you would state to the court just what that transaction was. A. That was a down payment on a quarter section of land that I sold him."

The escrow holder of the papers was not sure that the note was left with him. At least this part of the transaction is not made clear by the evidence. The agreement had no provision as to forfeiture of the money or note in lieu thereof, if defendant defaulted in carrying out the terms of the contract.

In support of the proposition that the plaintiff rescinded the agreement when he sold the land after the defendant refused to carry out the terms of the contract, the appellant cites many authorities, including *Eaton v. Redick,* 1 Neb. 305; *Durland Trust Co. v. Augustyn,* 110 Neb. 800, 195 N. W. 172; *Lowry v. Robinson,* 3 Neb. (Unof.) 145, 91 N. W. 174; *Adler v. Kohn,* 96 Neb. 346, 147 N. W. 1131; *Dent v. Johnson,* 111 Neb. 162, 195 N. W. 938.

The holdings of the courts in the different states largely depend upon the wording of the agreement under consideration in each case, that is, whether or not the agreement provided that the seller on default of the purchaser might terminate the agreement and retain what had been paid on the contract. The decisions are at variance. In the early Nebraska case of *Eaton v. Redick, supra,* this court announced the rule that, when the vendor availed himself of the vendee's default and elected to put an end to the contract by reselling the real estate to another, the vendee

might recover back the money he has paid in part performance, with interest from the date of rescission. Also, there appears to have been no clause in the agreement providing for forfeiture in that case.

The appellee claims that the *Eaton* case has been virtually overruled by this court in the cases of *Patterson v. Murphy*, 41 Neb. 818, 60 N. W. 1, and *Maloy v. Muir*, 62 Neb. 80, 86 N. W. 916. It will be noted in both of the last-named cases the contract contained the provision for forfeiture of advance payments if the purchaser defaulted in payment. In each of these cases the contract controlled. But the *Eaton* case has not been overruled. There are expressions in the cases last cited, which, separated from their context, seem to support the appellee's contention. Such expressions are argumentative and should be considered in reference to those cases only. In later cases in this court the *Eaton* case has been cited and approved.

In *Lowry v. Robinson, supra*, the *Eaton* case is approved in the following language: "Plaintiff's contention is that the fact of the cancelation of the contract for sale and purchase is in itself sufficient to authorize plaintiff to recover the purchase money paid. The rule seems reasonable and settled upon authority that where a contract of sale and purchase has been rescinded, the vendor cannot thereafter retain the part payment of purchase money which he may have received. The vendee is entitled to repayment of the purchase money subject to any recoupment for damages due the vendor provided the rescission of the contract was on account of the failure of the vendee to comply with its terms. It is probably likewise true that where the contract is rescinded by mutual consent, the vendee is entitled to a like repayment of the purchase money paid. *Eaton v. Redick*, 1 Neb. 305; *Shively v. Semi-Tropic Land & Water Co.*, 33 Pac. 848 (99 Cal. 259); *Cleary v. Folger*, 24 Pac. 280 (84 Cal. 316); *Evans v. Bently*, 29 S. W. (Tex.) 497. But the general rule is subject to the contract or agreement of the parties in making the rescission."

In *Adler v. Cohn, supra*, is the following language in the

opinion: "In *Eaton v. Redick*, 1 Neb. 305, it was held that, when the vendor exercised his option to rescind the contract, the parties stand as if no contract had ever subsisted between them."

In *Durland Trust Co. v. Augustyn, supra,* the *Eaton* case is cited to a like proposition of law, which is approved by the court. In *Dent v. Johnson, supra,* this court cited the *Eaton* case as authority to the proposition that, if a vendee was in default, a subsequent sale by the vendor amounted to a rescission by him, and he became liable for the purchase money paid. These cases were all decided since *Patterson v. Murphy, supra,* and *Maloy v. Muir, supra.*

In these Nebraska cases the decisive point seems to be whether or not the agreement provided for a forfeiture of the advance payment in default of subsequent payments by the purchaser. We think this court is committed to the rule that, where there is a rescission of the contract by the vendor because of failure to make payments by the vendee and the vendor sells the real estate to another before the time of final compliance by the vendee, the vendor should return the payments made by the vendee, unless the agreement provides otherwise. Also, that a resale of the real estate by the vendor, when the vendee is in default under the contract, before the time of final performance by vendee, and where no provision is made in the contract for forfeiture of advance payment, amounts to a rescission of the contract by the vendor. Of course, if the vendor is not permitted to retain the advance payment made on a contract as a forfeiture, he will not be permitted to recover on a note given in lieu of such advance payment.

The case of *King v. Waterman,* 55 Neb. 324, 75 N. W. 830, cited by appellant, is not applicable. In this case the note was an independent transaction from the agreement. In the instant case there is no independent contract in the sense that the contract was not a part of the same transaction as the note. In the case under consideration the parties treated the note in suit and the agreement as the same transaction and each so testified.

The appellee cites many authorities from other states to the proposition that there is no rescission by a resale of real estate by vendor when vendee is in default, and that vendor may retain the advance payment by vendee; but in most of those cases there is a provision in the agreement that the vendee shall forfeit the advance payment in the event of vendee's default.

On the proposition that plaintiff is entitled to all his damages in the event of rescission for vendee's default, the plaintiff relies on *Allison v. Cocke's Exrs.*, 112 Ky. 212, 65 S. W. 342. Also, that if there is a mutual rescission the vendor must be placed *in statu quo*. These contentions would be true if appellee had adopted that theory of the case and pleaded damages. He did not plead any damage and plaintiff objected to such evidence being put in the record. In *Allison v. Cocke's Exrs., supra,* such damages are pleaded. The court, over defendant's objection, did permit some items of damage, but damages cannot be recovered as they were not pleaded. The appellee states in his brief that the court on motion of defendant struck from plaintiff's reply the allegation of damages. That order was right. However, there is no cross-appeal and it cannot be considered now. Again, the plaintiff brought suit on the note, and the defendant set up facts as to the whole transaction, and defendant joined as to this theory, and, in a sense, plaintiff abandoned the action as one on a promissory note, but did not set up any damages. None can be recovered.

The appellee contends as another reason why the judgment of the trial court should be sustained that the stipulated damage clause in the contract would indicate that the plaintiff was to retain the $2,000 payment or note in lieu thereof made to him in case of defendant's default. The contract will bear no such construction. Nowhere is it said or implied in the agreement that in case of a breach of the contract defendant would pay or forfeit to the plaintiff the $2,000 advance payment or that plaintiff could collect the note. The contract provides and states that the defendant

has paid $2,000 cash as an advance payment. Nothing is said as to the forfeiture of this payment.

The contract provides: "That in case either of the parties hereto shall fail to perform the stipulation of this contract, or any part of the same, the failing party shall pay the other party * * * the sum of $2,000." This fixed the liability of the parties in case of default by either. If one party defaulted the other party would have an action for his damages. Nowhere is it stated or inferred that the $2,000 note was to be taken and collected in lieu of the $2,000 provided for as damages in the event of default by either party. There could be no contention that in case of default by either party the contract did not obligate one party the same as the other, but if the defendant is held liable on the note on account of the breach of contract under the clause providing for recovery against the one in default, defendant would have to pay 10 per cent. interest from December 1, 1929, as provided in the note. If either party wished to bring suit against the other on the damage clause, he could not obtain 10 per cent. interest, but only the legal interest as provided by law. This view of the case makes it unnecessary to decide whether the contract provided for liquidated damages or a penalty.

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

REVERSED AND DISMISSED.

DAN WILSON ET AL., APPELLANTS, V. CLARENCE A. GERHARD ET AL., APPELLEES.

FILED DECEMBER 11, 1936. No. 29586.

1. **Creditors' Suit: WITNESSES: CROSS-EXAMINATION.** In creditors' suit to set aside claimed fraudulent mortgage, a wide latitude of cross-examination of defendants should be permitted. This is particularly true when the inquiry is to determine the *bona fides* of transactions between close relatives.
2. **Evidence** examined and *held* restriction on cross-examination to have been prejudicially erroneous.

APPEAL from the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Reversed.*

Sterling F. Mutz, G. Porter Putnam, Jr., and *Robert S. Stauffer*, for appellants.

W. G. Kieck, contra.

Heard before GOOD, PAINE and CARTER, JJ., and CLEMENTS and THOMSEN, District Judges.

THOMSEN, District Judge.

This is an action to declare void a chattel mortgage on personal property and for the sale of the property to satisfy a judgment obtained by plaintiffs before the giving of the mortgage. The mortgage was given by Clarence A. Gerhard to his brother, Edward, to secure the latter for obligations amounting to approximately $3,600. The indebtedness between the brothers seems well established by the evidence. The trial court held the chattel mortgage to be a valid one.

Plaintiff's complaint is directed primarily to the trial court's limiting cross-examination in certain particulars. In transactions between close relatives, presumptively fraudulent, a wide latitude of cross-examination should be permitted. The burden of proof rests upon defendants to establish the *bona fides* of the transaction. *Melick v. Varney*, 41 Neb. 105, 59 N. W. 521; *Ayers v. Wolcott*, 66 Neb. 712, 92 N. W. 1036; *Blanchard v. McMillan*, 113 Neb. 275, 202 N. W. 878. Thus a searching inquiry to determine these *bona fides* is desirable.

The court sustained objections particularly to cross-examination as to other business transactions between the brothers and as to the delivery during the past few months of any live stock by Clarence to Edward. Either subject, if permitted to have been pursued, might have shown that no indebtedness now existed, or that the actual indebtedness was far less than the secured nonexempt property. The restriction on cross-examination, under the conditions, was prejudicially erroneous.

The court permitted defendants to show that the origin of the indebtedness between them grew out of a suretyship for money borrowed from others from which Edward did not benefit, but which debts he was required to pay. The plaintiffs contend that such testimony varied the terms of a written instrument, in that Edward apparently appeared as maker on the notes evidencing the indebtedness. The answer is that this proceeding is not between the parties to the notes nor those claiming through such parties. Plaintiffs are not attempting to enforce or defeat the notes. The proceeding is a collateral one and the testimony is merely incidental to a determination of the origin of the indebtedness between the brothers. The testimony was properly admitted. *Cox v. Ellsworth*, 97 Neb. 392, 150 N. W. 197. See 2 Williston, Contracts, secs. 644, 647; Ann. 65 A. L. R. 822.

For the error in limiting the cross-examination, the judgment is reversed and the cause remanded.

REVERSED.

JOHN FRADES V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1936. No. 29873.

1. **Larceny.** The offense of larceny by bailee is defined in section 28-547, Comp. St. 1929. The sentence is fixed by the general statute on larceny, section 28-511, Comp. St. 1929.
2. ———. "The gist of the offense in such a prosecution (for larceny as bailee) is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same." *Ford v. State*, 46 Neb. 390, 64 N. W. 1082.
3. **Criminal Law:** INSTRUCTIONS: CONSTRUCTION. "Whether an instruction is reversibly erroneous is not to be determined from its language alone, but from an examination and consideration of the whole charge. In other words, the instructions in a case should be considered together, not section by section or paragraph by paragraph." *Peterson v. State*, 115 Neb. 302, 212 N. W. 610.
4. ———: ———. "Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be

predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining." *Martin v. State*, 67 Neb. 36, 93 N. W. 161.

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

J. L. Richards, for plaintiff in error.

William H. Wright, Attorney General, and *Edwin Vail, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

GOSS, C. J.

Defendant was convicted on a charge of stealing a bull of which he was bailee. The jury valued the bull at $56. The sentence was for one year in the penitentiary.

The offense of larceny by bailee is defined in section 28-547, Comp. St. 1929. The sentence is fixed by the general statute on larceny, section 28-511, Comp. St. 1929. "The gist of the offense in such a prosecution (for larceny as bailee) is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same." *Ford v. State*, 46 Neb. 390, 64 N. W. 1082.

The brief of plaintiff in error, hereinafter called defendant or Frades, is occupied largely with the point that the evidence was insufficient to prove his guilt beyond a reasonable doubt and that the court therefore erred in denying defendant a dismissal.

Arthur C. Woodman, the prosecuting witness, testified that late in September or early in October, 1933, the defendant and Amos Kohl came to the farm of the witness in a car to which was attached a trailer. Defendant wanted to borrow a bull for breeding purposes. Witness made a practice of loaning cows for their keep. He had a young red roan bull and testified that he let Frades take him to keep until Woodman wanted him, with the under-

standing that the bull might be loaned but was not to be overbred. The bull had been branded and had been dehorned with clippers when he was a calf. His horns had grown a little and the knobs had begun to curl down. The end of the right ear had been cut off and a slit made in it. In August, 1934, the bull was about a year and a half old and weighed about 650 pounds. Frades bought some hogs of Woodman in August, 1934, and Woodman asked him whether the bull had made much of a growth and Frades said he had. About September 15, 1935, Woodman went to Frades' home and asked him if he had the bull he had borrowed and Frades said he had never borrowed any bull from Woodman. Woodman testified he asked Frades how he could look him in the eye and say that and then Frades said the bull had died the spring before. (There was conversation when Frades first got the bull that if the bull died Woodman would not hold Frades for the loss.)

Frades testified that when Woodman had the conversation with him in September, 1935, he merely said he was looking for a red roan bull and when Frades asked him to whom he had loaned it "he said, he didn't know, he forgot."

Amos Kohl testified that he took his car and defendant's trailer and accompanied defendant to Woodman's place about October 1, 1933; that defendant asked Woodman for a bull and when shown the red roan bull said "Just what I want." The witness got permission from Woodman to breed the bull to four of his cows because he was hauling the bull away. They took the bull in the trailer to Frades' place. About a month later the witness got the bull, kept him a few weeks, and Frades took him away.

Pete Aksamit testified that early in 1934 he was riding with defendant past the latter's stock field and asked defendant where he got that roan bull over there and defendant told him he got it from Mr. Woodman.

The testimony of Woodman, Kohl and Aksamit was sufficient basis for the finding of the jury that the bull was delivered to defendant and that there was a bailment.

When defendant told Woodman he had never borrowed any bull from him, Woodman further prosecuted his search for the bull. There was evidence indicating that the bull had been loaned out by Frades to various parties. It will serve no good purpose to detail all of it.

May Cradduck, a cousin of Woodman who had her home with him and his father and mother, testified that she was at home when defendant and Kohl got the bull and she saw them take him away. She knew the bull. On September 15, 1935, she saw the bull at John Bandemer's place and recognized it from its horns and the cut and slit in its ear. Ross Burch testified that he got the bull in June, 1935, and turned it over to John Bandemer the first week in August. John Bandemer testified that he got the bull, kept it about six weeks and took it to defendant. Orville Cook testified that on September 16, 1935, he and Frades bought a cow together. About noon of that day he and defendant had the bull loaded on a truck at Frades' place, went to Hebron and got the cow and took both animals to Carleton, where Cook sold both the cow and the bull for $109. Cook gave defendant all the money received from the bull and his share of the profits on the cow. The bull was promptly shipped by the purchaser to the Omaha market. There is no further testimony about him.

There is complaint that the bull sold in Carleton is not identified as the bull that was received by defendant from Woodman. Defendant argues that the state's case is weak because it did not follow the career of the bull further and show whether the hide was branded with the initials of Woodman, as he testified it was branded as a calf. Some of the witnesses testified that they did not see a brand; one at least testifying that the bull that was sold was not branded. Suffice it to say that there was sufficient evidence to go to the jury, from which it was for them to say whether the bull that was sold at Carleton was the bull that was the subject of the bailment alleged.

Defendant assigns error in instruction No. 4 in respect

of the first two material points necessary to be proved by the state beyond a reasonable doubt before a verdict of guilty can be reached. These read:

"1. That the defendant, John Frades, on or about the 16th day of September, 1935, was the bailee of certain personal property of Arthur C. Woodman, to-wit, one red roan bull;

"2. That while said property was held by the said defendant as said bailee, he the said defendant did convert said property to his own use with the intent to steal the same."

Of this instruction defendant says it does not, and that the instructions elsewhere do not anywhere, explain to the jury how long a bailment continues and the meaning of the term "convert to his own use." It is to be noted that the transcript does not show that defendant tendered any instructions. Further, any ambiguity in the instruction as to when the conversion occurred is covered by the first instruction, which was an abstract of the information and shows that the conversion was charged as of the 16th day of September, 1935. That was the day the bull was shown by the stated evidence to have been taken by Frades to market and sold.

"Whether an instruction is reversibly erroneous is not to be determined from its language alone, but from an examination and consideration of the whole charge. In other words, the instructions in a case should be considered together, not section by section or paragraph by paragraph." *Peterson v. State,* 115 Neb. 302, 212 N. W. 610.

"Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining." *Martin v. State,* 67 Neb. 36, 93 N. W. 161.

The third assignment of error states in an argument of six lines that instruction No. 9 leaves the jury to speculate

as to whether there might have been a conversion at some other time or place "than that which the state attempted to prove at Carleton on September 16, 1935." This is an admission of the date which was adopted by the state and is the date which, as we have shown before, was that clearly instructed by the court, as a reading of the entire instructions to the jury shows.

The court sustained an objection to the defense asking Woodman on cross-examination whether he made an effort to obtain its hide or to find the bull, the objection being that it was immaterial and not proper cross-examination; sustained an objection by the state to an offer of proof by defendant that the brand was a recorded brand, the offer being objected to as irrelevant and immaterial and not tending to prove or disprove any issue; and overruled the motion of defendant to strike the answer to the following question, asked the state's witness, Burch, as not responsive: "Q. During the time you had him did you notice any brand on him? A. I wouldn't swear whether it was a brand; I noticed a mark on him, so far as looking to see what this was, I never." The rulings do not appear to be prejudicially erroneous to defendant.

Defendant had a fair trial. While the evidence was disputed and conflicting on some points, the jury passed on such matters in the exercise of its fact-finding power. There is not found any prejudicial error in the record. The judgment is

AFFIRMED.

DOROTHY CLARKE, APPELLANT, V. ORVILLE E. WEATHERLY, APPELLEE.

FILED DECEMBER 18, 1936. No. 29713.

Evidence in the record examined, and *held* insufficient to sustain the charge of gross negligence as made against the defendant.

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

O'Sullivan & Southard, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

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

EBERLY, J.

The plaintiff alleges in her petition that, while accompanying the defendant in his automobile, as an invited guest, he, without any warning, drove this automobile against a fire hydrant located upon the grounds and driveway immediately adjacent to the Omaha Municipal Airport, causing the automobile to be violently stopped, and thereby throwing plaintiff in and about said automobile and against the windshield thereof, causing injuries specifically described in her pleading. Gross negligence of the defendant is charged in five particulars, viz.: Driving his automobile against a fire hydrant; excessive speed; failing to stop or slacken his speed or change the course of his car before striking the fire hydrant; failing to keep a proper lookout; failing to keep his automobile under proper control. In his answer the defendant admitted "that on April 5, 1934, plaintiff was riding with him in his Ford coupé as his guest;" and denied all other allegations of plaintiff's petition. In a trial to a jury, at the close of plaintiff's evidence, the court sustained defendant's motion to dismiss plaintiff's petition and action for want of sufficient evidence to support a verdict. From the judgment of the trial court overruling her motion for a new trial, the plaintiff appeals.

The record now before us invokes the application of the language employed by this court in *Rogers v. Brown,* 129 Neb. 9, 260 N. W. 794, viz.: "The question presented by the appeal is the sufficiency of the evidence to make a *prima facie* case in favor of plaintiff for the consideration of the jury, notwithstanding the statute providing that an unintoxicated owner or operator of a motor vehicle shall not be liable in damages to a gratuitous guest except for gross negligence. Comp. St. Supp. 1933, sec. 39-1129. The term 'gross negligence' as thus used has been defined to mean

'negligence in a very high degree, or the absence of even slight care in the performance of a duty.' *Morris v. Erskine,* 124 Neb. 754; *Gilbert v. Bryant,* 125 Neb. 731; *Swengil v. Martin,* 125 Neb. 745; *McDonald v. Wright,* 125 Neb. 871; *Sheehy v. Abboud,* 126 Neb. 554; *Thurston v. Carrigan,* 127 Neb. 625. The remedy of a motorist's guest for negligence resulting in personal injuries, as protected by the constitutional provision, that 'every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law,' was not taken away by the guest law. Const. art. 1, sec. 13; Comp. St. Supp. 1933, sec. 39-1129. The legislature merely changed the degree of proof essential to a recovery for damages. 'In reviewing a peremptory instruction in favor of defendant, issuable facts, which the evidence in favor of plaintiff tends to prove, will be regarded as established.' *Gilbert v. Bryant,* 125 Neb. 731. Proper inferences from such facts may be considered also. With these rules of law in mind, the testimony on the issue of gross negligence requires judicial scrutiny."

In the case at bar, the scene of the accident was what was referred to as the "plaza," situated adjacent to the administrative building of the Omaha Municipal Airport. In the light of the record before us, we define the term "plaza" as "a public square in a city or town." Webster's New International Dictionary (2d ed.) Unabridged. The photographs in the instant case disclose a plaza which, with the highways connected therewith, was prepared for use of the public. Situated within the boundaries, and at considerable distance from the confines thereof, was an ordinary "fire hydrant." On the night of the accident, it was in no manner marked or protected. As the plaintiff and defendant were proceeding to the Municipal Airport of Omaha, and were passing along the highway, they entered what we denominate the "plaza." Therein the defendant, who was at the wheel, when directly west of the Boeing hangar at the airport, turned the car sharply to the right toward a place near this hangar devoted to the parking of cars. He

was then driving about 25 miles an hour. He was not intoxicated. The lights of his car were on, and in good condition. Plaintiff states that when the car turned sharply to the right the crash occurred immediately afterwards. It appears that the right side of the front end of the car struck the fire hydrant, then located in the plaza as already described. This stopped the automobile, which caused plaintiff to be thrown forward, and thereby the injuries complained of were inflicted. Plaintiff testified that she was looking ahead, and stated as she looked ahead the path in front of the car was free from obstructions, and that prior to the collision she never saw the fire hydrant and did not then know of its existence, and never saw it until after the accident. She also stated that the lights on the defendant's car were lights which would cast their reflections straight ahead in front of the automobile, and did not cast any more light to the side than the usual automobile lights would. The defendant, called as a witness for plaintiff, testified that he had no knowledge of the existence or location of the fire hydrant, that constant lookout was kept by him, but the hydrant was not discovered by him until after the accident.

On cross-examination the plaintiff testified as follows: "Q. And he (defendant) was driving around 20 miles an hour? A. I think so. Q. And then you made the turn which you think was for the purpose of going into the parking space? A. Yes, sir. Q. And, of course, almost instantly after making the turn, the crash occurred? A. Yes, sir. Q. Prior to that time you had been looking ahead? A. Part of the time; yes. Q. And as you went up there? A. Yes, sir. Q. And you could see whatever lights, whatever part of the road your light illuminated, you could see that? A. Yes, sir. Q. But you did not see the fire plug? A. I did not; no. Q. As far as you know now, then, you saw the fire plug? That is right, isn't it? A. I did not see it. Q. You did not know what had happened until after the accident happened; then he told you he had hit the fire plug? A. Yes, sir. Q. And did you see it at that time?

A. Yes, right after I came to enough, I did; yes. Q. And that is after he backed up? A. Yes, sir; after he backed up to go back to town, then I saw it. Q. But up to that time, of course, you did not see it or know it was there? A. No, sir; I did not. Q. This is a great, big, wide road? A. A big, wide road running north and south. Q. At any time as you were driving up there, you never saw the fire plug? A. No, sir; I did not see it."

In consideration of the evidence in its entirety, we find therein no substantial conflict. It is to be remembered that, in passing on the question of gross negligence, it is the province of this court 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. *Thurston v. Carrigan*, 127 Neb. 625, 256 N. W. 39; *Belik v. Warsocki*, 126 Neb. 560, 253 N. W. 689. Applying this principle to the facts disclosed by the present record, we are unanimously of the opinion that gross negligence was not proved, and the action of the trial court in directing a verdict for defendant was, in all respects, correct.

The judgment is, therefore,

AFFIRMED.

WILLIAM A. HIGGINS, APPELLANT AND CROSS-APPELLEE, V. JOHN A. ADELSON, APPELLEE AND CROSS-APPELLANT: CHARLES COSNER, APPELLEE.

FILED DECEMBER 18, 1936. No. 29754.

1. **Appeal: TRIAL DE NOVO.** "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Gentry v. Burge*, 129 Neb. 493, 261 N. W. 854.
2. **Trial.** However, "When the trial court goes upon the premises in controversy, and makes a personal examination of the

topography of all of the land and water involved, his findings in reference thereto are entitled to great weight." *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647.

3. Waters: BOUNDARIES. Where an island in a nonnavigable stream, prior to its conveyance by the federal government, was by it surveyed and platted as bounded by the waters of such stream, and a meander line was then employed to indicate the shore line of such island, this meander line is not a line of boundary, but one designed to point out the sinuosity of the island's shore line, and a means of ascertaining the quantity of land which was to be paid for by the purchaser thereof.
4. ———: ———. Where title to an island in a nonnavigable stream is conveyed to a grantee by government patent, and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel.
5. ———: ———. The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.
6. ———: ACCRETION. The right of title and possession of land formed by accretions follows the ownership of the riparian lands to which it is attached.
7. Adverse Possession. Evidence in the record examined, and *held* to establish the actual, continued, notorious, adverse possession of the lands in suit by defendant John A. Adelson as owner for more than ten years prior to the commencement of this action.
8. Injunction. In the absence of any statute authorizing the court to assess damages in the injunction suit, upon the dissolution of the injunction or restraining order the court has no authority to do so; the party aggrieved must resort to an independent action upon the bond.

APPEAL from the district court for Merrick county: FREDERICK L. SPEAR, JUDGE. *Affirmed in part and reversed in part and dismissed.*

E. J. Patterson and *Cleary, Suhr & Davis*, for appellant.

H. G. Wellensiek, contra.

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

EBERLY, J.

This is an action in equity to restrain the defendants

from alleged repeated trespasses upon that part of an island in the Platte river, which is unsurveyed (referred to in the record as "Island No. 1"), and of which plaintiff in his petition claims to be the owner by virtue of his ownership of certain riparian lands in section 7, township 14, range 4 west of the sixth P. M. in Merrick county, Nebraska. The petition also alleges that the portion of said island No. 1 claimed by plaintiff is situated south of the north shore of the Platte river and within the extended east and west lines of his riparian lands in said section 7, and at right angles from said lines with the shore line of said river and north of the thread or center line of said river, and further that he is in possession thereof at the time of the institution of this action, and had been in the actual and adverse possession thereof more than ten years prior thereto. These allegations refer to the northeast portion of island No. 1, which is situated in the Platte river opposite the lands of plaintiff. Plaintiff's petition was positively verified, and with it were filed certain affidavits. In this pleading he prayed for the issuance of a restraining order, and that thereafter, upon due hearing, a temporary injunction be allowed restraining the defendants, their agents and servants, from trespassing upon the lands the ownership of which was alleged to be in plaintiff, and that upon final hearing the temporary injunction be made permanent. Upon the filing of these pleadings a temporary restraining order, in terms as prayed, was issued and served upon the defendants. By its terms the application for a temporary injunction was set for hearing on October 9, 1934, and the defendants and their agents were duly restrained from further trespassing upon the premises in dispute until further order of the court, upon plaintiff's executing an undertaking in the sum of $500 as provided by law. This undertaking was duly filed and approved on October 1, 1934, and on that day the usual summons and restraining order were served upon the defendants. Thereafter on November 6, 1934, the defendants demurred to the petition generally. This demurrer, it appears, was never disposed of by the

district court. On February 8, 1935, the defendants filed their answer and cross-petition, in which the ownership of plaintiff of the lands situated in section 7 north of the Platte river was admitted, and all other allegations in plaintiff's petition were denied. For their cross-petition defendants alleged their ownership of the lands in dispute by virtue of adverse possession for more than ten years, and also as accretions to island No. 1; that this island had been surveyed by authority of the United States and title by patent duly derived therefrom was vested in defendant Adelson; that defendants had been deprived of the use of the land in suit for some fifty days, to their damage in the sum of $1,250; and defendants prayed that the prayer of plaintiff's petition be denied; that the restraining order be dissolved; that defendant Adelson's title to the *locus in quo* be quieted; and "that the defendant John A. Adelson have and recover the sum of $1,250 with 6 per cent. interest from October 6, 1934, and costs." To this pleading plaintiff filed his reply, denying each and every allegation in said answer and cross-petition, except "such as admit allegations of the petition."

The record discloses that a hearing on the merits was had, commencing on April 15, 1935, and evidence was introduced on behalf of the parties to this action; that the cause was taken under advisement by the trial court; that thereupon the trial judge inspected the premises in suit; and that on August 7, 1935, a decree was duly entered finding for the defendants and cross-petitioners and against plaintiff; adjudging that the restraining order be dissolved, that the title to the entire premises in dispute be quieted in defendant John A. Adelson, and that defendant Adelson recover from plaintiff William A. Higgins the sum of $50 for damages sustained by the wrongful issuance of the restraining order. Both plaintiff and defendant Adelson thereupon filed their motions for new trial, and from the order overruling the same, plaintiff Higgins appeals, and defendant Adelson has presented his cross-appeal.

The record before us involves two questions which require

consideration of conflicting evidence, viz.: (1) Claims to the legal title of accretions to island No. 1; and (2) conflicting claims of adverse possession thereof.

In this connection, it will be remembered that: "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854.

So, also, "When the trial court goes upon the premises in controversy, and makes a personal examination of the topography of all of the land and water involved, his findings in reference thereto are entitled to great weight." *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647.

It appears that island No. 1, of which the land in suit is now a part, existed and was surveyed by the United States government in 1863, as bounded by the Platte river, and platted by use of meander lines to indicate the then shore lines of that stream. The southern line of plaintiff's land in section 7, by virtue of which he bases his claim to the land in suit, is also the Platte river, likewise then platted by use of a meander line.

In *Whitaker v. McBride,* 197 U. S. 510, it is stated: "A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *St. Paul & P. R. Co. v. Schurmeier,* 7 Wall. (U. S.) 272; *Hardin v. Jordan,* 140 U. S. 371; *Horne v. Smith,* 159 U. S. 40." See, also, *Osterman v. Central Nebraska Public Power and Irrigation District, ante,* p. 356, 268 N. W. 334.

Both the plaintiff, as owner of section 7, and the defendant John A. Adelson, as owner in fee of the surveyed portion of island No. 1, have derived title to their respective

properties by and through government patent issued in accordance with this survey of 1863.

It appears without substantial dispute that the general course of the Platte river at the place of dispute is from the southwest to the northeast; that since 1863, due to the action of the waters of the river, silt, sand, earth, and débris have been slowly deposited on the northeast end of island No. 1 in the form of gradual accretions, which resulted in the extension of that island still further to the northeast in a course roughly parallel to the north bank of the river for a distance of more than 2,000 feet from the northeast boundary of the original platted island indicated on plaintiff's map (Exhibit "A-A") as end of island No. 1, Government notes. A river channel still continues to separate this extension from the north shore of the Platte river. This "new-made land" is slightly less in width than the island as originally surveyed, but is physically a part thereof, and an accretion thereto.

The plaintiff contends that this "new-made land" lies between the extended east and west boundaries of his land in section 7, and is north of the thread of the channel of the Platte river as that channel existed at this place prior to the creation of this extension of island No. 1. Therefore, he claims that, by virtue of this ownership of the submerged lands on which this accretion was formed, he became the owner of the legal title in fee thereto. This contention cannot be sustained.

In considering a situation involving similar principles, in *Nebraska v. Iowa,* 143 U. S. 359, Justice Brewer says in part:

"It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States,* 10 Pet. 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water,

which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' (See, also, *Jones v. Soulard,* 24 How. 41; *Banks v. Ogden,* 2 Wall. 57; *Saulet v. Shepherd,* 4 Wall. 502; *St. Clair County v. Lovingston,* 23 Wall. 46; *Jefferis v. East Omaha Land Co.,* 134 U. S. 178.) * * * These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. * * * Vattel states the rule thus (Book 1, c. 22, secs. 268, 269, 270): 'If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural or indeterminate bounds (*territoria arcifinia*), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side—or if it is given to me upon that footing, I thus acquire beforehand the right of alluvion; and, consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land.'"

The title to island No. 1, as surveyed and patented, being vested in the defendant by virtue of the original patent, and the land being bounded by a nonnavigable stream, defendant's ownership carries with it the bed of the river to the center of each surrounding channel. *Wiggenhorn v. Kountz,* 23 Neb. 690, 37 N. W. 603; *Horton v. Niagara, Lockport & Ontario Power Co.,* 231 App. Div. (N. Y.) 386, 247 N. Y. Supp. 741.

The thread or center of a channel, as the term is above employed, must be the line which would give to the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. *Horton v. Niagara, Lockport & Ontario Power Co., supra.*

So, too, where the mainland and an island have been separately surveyed, and purchased by different parties as distinct tracts, the grantees of the mainland cannot claim the island, or accretions thereto, as included in their grant. *Wiggenhorn v. Kountz, supra.*

And, "The right of title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached." *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647.

The right to "accretions" is certainly to be deemed identical as between the owner of a surveyed island and the owner of a mainland tract opposite to the same and possessing the identical water boundary. True, the owner of land entirely surrounded by a water boundary may receive accretions from any direction, but the principles which determine their ownership to the tract in dispute are identical. The principles announced by the supreme court of the United States in *Nebraska v. Iowa, supra,* and the rule promulgated in *Wiggenhorn v. Kountz, supra,* alike award the legal title to the accretions here in dispute to defendant Adelson as an incident to his possession as owner of the title to island No. 1, derived from the government.

This result is in strict harmony with conclusions of this court announced in *Briard v. Hashberger,* 107 Neb. 199, 185 N. W. 430, in the following language: "Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong." See, also, *Independent Stock Farm v. Stevens, supra.*

It is obvious that a title by a government patent is at

least equal in dignity to one resting exclusively on adverse possession, and the case last cited sustains the proposition that legal title to a surveyed and patented island carries with it, as an incident thereto, legal title to accretions thereto.

In so holding we are quite in harmony with judicial opinion as elsewhere expressed.

In *Fillmore v. Jennings,* 21 Pac. 536 (78 Cal. 634) it appears: "Below plaintiff's land, which borders on a river, there is an island, which by accretions has been extended up the river opposite plaintiff's land, so that with the accretion to the latter a narrow channel only separates them, and plaintiff's land is separated from the main channel by the narrow one and the island. * * * *Held,* that plaintiff is not entitled to extend his boundaries across the narrow channel and the accretion to the island to the main channel, but that the owner of the island is entitled to the accretion to it." See, also, *Griffin v. Johnson,* 161 Ill. 377, 44 N. E. 206; *Naylor v. Cox,* 114 Mo. 232, 21 S. W. 589.

We have not overlooked the claims of plaintiff that at one time a small island owned by plaintiff existed in the Platte river, situated about half a mile east of island No. 1; and that in the development of the accretions to the latter the intervening channel was closed and this small island became included in, and as a part of, island No. 1. Due consideration has also been given to plaintiff's claim of adverse possession to the disputed land. Not only does the evidence in the record in support of plaintiff's claim lack in definiteness and probative value, but the evidence in this case, considered as an entirety, fairly establishes such acts and conduct on part of defendant Adelson as constitute actual, continued, notorious, and adverse possession of the lands in suit, as owner for more than ten years prior to the commencement of this action, and renders further consideration of plaintiff's adverse claims thereto unnecessary. *Twohig v. Leamer,* 48 Neb. 247, 67 N. W. 152; *Lantry v. Parker,* 37 Neb. 353, 55 N. W. 962; *Stryker v. Meagher,* 76 Neb. 616, 107 N. W. 792.

The sole remaining question for determination by this court, trying this case *de novo* and without reference to the determination of the matter as made by the district court, is as to the application for assessment of damages upon the dissolution of the temporary restraining order, made to and in the district court as a court of equity in the proceeding in which this restraining order was set aside, as a part of the final judgment entered therein. This appears to have been done in the instant case. No statute of Nebraska is cited in the briefs of counsel as supporting this procedure, and we are unable to find any legislation to that effect.

On this subject, a well-known text-writer declares the law to be as follows: "There has been much conflict of authority whether, in the absence of express legislation, a court of general equity powers might, upon dissolving an injunction, ascertain by reference, or otherwise, the amount of damages sustained by the injunction and decree payment of such amount without a new suit for that purpose. But, while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond, the undoubted weight both of authority and principle is against the exercise of such a jurisdiction. It is certain that no warrant can be found for its exercise in the former practice of the English High Court of Chancery, and however desirable and convenient such procedure may be and undoubtedly is in practice, the doctrine is too firmly fixed to admit of controversy, that in the absence of positive legislation a court of equity has no power to afford a remedy upon the bond in the injunction suit, such a power being neither an incident to the general powers of courts of equity, nor consistent with the principles of equity jurisdiction. In the absence, therefore, of legislative authority to the contrary, a court of equity will not, upon dissolving an injunction, enforce payment of damages in the original cause, but will remit the parties aggrieved to their action upon the bond." 2 High, Injunctions (4th ed.) pp. 1605-1606, and cases cited in support thereof in the footnotes.

So also, this rule is announced in Corpus Juris: "The majority of decisions hold that, in the absence of express statutory authority or of some provision in the bond itself authorizing it, the court granting the injunction has no power on dissolution thereof to assess the damages resulting from the wrongful issuance of the injunction; even in jurisdictions where the power of the court to assess damages independently of statute or rule of court is recognized, this power is conditioned upon the fact that no injunction bond has been given." 32 C. J. 439.

Standard Encyclopedia of Procedure announces the applicable rule in these terms: "Except in the federal courts, in the absence of any statute authorizing the court to assess damages in the injunction suit, upon the dissolution of the injunction, the court has no authority to do so; the party aggrieved must resort to an independent action upon the bond." 13 Standard Ency. of Procedure, 315.

In this connection see also the following cases: *Higgins v. Allen,* 6 How. Pr. (N. Y.) 30; *Garcie v. Sheldon,* 3 Barb. (N. Y.) 232; *Bogacki v. Welch,* 94 Ala. 429, 10 So. 330; *Stanley v. Bonham,* 52 Ark. 354, 12 S. W. 706; *Greer v. Stewart,* 48 Ark. 21, 2 S. W. 251; *Sartor v. Strassheim,* 8 Colo. 185, 6 Pac. 215; *Chicago, R. I. & P. R. Co. v. Dey,* 76 Ia. 278, 41 N. W. 17; *Eastern Kentucky R. Co. v. Brown,* 99 Ky. 540, 36 S. W. 555; *Rankin v. Estes,* 13 Bush (Ky.) 428; *Dougal v. Eby,* 11 Idaho, 789, 85 Pac. 102; *American Bonding Co. v. State,* 120 Md. 305, 87 Atl. 922; *People v. Hawley,* 207 Cal. 395, 279 Pac. 136.

In view of the situation presented by the present record, this court finds it necessary to refuse to entertain jurisdiction of the question of assessment of damages now presented.

It follows that the decree appealed from is in all respects affirmed, save and except as to the determination of damages as therein made. That portion of the decree determining defendant's damages in the sum of fifty dollars is reversed, and the application for the assessment of damages as made by defendant is dismissed, without prejudice,

however, to his independent suit upon the bond given and approved in this proceeding.

AFFIRMED IN PART AND REVERSED IN PART.

PLATNER LUMBER COMPANY, APPELLANT, V. KRUG PARK AMUSEMENT COMPANY ET AL., APPELLEES: CASSEL REALTY COMPANY, APPELLEE.

FILED DECEMBER 18, 1936. No. 29689.

1. **Mechanics' Liens.** A tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing a building thereon.
2. **Landlord and Tenant: LEASE: FORFEITURE.** A landlord who fails for a long period of time to exercise an option to declare a forfeiture of a lease for failure to pay rent according to the terms, while the tenant with the knowledge and consent of the landlord was constructing a building, may be estopped to exercise such option when the improvements are completed.

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

Frost, Hammes & Nimtz and *Adams, Wolff & Travis,* for appellant.

Ziegler, Dunn & Becker, McGan & Burbridge, Robertson & Robertson, Troyer & Pardee, Shotwell & Vance, E. D. Gerye, W. R. King and *William W. Graham, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

DAY, J.

The Platner Lumber Company brought this suit to foreclose a mechanic's lien on the property known as Krug Park located in Omaha. One defendant was the Krug Park Amusement Company, the lessee and operator of the amusement park. Another defendant was the Cassel Realty Company, the owner of the fee title to the real estate. The lien was asserted by virtue of a contract

between the plaintiff and the defendant Krug Park Amusement Company for material for the construction of a bathhouse. There were several interveners who also furnished material and labor for the construction of the same building. The plaintiff sought to extend the lien to cover the fee owned by the Cassel Realty Company. The trial court found in substance that the plaintiff and interveners had established their rights to liens for certain amounts against the leashold estate of the Krug Park Amusement Company. The trial court found that the lienors were not entitled to a lien against the fee. There are other phases of the decree which will be noted later, but this is sufficient for a discussion of the first question for our consideration.

The real estate involved consists of about 20 acres known as Krug Park, equipped as an amusement park and owned in fee simple by the Cassel Realty Company, a corporation organized in 1903. In January, 1917, the Cassel Realty Company leased Krug Park to Ingersoll for a term of 10 years with an option to extend the lease for another 10 years. Ingersoll organized the Krug Park Amusement Company and assigned his lease to it. In 1927 the lessee exercised its option and extended its lease until December 31, 1937. In 1932, the Krug Park Amusement Company issued and sold bonds, and to secure them executed a trust deed to the First National Company as trustee. A provision of this trust deed was that the Krug Park Amusement Company should keep the property insured against fire by a policy with a provision that the loss should be payable to the trustee according to its interest. In September, 1932, the bathhouse, a feature of the park, was destroyed by fire. The rebuilding of the bathhouse caused this controversy.

The Krug Park Amusement Company proceeded to rebuild the bathhouse by contracting for labor and materials. The Platner Lumber Company furnished materials, and the interveners furnished materials and labor for the construction of the building as follows: Platner Lumber Com-

pany, $4,079.71; Dudley Hamilton Company, $1,214.98; Johnson Hardware Company, $116.39; Giant Manufacturing Company, $338.59; Carlson & Hendershot, $1,005.00; G. H. Nelson Paint Company, $639.26; Ralph N. Perkins, $175.09; William J. Peterson, $308.08.

The trial court decreed a lien for the above amounts against the leasehold estate but denied the lien against the fee. The Platner Lumber Company has appealed from the judgment, and the Dudley Hamilton Company has filed a brief in this court. The Krug Park Amusement Company as a tenant had no authority to encumber the land for improvements. *Waterman v. Stout*, 38 Neb. 396, 56 N. W. 987. A tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing a building thereon. *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546; *Cross & Johnston v. Eyerley*, 86 Neb. 516, 125 N. W. 1085. The law relating to mechanics' liens requires a contract between the owner or his agent and the one who seeks to enforce a lien for labor or material for the improvements on the land. It is not claimed that there was any contract between the Platner Lumber Company or any intervener and the Cassel Realty Company, the owner of the fee.

The Krug Park Amusement Company was not the authorized agent of the landlord, the Cassel Realty Company, in the construction of the bathhouse. It seems to be the argument of the appellant in this case that the Krug Park Amusement Company was in fact the agent of the owner of the fee. At least it is argued that the Cassel Realty Company had knowledge of and consented that the improvement be made. After the fire the Krug Park Amusement Company consulted the trustee for the bondholders and requested that the insurance money on the bathhouse be used for replacing the property. The trustee consented by a letter dated October 8, 1932. There was some difficulty about the payment of insurance, and on January 14, 1933, the trustee wrote another letter qualifying the former one in which it stated that it had not yet received any insurance

and that it would only consent to the insurance money's being used for the replacement if approved by the Krug Park Amusement Company, Cassel Realty Company, and any other parties claiming any interest in the money. Thereafter, in an attempt to meet the conditions laid down in this later letter, a letter was written to the trustee consenting to the insurance money's being used for this purpose which was signed by the Krug Park Amusement Company, the Park Bathing Company, and the Cassel Realty Company. This letter is sufficiently definite and certain that it cannot be said to have been anything except a consent by the Cassel Realty Company that the proceeds of the fire insurance policies on the bathhouse might be paid for replacing the bathhouse. It was not sufficient to create the Krug Park Amusement Company an agent to contract on behalf of the owner for the construction of the improvement. The Cassel Realty Company had no interest in or claim to the insurance money.

There is another circumstance that materially aids in our conclusion that there was no such agency, and that is the fact that appellant, Platner Lumber Company, did not furnish the material on the credit of the Cassel Realty Company, or look to them for payment of their claim. The Platner Lumber Company had been dealing with the Krug Park Amusement Company before this transaction. They had an unpaid and delinquent claim for material furnished for other purposes at the time. They knew and understood that the Krug Park Amusement Company was the lessee of the property. The mechanic's lien which was filed and later the petition which was filed in this foreclosure case recites that the Krug Park Amusement Company had a leasehold interest in the premises. The appellant, Platner Lumber Company, did not rely upon the Cassel Realty Company for payment. The trustee for the bondholders paid for the material furnished so far as the insurance money was received. However, the insurance company refused payment on some of the policies amounting to $7,500, and as a result the Krug Park

Amusement Company was unable to pay its obligations to the plaintiff and the interveners; so that during the time the material was being furnished, the Platner Lumber Company was not satisfied to furnish the material under the circumstances on credit. Therefore, the Platner Lumber Company took the matter up, not with the Cassel Realty Company, but with the Krug Park Amusement Company and required additional security for their account. The additional security which they demanded was: (1) A power of attorney dated March 30, 1933, empowering it to take over possession of the park premises and the park receipts; (2) the assignment by the Krug Park Amusement Company of its claim for $2,500 on an insurance policy issued by the New York Underwriters Insurance Company, the assignment of a similar claim against the New Brunswick Fire Insurance Company, and the assignment of a third similar claim against the Great American Insurance Company, all executed May 31, 1933; (3) the addition of a penalty of 25 per cent. to the cash price for lumber if the lumber was not paid for by a certain date; and $1,500 worth of Krug Park Amusement Company bonds as additional collateral. With this additional security the Platner Lumber Company furnished the lumber. The record does not reveal that the Cassel Realty Company did anything in connection with this transaction. The party who makes the contract with the one furnishing the labor and materials is to be regarded as owner within the meaning of the statute only to the extent of the interest which he owns. That interest can be subjected to the lien just as the trial court decreed in this case. The lease in this case contained an express stipulation that no mechanic's lien was to attach to the lessor's interest, and, while this lease was not recorded, the appellant had actual knowledge that there was a lease. It did not see fit to investigate the terms of the lease. The lease was an accepted fact, and the conduct of the appellant indicates that it did not furnish the material expecting the Cassel Realty Company to pay.

The lease between the Krug Park Amusement Company and the Cassel Realty Company required the payment of approximately $10,000 a year rental. The lease required the Krug Park Amusement Company to pay the taxes on the land, to use the premises as an amusement park, and provided that no contract, mortgage, judgment, or mechanic's lien or other liens resulting from any act or omission of the lessee should in any manner affect the title or interest of the Cassel Realty Company.

On October 1, 1931, the Krug Park Amusement Company failed to pay the $1,625 rent due. By April 1, 1932, the past-due rental amounted to $4,875. On June 13, 1932, at the opening of the amusement season, $2,000 was paid on the rental account. Rentals then past due and unpaid amounted to $2,875. On July 1, 1932, the past-due rentals increased to $4,500. During the summer at different times sums aggregating $1,041.66 were paid, leaving the past-due rentals amounting to $3,458.34 which was the amount past due when the bathhouse was destroyed in September, 1932. The rentals were not paid regularly and reached the total of $10,083.34 on the first of April, 1933. Some payments were made thereafter, but in September, 1933, the amount past due on the rental account was approximately $10,000. This recital of the condition of the rental account is made for the purpose of showing that the rent was not paid regularly and when due from October, 1931, to September, 1933. During this time the materials and labor were furnished by the appellant and the interveners for the construction of the bathhouse under a contract with the tenant.

The only intervener which has filed its brief as a cross-appellant is Dudley Hamilton Company. Its answer and cross-petition allege that in accordance with its contract with the Krug Park Amusement Company it furnished certain labor and material for the construction of the bathhouse; that the material was furnished and the labor performed at the instance of and with the consent, approval, and knowledge of, and on the authorization and for the

benefit of the Cassel Realty Company, and that the Krug Park Amusement Company acted as the agent of the Cassel Realty Company in contracting for such materials and labors. The only distinction we can see between the claim of Dudley Hamilton Company and the Platner Lumber Company is that Dudley Hamilton Company alleged in its petition that the Krug Park Amusement Company was the agent of the Cassel Realty Company, and its lien which was filed prior thereto was filed against the Cassel Realty Company, and alleged a contract with the Cassel Realty Company. The evidence would not support a finding that Dudley Hamilton Company did in fact have a contract with the Cassel Realty Company for the construction of the bathhouse. The testimony of Mr. Dudley Hamilton would not justify a finding that there was any contract between Dudley Hamilton Company and the Cassel Realty Company.

The appellant contends that this case comes within the rule announced in *Harte v. Shukert*, 94 Neb. 210, 142 N. W. 517. The rule there is: "A landlord who, for several months, failed to exercise an option to declare the forfeiture of a long-term lease for nonpayment of past-due monthly rentals, while the tenant, with the knowledge and consent of the landlord, was making permanent improvements under his lease at a vast expense, may be estopped to exercise such option after the improvements have been completed." It is certain that this rule is applicable to the present case. In the present case the landlord had for a long period of time failed to exercise the option to declare a forfeiture of the lease for nonpayment of the past-due rentals, during which time the tenant was reconstructing the bathhouse which was burned. This was done with the landlord's knowledge and consent or at least without any objection on its part. While this improvement was being constructed the Cassel Realty Company waived its option to declare a forfeiture and is bound by the rule on the matter of estoppel. There the similarity between the *Shukert* case and the case at bar ends. In the appellant's brief it is argued that,

"where the district court finds that the landlord is so estopped, the leasehold estate merges in the fee and a decree of foreclosure of a mechanic's lien should be rendered against the fee." This contention is untenable. It does not necessarily follow that an estoppel against the landlord to exercise an option to forfeit the lease because the rent has not been paid causes a merger of the estates and an attachment of the lien to the fee. Such cannot be the fact when the evidence discloses, as in this case, that there has been no merger of the leasehold with the fee; that there has been no forfeiture; and that the estates remain separate and distinct, not only as a matter of fact, but because the landlord is estopped to exercise the option of forfeiture. The evidence relied upon by the appellant of a forfeiture is: First, that the landlord served a written notice upon the tenant to comply with the terms of the lease and prevent a forfeiture according to the terms of the lease; secondly, that the landlord filed a suit to quiet title against the mechanic's lien; and thirdly, that the landlord took possession of the property in the fall of 1933. It appears from an examination of the record that the provision of the lease required a ninety-days' notice before the landlord could exercise the option to forfeit the lease. The suit to quiet title was never tried, and at most the petition in the case could only be an admission against interest. It is adroitly argued that an allegation in the petition that the rent was in default in the sum due September 1, 1933, was an admission that a forfeiture had occurred at that date, or the allegation as to the amount of the default would have been larger. The petition was verified by one of the landlord's attorneys who, it appears, was not familiar with all the details. The original answer in this case of the Cassel Realty Company alleged that a forfeiture had taken place. An amended answer did not so allege. Regardless of allegations in pleadings, the Cassel Realty Company was estopped to exercise its option of forfeiture.

With respect to the landlord's taking possession, it appears that in the winter of 1933 the Krug Park Amuse-

ment Company had not paid the watchman. The Cassel Realty Company was interested in some of the buildings there and paid the watchman so that he would not abandon the premises. After the Krug Park Amusement Company went into bankruptcy, the Cassel Realty Company did not lease the premises, but agreed with a former officer of the Krug Park Amusement Company that, if he could run the park by an arrangement with the Krug Park Amusement Company or any one interested through it, it would not disturb his possession if he paid the sum of $50 a day. But they refused to insure his possession as against the lessee or any one claiming through or under it.

The facts in the case at bar and the *Shukert* case are distinguishable because in that case the landlord illegally took possession and appropriated the leasehold interest, including the expensive improvements erected by the lessee, to his own use and benefit, to the exclusion of a lienholder.

While it is not the duty of the landlord to release, nevertheless he may do so to mitigate damages, and yet there will be no forfeiture of the original lease necessarily arising from the fact. *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914. In the recent Nebraska case, *Johnston v. Jackson*, 129 Neb. 545, 262 N. W. 19, it was held that, where a lessee becomes bankrupt during the term of a lease, the landlord's acceptance of rent from the trustee and his tenants for several months and unsuccessful attempts to rent the premises do not amount to such interferences with lessee's possession as to indicate an intention of reentry so as to preclude recovery for the remaining period of the lease.

There is a very great divergence of opinion between the parties, not so much as to the evidence, but as to the conclusions to be drawn from certain evidence. To have set out the various contentions of the parties as to the conclusions to be drawn from the evidence would have extended this opinion to an unwarranted length. It is sufficient to say that the Cassel Realty Company had not exercised its option to forfeit the lease because the pay-

ments were delinquent, and that the leasehold and fee estates were not merged; that the Cassel Realty Company because of its neglect to exercise the option while the improvements were being made to the real estate was estopped to exercise said option; that the plaintiff and the interveners are entitled to liens upon the leasehold as provided by the decree of the district court upon the payment of the rental as provided in the decree.

AFFIRMED.

JOHN P. KRAMPER, APPELLANT, V. ST. JOHN'S CHURCH OF VISTA ET AL., APPELLEES.

FILED DECEMBER 18, 1936. No. 29773.

1. **Deeds.** A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed, but which may have been occupied by the grantor in connection therewith.
2. **Adverse Possession.** When a deed expressly excludes property occupied adversely by the grantor in connection with that conveyed, the grantee cannot tack the grantor's possession to his own, where no privity is disclosed in regard thereto.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

William P. Warner, for appellant.

George W. Leamer and *Sherman W. McKinley, Jr.*, *contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

PAINE, J.

This is an action brought by the plaintiff and appellant to quiet title to a small tract of ground of less than an acre adjoining the site of the St. John's Church of Vista in Dakota county. A motion to dismiss the action was made at the close of the plaintiff's evidence and sustained

by the court. The case involves simply a question of evidence.

The plaintiff's evidence, as found in the bill of exceptions, covers 154 pages, and it is impossible to set forth all of the various details, but the salient facts may be stated as follows:

The plaintiff and all of the individual defendants are members of the defendant Catholic church, and the only defendant that filed an answer was this St. John's Church of Vista. Judge W. H. Ryan, former county judge of Dakota county, owned the property, and in 1887, upon request of Father Lysaght, gave a warranty deed for about an acre in the corner of his farm for a church site. Judge Ryan testified that, while the deed was given for a tract including the land in dispute, it was the understanding that the portion in dispute was to be used for a home for the priest whenever they got a priest appointed to that church, and the further agreement was that if he would sign a deed they would fence off what was needed for a church and if the remainder was not needed for the priest's residence they would never ask for it. There was a reversionary clause in the deed that in case it was not used for church purposes it should revert to Judge Ryan, and they placed a fence along the north side of the church property, separating this part which is in dispute from the church property, and that fence remained there for 45 years.

In 1903 Judge Ryan sold the farm to Thomas Hodgins, also conveying the reversionary rights, but in 1907, when they got ready to build a priest's home, they asked to have another site for the home, on higher ground farther away from the creek, and Hodgins deeded to the church a site west of where the church had been built, upon which location the new priest's home was erected.

Some testimony is to the effect that the church agreed to deed him back the other location, but they never gave Hodgins a deed for the tract involved herein. In 1902 Hodgins died, and the plaintiff later purchased the property.

Up to 1907 the record owners had each been willing to concede this tract of land to the church if it had been needed for a priest's home.

Father Gleeson, the priest in charge from 1915 to 1927, testified that he asked consent of Hodgins, the then owner of the disputed tract, before running a tile drain from the priest's home over this tract to the creek.

Plaintiff Kramper came into possession of the 180-acre farm March 1, 1925, and while this disputed tract had been continuously fenced in with the farm for nearly forty years, yet all grantors in their deeds had always exempted the acre of ground for church purposes, which acre included the tract in dispute, and no one of such grantors had ever made claim to the disputed tract by adverse possession.

The appellee argues that, when the plaintiff bought the property from the Hodgins' heirs after the administrator's sale was held up, he knew the deed did not contain this disputed half-acre, and that he must obtain a deed from the church to get title to that, and that he tried to get it from Father McCarthy, Father Gleeson, Father Carmody, the bishop, and also the bishop's attorney, but did not succeed.

The question is thus narrowed down to the plaintiff's possession, and is disposed of by an examination of the evidence to ascertain whether he has had the ten years' possession, such as is required under the law.

In 1 American Jurisprudence, 882, sec. 156, it says: "A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land not described and uses it in connection with that conveyed. * * * Likewise, where a deed expressly excludes certain property occupied by the grantor in connection with that conveyed, the grantee, even though he succeeds to the possession of that property, cannot tack the grantor's possession to his own."

Section 36-103, Comp. St. 1929, provides that interest

in land with certain exceptions cannot be assigned except by deed of conveyance.

This same question has been before this court in another case, involving church property in Gage county, as set out in the case of *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, 83 N. W. 201, in which this court said: "Possession cannot be tacked to make out title by prescription where the adverse occupant did not come in under another, and the deed under which the last occupant claims title does not include the land in dispute or show any privity between him and his grantor in regard thereto."

The evidence discloses that in 1933 a fence was put up on the west line of the small tract in dispute, and that six weeks later the plaintiff tore it out and immediately went to see Bishop Rummell in Omaha, and in May, 1934, the bishop came up and examined the property, and requested the plaintiff to put back the fence, which he did, and this fence remained there until just before plaintiff began this lawsuit in April, 1935.

It appears that the church has at times in the past used this half-acre of ground for parking purposes when needed, and that it is now necessary for such use every time there are services in the church.

The motion at the close of the plaintiff's evidence consisted of nine separate and distinct paragraphs, the seventh of which is as follows: "That the plaintiff by his own evidence shows that he is not claiming this property by adverse possession, and that any evidence of the claims as to occupancy of said premises is not sufficient in length of time or of such a character as constitutes adverse possession under the laws of Nebraska."

Finding no error in the record, the order of the district court, dismissing the plaintiff's petition, was right, and is hereby

AFFIRMED.

CLEO M. NEWELL, APPELLANT, V. MAY PIERCE, APPELLEE.

FILED DECEMBER 18, 1936. No. 29634.

1. **Deeds: DELIVERY.** When a grantor deposits a deed with a third person, without reserving dominion or control over it, and with directions to the latter to hold the deed during the lifetime of the grantor and upon grantor's death to deliver it to the grantee, such a delivery is effectual to pass the title to the grantee.
2. ———: ———. Where a grantor has thus conveyed his property, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed.
3. ———: ———. Where deeds conveying land were left with a depositary to be delivered after the grantor's death to his children, the testimony of the depositary that he would have returned the deeds to the grantor had he asked for them, and the fact that before grantor's death the deeds were returned to him, are not material in determining the legal effect of grantor's acts and instructions.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Reversed, with directions.*

Bruckman & Dunmire, for appellant.

J. E. Willits, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CARTER, J.

This is an action brought by the appellant, Cleo M. Newell, against the appellee, May Pierce, to cancel certain deeds and to quiet title to certain lands in Adams county, Nebraska. The trial court found against appellant and dismissed his petition. From this order appellant has appealed.

It appears from the record that one George W. Hall was the owner of the lands involved in this action during the year 1924 and for many years prior thereto. During the month of May, 1924, George W. Hall executed deeds to all of his real estate to his two daughters, May Pierce and Nellie Mae Newell. By these deeds Hall purported

to convey his home in Juniata, Nebraska, to May Pierce and the balance of his real property to May Pierce and Nellie Mae Newell jointly. The first question to be determined is whether these deeds were absolute and delivered without the reservation of any dominion or control over them by the grantor.

The evidence shows that Hall caused one Siebelt H. Itzen to prepare the deeds in question and bring them to his home in Juniata. The undisputed testimony of Itzen is to the effect that, after the deeds were executed, Hall told Itzen to take the deeds and hold them until after his death at which time Itzen was to deliver them to May Pierce and Nellie Mae Newell. Itzen took possession of the deeds and held them in the vault of the bank at Juniata in which he was employed. During this same period of time Hall had a safety-deposit box in the same bank in which he kept his personal papers. The deeds at no time were ever kept among Hall's personal papers. There is testimony in the record that Hall said, after delivering the deeds to Itzen, that now he was a pauper, that he had no more property as he had deeded it all to his children. There is no evidence in the record of any reservation of any dominion or control over the deeds on the part of the grantor.

We are convinced that, under this state of facts, Hall had absolutely conveyed his property to his two children, subject only to his life estate. He had divested himself of all dominion and control over the deeds and shown an intent to convey the title to the lands in question without reservation. The rule of law applicable thereto is as follows: "If a grantor deposit a deed with a third person, without power of revocation or recall by the grantor, and with directions that it be held until the grantor's death and then put upon record by the holder, this is a sufficient delivery and will be effectual to pass the title to the grantee, even though he had no knowledge of the execution of the deed." *Dunlap v. Marnell,* 95 Neb. 535, 145 N. W. 1017. See, also, *Kennedy v. Nelson,* 125 Neb. 185, 249 N. W.

546; *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586.

The record shows, however, that Nellie Mae Newell died on December 2, 1932, which was prior to the death of her father, George W. Hall. On January 19, 1933, May Pierce, at the request of Hall, caused Itzen to make out new deeds which were executed by Hall by which all of the real estate except 40 acres was conveyed to May Pierce. The remaining 40 acres were conveyed to the appellant, Cleo M. Newell, the son of Nellie Mae Newell. We having decided that the deeds executed in 1924 divested George W. Hall of all interest in the property except his life estate, he had no interest in the fee title to convey in 1933 when he attempted to again convey the property. The rule has been stated by a noted annotator as follows: "The authorities uniformly hold that where a grantor has deposited a deed with a third person, to be delivered to the grantee after the death of the grantor, reserving no dominion or control over the same, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect a delivery thus completed." Ann. 52 A. L. R. 1247, and cases therein cited.

Neither could any subsequent act or statement of the depositary change the legal effect of the conveyance. The fact that Itzen testified that if Hall had asked for the deeds he would have returned them to him could make no difference in the result, and such evidence should have been excluded as immaterial. Likewise, the fact that Itzen did return the deeds to Hall cannot change the legal effect of the conveyance actually made prior thereto unless it was done with the consent of the grantees in the deeds. *Stalting v. Stalting*, 52 S. Dak. 309, 217 N. W. 386; Ann. 52 A. L. R. 1247. In *Johnson v. Cooper*, 123 Kan. 487, 255 Pac. 1112, the court said: "In no event was Gardner's opinion about the effect of the transaction competent, and the court was not authorized to consider it. Because Kessler's intention at the time he deposited the deed is unmistakable, his subsequent conduct in getting possession

of the deed and destroying it had no effect on the previous completed delivery."

In view of the conclusion we have reached, the judgment is reversed and the cause remanded, with dirctions to enter a decree canceling the deeds executed by George W. Hall on January 19, 1933, and quieting title to an undivided one-half of the property described in the petition in the estate of Nellie Mae Newell, deceased.

REVERSED.

D. E. PETERS, APPELLEE, V. WILLIAM H. MEYER, APPELLANT.

FILED DECEMBER 18, 1936. No. 29769.

1. **Action.** An agreement to pay the principal of a debt at one time and the interest thereon at another or other times gives rise to separate causes of action.
2. **Judgment.** A judgment for instalments of interest on a promissory note will not bar a subsequent action for the principal and interest after maturity, although it was due when the former action was commenced.

APPEAL from the district court for Wheeler county: ERNEST G. KROGER, JUDGE. *Affirmed.*

H. Halderson, for appellant.

Arthur O. Auserod, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

This is a law action to recover the principal and interest thereon after maturity of a $1,500 promissory note or negotiable bond, dated May 18, 1927, maturing June 1, 1932. The interest accruing before maturity is represented by ten interest coupons payable semiannually upon which no recovery is sought in this action. Defendant, appellant, filed answer to petition of plaintiff, appellee, in which, for his first defense, he denied generally the allegations therein except that he signed the note and that plaintiff was

assignee thereof as alleged. For a second defense he pleaded in bar that plaintiff had, after the principal had matured, brought an action in the county court of Wheeler county, Nebraska, and obtained judgment thereon for a part of this same claim, to wit, a judgment upon the interest coupons; that the right to recover the principal and interest, having both matured, constituted one single indivisible demand for the aggregate sum due thereon, recoverable only in one action; that judgment on the interest coupons was *res adjudicata* of the entire claim. He pleads a third defense in his answer which will not be discussed in this opinion for the reason that it was abandoned in his brief and argument to this court, and is without merit.

Demurrer to the second and third defenses of the answer was sustained by the trial court. Defendant thereafter elected to stand on his answer and, the parties and counsel all being present in court, it was agreed that a jury be waived, and trial was had to the court. Evidence was adduced for plaintiff, and defendant rested. Whereupon, the court entered judgment for plaintiff and against the defendant. The amount of the judgment is not in dispute. The sole question for our determination is whether the trial court rightly sustained plaintiff's demurrer to the second defense of the answer.

We concede appellant's contention that a single, entire and indivisible demand cannot, at the will of plaintiff, be separated and collected in separate actions; that plaintiff cannot split up an entire cause of action. It is against the policy of the law to permit a debtor to be subjected to the expense and annoyance that would necessarily result from such a course, but there is no authority, statutory or otherwise, that requires a party to join in one suit several distinct causes of action. *Beck v. Devereaux*, 9 Neb. 109, 2 N. W. 365. See, also, *Kansas City Hotel Co. v. Sigement*, 53 Mo. 176; *Lincoln Joint Stock Land Bank v. Williams*, 216 Ia. 659, 246 N. W. 841. He may join such causes of action under certain conditions. See section 20-701, Comp.

St. 1929. When two or more actions are pending in the same court which might have been joined, they may, upon application, be consolidated. See section 20-703, Comp. St. 1929.

In none of the cases cited by appellant as authority for his contention has been found the question presented here. While recognizing the doctrine that a recovery for a part of an entire indivisible demand will bar an action for the remainder the great weight of authority is to the effect that a judgment for instalments of interest on a note will not bar a subsequent action for the principal, although it was due when the former action was commenced. A promise to pay a debt at one time and the interest at another is construed as containing distinct promises giving several causes of action and, being several in their origin, maturity of both will not make them one and entire. *Dulaney v. Payne,* 101 Ill. 325; *Wehrly v. Morfoot,* 103 Ill. 183; *Presstman v. Beach,* 61 Md. 203; *French v. Bates,* 149 Mass. 73, 21 N. E. 237; *Andover Savings Bank v. Adams,* 1 Allen (Mass.) 28; *Sparhawk v. Wills,* 6 Gray (Mass.) 163; *Stone v. Bennett,* 8 Mo. 37; *Butterfield v. Ontario,* 44 Fed. 171; *Nathans v. Hope,* 77 N. Y. 420. See, also, 1 C. J. 1114, 1115; 1 R. C. L. 351, sec. 31; 22 Cyc. 1572, secs. 3, 4, and cases therein cited.

The fact that several causes of action arise from the same contract does not *ipso facto* render a judgment on one a bar to a suit on another. It is not a test of the right of the plaintiff to maintain separate actions that all claims might have been prosecuted in a single action. *Perry v. Dickerson,* 85 N. Y. 345. The promissory note or negotiable bond upon which recovery is sought and the interest coupons attached are several, separate and distinct causes of action. A recovery upon one or more of such coupons will not be a bar to recovery of the principal and interest accruing after maturity thereof in a subsequent separate action even though both were due at the time of the first action.

The judgment of the district court is right, and it is

AFFIRMED.

GENERAL CAR ADVERTISING COMPANY, INC., APPELLANT, V. WALKER H. BARNEBEY ET AL., APPELLEES.

FILED DECEMBER 18, 1936. No. 29749.

1. **Execution.** The district court has the power, in accomplishing the ends of justice, to stay the issuance of an execution in order that instalment payments may be made on a judgment, where a stipulation of the parties to that effect is received in evidence on the trial of the action.
2. **Judgment.** Where a stipulation of the parties to an action is received in evidence, agreeing to a stay of execution contingent on certain payments being made on a judgment, and the trial court in its discretion and to preserve the rights of the litigants incorporates such stay of execution in a law judgment, and, before execution shall issue, requires a showing to be made of default in such payments, the proper procedure of the judgment creditor is to make a showing of such default in payments, and upon such showing execution shall issue forthwith.

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

Howard Saxton and *George E. Truman*, for appellant.

Leon & White and *Webb, Sheehan & Kelley, contra.*

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

MESSMORE, District Judge.

The district court for Douglas county overruled a motion to strike and to correct a judgment wherein said court included a stay of execution in said judgment, finding that execution should not issue without an order of the court made upon a showing that default had been made by Walker H. Barnebey in certain monthly payments provided for in a stipulation entered into between the parties to the action and relating to a judgment entered in the district court of the United States, for the district of Nebraska, Omaha division. From this ruling appellant appeals.

In analyzing the authorities cited by appellant, this court

has no quarrel with the general principles of law contained therein. The sole question for our determination is whether or not the trial court had the right to stay the issuance of an execution under the terms of the judgment entered. The stipulation entered into is as follows: "It is hereby stipulated between the plaintiff and the defendants that the plaintiff acknowledges receipt of $500 paid on the judgment in this case, and will withhold issuing execution further if the defendants pay to Howard Saxton, attorney for plaintiff, $500 on or before the 22d day of December, 1933, without grace, and $100 monthly on or before the 8th day of each month beginning Jan. 8, 1934, without grace, until the full amount of this judgment and interest thereon and all costs in this case and in any other action or proceedings which have been or may be instituted to effect collection are paid.

"This stipulation shall be without prejudice to the right of the plaintiff to prosecute to judgment any action or proceeding now pending, or later to be instituted against the surety on the supersedeas bond herein, or against any or all of the defendants, provided no execution is levied on any final order or judgment obtained in such actions or proceedings, except in default of payments above mentioned.

"This stipulation shall not in any sense be considered as a novation nor as an attempt to change the status of the judgment or the obligations of any or all of the parties or the surety J. A. Gross for its payment as such obligations existed prior to the making of this stipulation."

That part of the judgment attached is as follows: "It is further ordered and adjudged that the plaintiff shall not issue execution upon the judgment herein against the defendant Jacob A. Gross, without an order of the court made upon a showing that default has been made by the defendant, Walker H. Barnebey, in certain monthly payments provided for in a stipulation entered into between the parties hereto and relating to the judgment entered in the district court of the United States, for the district

of Nebraska, Omaha division, said stipulation having been identified in the trial of this cause as exhibit number 4, to which said further order and judgment so pertaining to execution, the plaintiff excepts."

The original judgment was obtained in the federal court. This stipulation was dated December 12, 1933. The trial in the instant case on the supersedeas bond was had January 28, 1935. The stipulation formed a part of the evidence in this case. The journal entry was signed July 27, 1935. The motion to correct and strike from the judgment was filed July 30, 1935, and the order overruling said motion was filed under date of August 24, 1935.

The stipulation is a *bona fide* agreement between the parties. The court, recognizing the desires of the respective parties and to protect the interests of the litigants, in its discretion made the stipulation and condition a part of its judgment. The right to do so is supported by ample authority.

"Under the general supervisory powers over their process, all courts of common law have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice. * * * The judgment itself may contain a stay of execution which may be conditional." 23 C. J. 521.

"But a judgment may order payment to be made out of a particular fund, when the contract of the parties contemplates the payment out of such fund, or may be adapted to the proportionate liabilities of the several defendants in the action, or in the case of a debt payable by instalments, the judgment may be so framed as to provide for its payment at successive periods, as the instalments fall due, or may order the payment of the amount presently due, with leave to plaintiff to take out execution for the succeeding instalments." 33 C. J. 1211.

It is apparent from the record that default has been made in the payments on such judgment and that the judgment creditor is entitled to have an execution issued. If appellant makes a further showing to the lower court that such

default has been made he would then be entitled to have execution awarded.

Appellee, Jacob A. Gross, has filed a cross-appeal herein. A careful reading of the contentions of cross-appellant and consideration of the points raised as alleged errors show such cross-appeal to be wholly without merit, and it is hereby dismissed.

The judgment of the lower court is

AFFIRMED.

IN RE ESTATE OF LAURA ANN PARVIN. WILLIAM A. PARVIN, APPELLEE, V. ETTA HAGENBUCH, APPELLANT.

FILED DECEMBER 18, 1936. No. 29571.

1. **Evidence.** Testimony of experts on the subject of handwriting is "circumstantial evidence" and is admissible under proper instructions alone or with other evidence to determine the authenticity of the signature on a promissory note.
2. **Witnesses.** The testimony of expert witnesses in handwriting called by the representative of the deceased, the purpose of such testimony being to determine whether or not the deceased executed a promissory note, does not amount to a waiver under section 20-1202, Comp. St. 1929, which would allow a person having a direct legal interest in the result of a civil action or proceedings to testify in regard to the execution of such promissory note.
3. **Appeal.** Before it can be considered that evidence erroneously admitted is without prejudice, it must appear from an examination of the record and the resultant judgment that such evidence so admitted alone or in conjunction with all the evidence probably did not influence the result either favorably to the party adducing it or adversely to the opposing party.
4. ———. The testimony of the witness C. J. Campbell examined and found to be self-serving and prejudicial to the appellant.

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

George I. Craven, for appellant.

Claude S. Wilson, Roy F. Gilkeson, Hymen Rosenberg and *P. James Cosgrave, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and YEAGER, District Judge.

YEAGER, District Judge.

Laura Ann Parvin, a resident of Lincoln, Lancaster county, Nebraska, died in Lancaster county, Nebraska, on July 12, 1933, leaving a small estate. She left surviving her as her only heirs at law William A. Parvin, known as Alva Parvin, a son, and the appellee herein, and Etta Hagenbuch, a daughter. Etta Hagenbuch is the appellant.

The estate of Laura Ann Parvin was probated in the county court of Lancaster county, Nebraska. After the commencement of the probate proceedings the appellee filed a claim against the estate based upon a claimed promissory note dated May 20, 1919, for the sum of $1,500, payable five years after date, bearing interest at the rate of 6 per cent. per annum until maturity and 10 per cent. after maturity, and purporting to have been signed by Laura Ann Parvin, the decedent herein, and F. Parvin, father of appellee and husband of the decedent, who had died several years before. A hearing was had in the county court, from which appeal was duly taken to the district court, where a trial was had to a jury, which trial resulted favorably to the appellee. From the judgment of the district court the case comes to this court for review.

The appellant sets forth seven assignments of error as a basis for the reversal of the judgment. The first four have to do with claimed error of the trial court in the admission of evidence over objection of the appellant. In the first assignment appellant complains of the fact that appellee was permitted to testify to transactions and conversations with the deceased, appellee being directly interested in the result of the suit and the adverse party being a representative of his deceased mother, in violation of section 20-1202, Comp. St. 1929.

The particular testimony which was complained of and

which was duly and timely objected to is as follows: "Q. Mr. Parvin, I now ask you to again reexamine exhibit No. 5 and tell me, if you know, who wrote the signature of Mrs. Laura Parvin on that instrument, exhibit No. 5? A. I do. Q. You may state. A. My mother. Q. Mr. Parvin, did you see your mother write that signature on exhibit No. 5? A. I did." There can be no doubt that this evidence taken in and of itself, without limitation or qualification amounting to a waiver, would be in strict violation of that portion of 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."

We must, however, determine the question of whether or not the appellant, agreeable to the further provisions of this same section, waived the right to object to the testimony of appellee regarding this transaction with his mother, which provision is as follows: "Unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." The appellee contends that there has been, in this case, a waiver. He bases his contention on the theory and proposition that appellant called a witness or witnesses, experts in handwriting, to testify to the transaction involving the signing of the note which is the basis of the action. The facts in this connection are that, the authenticity of the signature of Laura Ann Parvin on the note being in dispute, appellant called witnesses who examined the signature and compared it with proved signatures of Laura Ann Parvin and testified that, in their opinion, the note did not bear the genuine signature of the said Laura Ann Parvin. No witness was called who testified directly to the transaction on behalf of appellant.

This testimony given on behalf of the appellant was "circumstantial evidence." *Wakeley v. State*, 118 Neb. 346, 225 N. W. 42. The purpose in introducing this evidence was to prove that Laura Ann Parvin did not sign the note in litigation in this case. In other words, it was for the purpose of permitting these witnesses to testify with reference to the existence or nonexistence of the transaction in controversy. However, we think, in the enactment of this law, the legislature intended by the language used that a waiver should not be effective unless and until some witness called by the representative of the deceased shall have testified directly as to the existence of a particular conversation or transaction. As has been suggested, the testimony adduced by appellant was circumstantial, or, in other words, was testimony with reference to certain facts from the existence of which the existence or nonexistence of the conversation or transaction in controversy might be ascertained.

The trial court was therefore, we think, in error when it permitted appellee to introduce the evidence directly complained of in this assignment. This view is amply supported by the authorities on this subject and is in line with the evident purpose of the law to protect the estates of deceased persons against what might be false and fraudulent claims after the possibility of refutation has expired. Comp. St. 1929, sec. 20-1202; *Bergfield v. Bergfield*, 124 Neb. 67, 245 N. W. 12; *Wilkins v. Skoglund*, 127 Neb. 589, 256 N. W. 31; *In re Estate of Neckel*, 80 Neb. 123, 113 N. W. 1045.

The second and fourth assignments of error are substantially the same and do not require separate discussion. They have to do with conversations between C. J. Campbell and the appellee and testified to by C. J. Campbell. This testimony was objected to on the ground, among others, that it was self-serving. C. J. Campbell testified that about 20 years before the trial of this case in the district court he had been attorney for the appellee and had obtained a settlement wherein there was obtained a considerable sum of money for appellee. He had also, for a long period of

time, been legal adviser to the father and mother of appellee. He also testified to a conversation with appellee wherein a discussion was had about moneys owed to appellee by his father and mother, wherefor appellee was contemplating the taking of a note or notes to evidence the indebtedness. In the conversation the matter of whether or not a mortgage should be taken as security for the note was discussed. The witness vaguely recalled that he had advised against the taking of a mortgage in case of the giving of a joint note by the father and mother to evidence the joint indebtedness. This evidence was offered and received in evidence on behalf of appellee as a part of his case in chief.

Appellant contends that this evidence is self-serving and inadmissible. As against this appellee urges that it is evidence collateral in character and if admitted erroneously was error without prejudice. He cites many authorities on the question of the admissibility of such evidence and the discretion of the trial court in its admission, but we find none which presents a situation comparable to the one presented in this case. We think that, before it can be said that evidence admitted erroneously is without prejudice to the opposite party, it must appear from an examination of the record and the resultant judgment that such evidence so admitted, alone or in conjunction with all other evidence, probably did not influence the result either favorably to the party adducing it or adversely to the opposing party.

The evidence complained of cannot be brought within the purview of this rule. Appellee does not so contend. He says in his brief: "The fact that before the note in question was given that plaintiff consulted Mr. Campbell about taking a joint note from his father and mother, while not actually proving the giving of such a note, is an inference to be drawn and a circumstance to be considered with other evidence in the case." The express purpose and design and the purpose to be drawn from the testimony itself was calculated to exert an influence upon the jury. We cannot say that the jury were not influenced by it. The evidence was clearly self-serving and should not have been admitted.

Jones, Evidence, Civil Cases (3d ed.) 355; *Kane v. Chicago, B. & Q. R. Co.*, 90 Neb. 112, 132 N. W. 920.

On account of the error of the trial court in admitting the testimony of C. J. Campbell as to conversations between him and the appellee, it becomes necessary to reverse the case and remand it for a new trial.

Other errors are presented and discussed in the briefs, but since the case must be retried we find it unnecessary to discuss them, and especially since the other errors complained of deal mainly with questions of foundation for introduction of evidence, rather than with the question of admissibility as evidence.

REVERSED AND REMANDED.

BANKERS LIFE INSURANCE COMPANY, APPELLEE, V. MINNA OHRT ET AL., APPELLANTS: ROSA OFT ET AL., APPELLEES.

FILED DECEMBER 23, 1936. No. 29767.

1. **Attorney and Client:** ADMISSIONS. Where it is clearly shown that an attorney improvidently and by mistake made an admission against his client's interest, the court, in its discretion, may allow the admission to be withdrawn during the trial, where it does not prejudice the right of the adverse party to offer evidence on the point.
2. **Annuities:** LIENS. Where a stipulation in a deed binds the grantee to pay to the grantor a fixed sum each year during life, the grantee's liability thereon becomes a lien on the real estate for payments due and to become due.
3. **Evidence.** Oral testimony as to conversations in 1919 and 1920, designed to modify a written contract previously made in 1919, is not admissible in a trial of an action begun in 1935.
4. **Mortgages:** PLEADING. "The provision of the Code, that the plaintiff shall state in his petition whether any proceedings had been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties." *Dimick v. Grand Island Banking Co.*, 37 Neb. 394, 55 N. W. 1066.
5. **Fixtures.** "Ordinarily the requisites of a fixture are: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the

realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold—this intention being gathered from the nature of the articles affixed, the relation and situation of the person making the same, the structure and mode of annexation, and the purpose or use for which it has been made. *Freeman v. Lynch*, 8 Neb. 192, followed." *Oliver v. Lansing*, 59 Neb. 219, 80 N. W. 829.

6. ———. Lawn-fence, light-plant, and hot-air furnace *held* to be a part of the mortgaged real estate.

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

Robins & Yost, for appellants.

C. Petrus Peterson, William C. Ramsey, Sherman Welpton, Jr., Amos E. Henely, T. F. Henely and *John A. McKenzie, contra.*

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

GOSS, C. J.

Defendants Minna Ohrt, George Ohrt, Eggert J. Ohrt and Nancy Ohrt appeal from a decree of foreclosure.

Plaintiff foreclosed a mortgage on land owned and mortgaged to it by Minna Ohrt and husband, George Ohrt. Minna Ohrt had originally acquired this land from her father and mother, Eggert Oft and Rosa Oft, by warranty deed dated February 8, 1919, which contained the following covenant or condition:

"Subject to the following stipulation: Grantee herein agrees to pay to the grantors, so long as either one may live, $500 on the first day of September each and every year, this being a part of the consideration for the purchase of said land."

Eggert Oft had died on March 1, 1931. So when plaintiff took the note and mortgage it required Rosa Oft to join the Ohrts in their execution.

Rosa Oft cross-petitioned to preserve her lien upon the land subject only to plaintiff's prior mortgage lien, which she conceded to be such.

Bank of Bennington set up a note and mortgage subject to plaintiff's mortgage but not conceding that it was subject to Rosa Oft's claim.

Minna Ohrt and George Ohrt pleaded that, when the deed to this land was made in favor of Minna Ohrt by the Ofts on February 8, 1919, it was really made in consideration of services of their daughter Minna to her father and mother for a series of years from 1896 to 1901; and that at the time of the transfer it was orally agreed by the Ofts and their daughter Minna that the payment of the $500 each year, starting September 1, 1919, was conditioned (1) upon the land producing that much each year above the cost of production, and conditioned (2) upon the necessity of the Ofts of that sum for their support and maintenance, and was conditioned further (3) upon the oral agreement that, in case of such necessity, the Ofts would require each of the children (three others of whom had like contracts with their parents) to prorate the necessary sum for the maintenance of their father and mother so that "one would not be required to pay more than the other." The answer of Minna and George Ohrt further pleads an oral agreement made June 19, 1919, with Rosa Oft and her husband, Eggert, in which it was agreed by the Ofts, as owners of certain lots improved by a two-story building, that if Minna and her three sisters, with their husbands, would furnish the money to improve the building, at an estimated cost of something over $3,000, the said Minna and her sisters should receive one-fourth of the income from said property thereafter and upon the death of their parents should receive the property; that Minna Ohrt and George Ohrt, pursuant to that agreement, paid out as their share of such improvement in 1919 and 1920 a total of $937.38; that, shortly after the daughters improved the premises, the Ofts placed Roy Gordon, husband of Nancy Gordon, their youngest daughter, in charge of the operation of the premises and ever since he has continued to do a large and lucrative business in said property for the Ofts and, since the death of Eggert Oft, for Rosa Oft; that Rosa Oft has

conveyed said property to Nancy Gordon in consideration of one dollar and love and affection; that Minna and George are entitled to an accounting for the profits of said premises from June, 1919, or, in lieu thereof, to the $937.38, with interest from the date of their payments:

Further, the Ohrts alleged that in May, 1920, Minna and her sisters learned that Eggert Oft had become indebted to the Bank of Bennington in excess of $9,000 and orally agreed with the Ofts that each of them would share equally in the payment of that debt of the parent on the condition that their payments would be credited on account of their annual payments on their respective farms at any time it was not convenient for them to make the annual payments; that Minna and her husband contributed $2,554.75 to Eggert Oft on May 22, 1920, which was used to pay the debt to the bank, have made all annual $500 payments in cash on the contract in the deed of February 8, 1919, up to and including all of the 1931 payment and paid $20 on 1932 payment on June 23, 1933, and are entitled to all payments made by them as credits on the balance of the 1932 annual payment and subsequent thereto.

Eggert J. Ohrt and Nancy Ohrt answered that they are tenants from year to year and that they have the right to remove certain property upon termination of their lease, viz.: Lawn-fence, Westinghouse light-plant with wiring and fixtures, galvanized steel grain-bin, one frame hog-house, two brooder-houses, 160 rods of hog-wire and posts and one Nesbit hot-air furnace.

The decree allowed plaintiff's lien as a first lien; found that the lawn-fence, including steel posts and gates, the Westinghouse light-plant with wiring and fixtures, and the Nesbit hot-air furnace, claimed by Eggert J. Ohrt and Nancy Ohrt, were affixed to and a part of the real estate; that the condition of the deed from Eggert Oft and Rosa Oft to Minna Ohrt created a lien on the land for a $500 charge each year, and Minna Ohrt, by allowing the mortgage to become delinquent, had jeopardized her mother's lien; that the present worth of that lien is $4,055, and Rosa

Oft is entitled to a foreclosure thereof subject to plaintiff's first lien; that the Bank of Bennington is entitled to a lien and foreclosure thereof subject to the preceding named liens; and that the grain-bin, the hog-house, two brooder-houses and 160 rods of hog-wire and posts are the personal property of Eggert J. Ohrt. Decree was entered accordingly.

The first error assigned by the four appellants is that Rosa Oft was released as a joint maker of plaintiff's note and mortgage and that released the other joint makers, but that the court refused to release them. The answer to that is that in the beginning of the trial counsel for plaintiff, in offering his formal evidence, said: "The plaintiff further waives personal liability of the defendant Rosa Oft on its note and mortgage herein sued on." Later the record shows that counsel requested leave to withdraw this waiver. Rosa Oft consented but appellants objected. The court overruled the objections and permitted the withdrawal of the waiver. Appellants offered no further evidence. It is well settled: "The unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all." *Huber Mfg. Co. v. Silvers*, 85 Neb. 760, 124 N. W. 148; *Farmers State Bank v. Baker*, 117 Neb. 29, 219 N. W. 580. But the evidence here does not show an unconditional release of Rosa Oft from the note and mortgage. In the first place, the statement of counsel for plaintiff is not that Rosa Oft is released from all effects of the note and mortgage, but plaintiff merely waives her personal liability; in other words, the evident intent was to waive the right to a personal judgment against her. In the second place, during the trial counsel for plaintiff, with permission of the court, withdrew that statement from the record. There was no jury. The court was in entire control of the trial. If counsel inadvertently or without consideration makes a statement or admission which may or may not be embarrassing or injurious to his client in a trial to a court, we see no legal reason why it may not be withdrawn during the trial

and before the evidence is concluded, at a time when it does not prevent an adverse party from offering any evidence which he might have offered if such a statement had not been made in the record. Defendants were not misled. No consideration for the statement moved from appellants to plaintiff. The court had the right and the discretion to permit plaintiff to withdraw the statement. "Where it is clearly shown that admissions were made improvidently and by mistake, the court, in its discretion, may relieve a client of the consequences of the error." 6 C. J. 650. No prejudicial error resulted here as might have been the case if, for a consideration, counsel for plaintiff had undertaken to release Rosa Oft from her liability.

The remainder of the errors assigned relate chiefly to matters between defendants. The first is that the court erred in finding that the language in the deed constituted a lien on the land. The language of this deed was quoted in the early part of this opinion. This language did not create a technical annuity under the common law as that term "annuity" is technically defined. Such a charge is technically "chargeable only on the person of the grantor" or person who makes the agreement to pay the annuity. 3 C. J. 200. If we use the term annuity as applied to the annual payment agreed to be made by Minna Ohrt to her father and mother annually so long as either of them should live, as expressed in the deed which she accepted from them, then the term annuity is used in a broader sense than the technical one. "The term is used in a broader sense as designating a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such specific limitations as to its duration as the grantor or donor may lawfully impose. It may be made a charge on real estate as well as on the person, if such intention is expressed, or if that result follows by operation of law." 3 C. J. 200.

In the present decree, the sum is referred to as a "rent charge" for which the stipulation in the deed created a lien. We do not see any point in distinguishing in favor of

it being an annuity or a rent charge. Whether called by either name, the effect is the same. By putting the stipulation for its payment and the exact time and terms thereof in the deed, all parties thereto engaged to observe it and also gave notice to third parties dealing with the land of the terms of this agreement between the parties to that deed. The parties to the deed and all parties dealing with the title to the land were cognizant of the contract and bound to take notice of its terms.

The contract in the deed does not affect plaintiff's lien because plaintiff's mortgage was made by the Ohrts as owners of the fee and, by joining in the mortgage, Rosa Oft waived any priority of her claim over that mortgage. The controversy here is only between the Bank of Bennington and Rosa Oft and between the Ohrts and Rosa Oft as to whether the latter has a lien for the unpaid balance of her claim against the Ohrts and for the present worth of any future payments to become due upon her claim, based upon her expectancy, on the theory that a sale of the Ohrts' land will divest her of the security.

In a case involving a very similar provision in a deed, this court held: "Where, in a deed conveying real estate, as a part consideration therefor, it is provided that the grantee shall pay to a person therein named $50 per annum for ten years, which payment is assumed by the grantee by the acceptance of the deed, *held*, that the sum so to be paid is, and was intended to be, a charge upon the land, and its payment secured as an equitable lien on such land." *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837. That decision is unmodified and in full force and effect.

There was a consideration for the contract of Minna Ohrt to pay the $500 each September 1st to her father and mother during life, in that they conveyed this valuable land to her in fee, subject only to that small annual charge. While it did not constitute a mortgage, yet it was contemplated by the form of the contract and the vehicle through which it was expressed that it should be a charge upon the land. It would be contrary to equity to hold that this

charge does not constitute a lien upon the land when the effect of an adverse holding would result immediately in divesting Rosa Oft of the very security that the parties contemplated should stand for the performance of the contract.

Appellants assign error because the trial court refused to receive their evidence as to some other or different contract between them and the Ofts than that expressed in the deed of February 8, 1919. A sufficient answer to this point is that the court excluded the oral testimony as to another contract or as to a modification of the contract between the Ofts and these defendants because the testimony undertook to prove conversations in June, 1919, and the statute of limitations had barred the claim. This applies to the claims of the Ohrts that they are entitled to credit for $937.38, as their payment to improve the two-story building, and that they are entitled to credit for $2,554.75 as their payment to the Bank of Bennington on account of the payment of their share of Eggert Oft's debt to that bank.

Error is assigned because Rosa Oft did not plead nor prove that no proceedings at law had been had to recover against the Ohrts. "The provision of the Code, that the plaintiff shall state in his petition whether any proceedings had been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties." *Dimick v. Grand Island Banking Co.*, 37 Neb. 394, 55 N. W. 1066.

The last assignment of error is that the court erred in finding that the lawn-fence, light-plant and hot-air furnace are a part of the real estate. The evidence shows that the heating-plant and the light-plant were both built into the house when it was erected in 1927. They were there when the mortgage was made in 1931 and were not excepted in any way. They are naturally adapted to the use of the house as a conventional part thereof and annexed to the realty. To remove the respective plants in their entirety would injure the free-hold. The lawn-fence was also erected

in 1927. The posts are iron and the corner posts are set in concrete in the ground.

"Ordinarily the requisites of a fixture are: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold—this intention being gathered from the nature of the articles affixed, the relation and situation of the person making the same, the structure and mode of annexation, and the purpose or use for which it has been made. *Freeman v. Lynch*, 8 Neb. 192, followed." *Oliver v. Lansing*, 59 Neb. 219, 80 N. W. 829.

The judgment of the district court is

AFFIRMED.

E. H. LUIKART, RECEIVER OF BANK OF OTOE, APPELLANT, V. SCHUYLER H. BUCK ET AL., APPELLEES.

FILED DECEMBER 23, 1936. NO. 29768.

1. **Subrogation.** Subrogation is of two kinds—legal and conventional. Legal subrogation is allowed in cases where one who pays the debt of another stands in the situation of a surety and is compelled to pay the debt to protect his own rights. Conventional subrogation arises when one pays the debt of another, under an agreement existing at the time of the payment with either the debtor or creditor that the person paying it shall be subrogated to the rights of the creditor.
2. ———. To entitle one to subrogation his equity should be strong and his case clear. The person seeking subrogation must act fairly and equitably and be free from fault. It will not be allowed where he would derive an advantage or establish his claim through his own negligence or from his own wrong-doing or from the wrong-doing of another under whom he claims.
3. ———. The object of subrogation is the prevention of injustice. It is designed to promote and accomplish justice and is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity and good conscience, ought to pay it.
4. ———. "The doctrine of subrogation applies where a party is

compelled to pay the debt of a third person to protect his own rights or to save his own property." *Cole v. Malcolm*, 66 N. Y. 363.

5. ———. The doctrine of subrogation is not available to one who pays his own primary obligation.
6. **Banks and Banking**: TRUST FUNDS. Bank receiving deposit, under circumstances which create a trust in favor of the owner of the deposit, is primarily liable to the owner of such fund.
7. ———: INSOLVENCY: TRUST FUNDS. Trust funds in an insolvent bank are not the property of the bank and are not assets of the bank, distributable to its depositors or creditors.

APPEAL from the district court for Otoe county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed.*

Moran & James, F. C. Radke and *Howard L. Holtzendorff*, for appellant.

W. W. Wilson, Allen Wilson and *I. D. Beynon, contra.*

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

GOOD, J.

In this action plaintiff seeks to be subrogated to the rights of School District No. 78 of Otoe county on the official bond of the district's treasurer and for a money judgment against the principals and sureties on such bond. A demurrer to plaintiff's amended petition was sustained by the trial court. Plaintiff elected not to further plead, and the action was dismissed. Plaintiff has appealed.

The facts pleaded and relied upon to support plaintiff's alleged right of subrogation, as they appear in the petition, are: Moneys belonging to the school district and in the possession of its treasurer were deposited in the Bank of Otoe, which became insolvent, and the district was awarded a claim against the receiver of that bank for a trust fund, payable out of the assets in the hands of the receiver before the claims of depositors and of general creditors of the bank. This claim was duly adjudicated and paid by the receiver as a trust fund. Plaintiff now alleges that Buck, the treasurer, withdrew $894 while the bank was a going concern and embezzled the amount, and that the bank hav-

ing paid the entire deposit, including the $894, is entitled to be subrogated to the rights of the school district against Buck and his bondsmen, on the theory that the district had open to it an action upon the bond of the treasurer, as well as a claim for a trust fund against the insolvent bank; that it elected to pursue its remedy against the bank for the trust fund, and the receiver having paid it is, in equity, entitled to be subrogated to the rights of the district and to recover on the bond of Buck the sum of $894.

Subrogation is of two kinds—legal and conventional. Legal subrogation is allowed in cases where one who pays the debt of another stands in the situation of a surety and is compelled to pay the debt to protect his own rights. Conventional subrogation results from an agreement of the parties that the persons paying will be subrogated. 2 Story, Equity Jurisprudence (14th ed.) 110, sec. 706; *State v. Citizens State Bank,* 118 Neb. 337, 224 N. W. 868; *State v. Holdrege State Bank,* 110 Neb. 814, 195 N. W. 120. The record presents nothing that would in any wise indicate the applicability of the doctrine of conventional subrogation. In the following discussion reference is made solely to legal subrogation.

"To entitle one to subrogation his equity should be strong and his case clear. * * * The person seeking subrogation must act fairly and equitably and be free from fault. It will not be allowed * * * where he would derive an advantage from, or establish his claim through, his own negligence or, in any way, would thereby reap advantage from his own wrong-doing, or from the wrongful act of one under whom he claims." 60 C. J. 708. "The object of subrogation is the prevention of injustice. It is designed to promote and to accomplish justice, and is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, ought to pay it." 60 C. J. 697.

"The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights or to save his own property." *Cole v. Malcolm,*

66 N. Y. 363. See *Bursell v. Morgan,* 181 Minn. 462, 233 N. W. 12; *Brown v. Sheldon State Bank,* 139 Ia. 83, 117 N. W. 289.

The right of subrogation never follows an actual primary liability, and one who discharges a primary liability has no right of subrogation against another. In such cases payment is an extinguishment of the liability. 60 C. J. 712. In Nebraska, a school district treasurer's sole authority for deposit in a bank of school funds is found in the statutes, and to make a legal deposit by such officer the statutory requirements must be complied with.

In *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538, 247 N. W. 433, it was held: "Bank receiving deposit of funds of school district treasurer, who is also active managing officer of the bank, holds such funds as trustee." This holding was reaffirmed in *State v. Bank of Otoe,* 125 Neb. 414, 250 N. W. 547.

In *State v. State Bank of Touhy,* 122 Neb. 582, 240 N. W. 925, it was held, in effect, that trust funds in an insolvent bank are not the property of the bank and are not assets of the bank distributable to its depositors or creditors. In the opinion it was said (p. 584): "The proceeds constituted trust funds which belonged to claimant pending the execution of the trust—an unperformed duty of the trustee. The trust funds never became the property of the bank and are not assets distributable to depositors." See, also, *State v. Farmers State Bank,* 121 Neb. 532, 237 N. W. 857; *State v. American Bank of Mitchell,* 121 Neb. 862, 238 N. W. 753.

Applying the principles above quoted to the facts disclosed by the record, it clearly appears that the funds deposited in the bank could not have been deposited in the manner and under the circumstances prescribed by statute. The deposit of the school funds was a wrongful act. The bank participated in the wrongful act. The funds so deposited never became the property of the bank and were not part of its assets. It held the funds only in trust for the school district and did not perform that trust until

compelled to do so by the judgment of a competent court. The obligation to refund or pay to the school district was a primary obligation of the bank, and when it paid under compulsion it paid only the obligation for which it was primarily liable. It was not discharging the debt of another wherein it stood in the position of a surety. It was not discharging a debt for which another was liable to protect itself or its rights.

The pleaded facts are insufficient to warrant the application of the doctrine of subrogation. The trial court properly sustained the demurrer and dismissed the action.

AFFIRMED.

JOHANNA FAIMAN, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED DECEMBER 23, 1936. No. 29701.

Evidence in the record examined, and *held* ample to sustain the verdict of the jury and judgment entered thereon.

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

Leigh & Krajicek, for appellant.

Seymour L. Smith, Harold C. Linahan, W. W. Wendstrand and *A. C. R. Swenson, contra.*

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

EBERLY, J.

This is an action at law for damages to the real estate of the plaintiff, alleged to have been occasioned by the discharge of sewerage by the defendant into a ravine adjacent to the property of plaintiff. In this connection, we would define "sewerage" as, "the systematic removal and disposal of sewage and general surface water by sewers." Webster's New International Dictionary (2d ed.) Unabridged.

Plaintiff's petition may be summarized as alleging: That

the defendant is a municipal corporation of the metropolitan class; "that plaintiff * * * was the owner of the following described property: Lot Three (3) in Block Two (2), Dworak's Addition * * * to South Omaha, now Omaha, Douglas county, Nebraska; * * * that the defendant, city of Omaha, owns and is now maintaining a park in the city of Omaha, known as Brown Park," and as part thereof has constructed and maintains therein a swimming pool; that the city of Omaha "has constructed and is now maintaining a sewer in said city * * * for the drainage of 'S' street and other streets to the south of plaintiff's property," which sewer connects with and forms the outlet of the Brown Park swimming pool; that the defendant has constructed and is maintaining an outlet for this sewer into a small ravine to the west and south of plaintiff's property, but that said ravine is not a natural ditch or watercourse, and had always been a dry ravine without any water flowing into it, until the city of Omaha caused said sewer to be discharged into this ravine; that defendant also caused and permitted connections to be made to said sewer for sanitary purposes; that the surface waters thus collected by the sewer complained of, to which were added the drainage water contributed two or three times a week from the Brown Park swimming pool and the sanitary sewerage mentioned and which formed a part thereof, were so carelessly and negligently caused to be carried from said streets in said sewer and over and across plaintiff's land that it "has cut large ditches through and along plaintiff's land to a depth of two hundred feet or more, and has carried and washed away large portions of plaintiff's property as heretofore described; and that the plaintiff's residence is about to crumble into said ravine, also a large portion of said described property has been entirely destroyed, either for residence or business purposes;" that due to sewage contributed from the sanitary connections permitted and caused to be made by the defendant to said sewer, the waters carried thereby and discharged into said ravine, as an open ditch, were of such a nature that by reason of the

odors emanating therefrom, especially during warm weather and summer months, the use of plaintiff's home has been seriously interfered with, and its value for residence purposes greatly impaired; "that by reason of the washing away of said premises and the encroachment of the ditch carrying said waters and sewerage upon plaintiff's premises, and the odors emanating from said sewerage," the plaintiff has been damaged in the sum of $4,750. The foregoing is followed by an appropriate prayer.

To this petition the city of Omaha answered, and in the first paragraph thereof admitted its corporate capacity; admits plaintiff's ownership of the *locus in quo;* the construction and maintenance and operation of the sewer for the drainage of "S" street and other streets to the south of plaintiff's property and elsewhere; that said sewer connects with the swimming pool in Brown Park; that the defendant constructed an outlet into a small ravine west and south of plaintiff's property; and concludes with a general denial of the allegations in plaintiff's petition not admitted. In the second paragraph of the answer it is alleged that the sewer complained of was constructed and completed and connection made with the swimming pool in Brown Park for approximately eight years before the commencement of this action, and that the cause of action alleged by plaintiff did not accrue within four years next before the commencement of plaintiff's action, and therefore the same is barred by the statute of limitations.

The new matters alleged in the answer were put in issue by plaintiff's reply.

A jury was impaneled and evidence introduced on part of both plaintiff and defendant. Pursuant to an order entered by the trial court, the jury inspected the premises constituting the *locus in quo,* and, after argument of counsel and instructions given by the court, the jury returned a verdict finding "for the said defendant and against the plaintiff," and judgment for defendant was entered thereon. From the order of the trial court overruling her motion for a new trial, plaintiff appeals.

The plaintiff relies upon four alleged errors of the trial court as the basis of her appeal, viz.: The giving of instructions No. 3, No. 4, and No. 5 of the instructions given by the trial court on its own motion; the verdict of the jury and the judgment rendered thereon are not sustained by the evidence.

A careful examination of the instructions complained of, in view of the issues made by the pleadings and the proof disclosed by the record, and in the light of the authorities cited, is convincing that these instructions were in no manner prejudicial to plaintiff, and that reversible error cannot be predicated thereon.

In consideration of the last question, it is to be remembered that in this case the jury were the exclusive triers of the facts. They necessarily determined all questions of disputed fact disclosed by the evidence in the record, in the light of their examination and actual view of the *locus in quo*. Their determination thus made, at least so far as substantial evidence exists supporting their conclusions, is binding on this tribunal. In jury cases we are not triers of disputed facts, and the determination expressed in the jury's verdict, so far as the same is supported by competent evidence, is final and controlling.

Lot three (3) in block two (2), Dworak's Addition to Omaha is situated adjacent to the banks of a ravine. From this lot such ravine extends in a varying curve in a general southwesterly direction to its source. In a state of nature it had well-defined banks of some fifteen or more feet in depth. While the evidence does not clearly disclose the entire watershed which formed the limits of the basin drained by it, plainly it embraced territory on both sides of the depression. Tributary gulleys or depressions connected with it, and surface waters as far west as Twentieth street found their way to its bed. The evidence is also undisputed that all the surface waters now carried by the sewer complained of in a state of nature drained into its bed. It is expressly alleged by plaintiff, as a legal conclusion, that this ravine was not a natural ditch or watercourse, and had always

been a dry ravine without any water flowing into it until after the municipal improvement had been made. But, our statutory definition of a "watercourse" is: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Comp. St. 1929, sec. 31-302.

In this situation, plaintiff complains of two sources of injury, viz.: (1) The washing away of the land by the waters in the gulley or ravine; and (2) the disagreeable odors arising from the channel of this watercourse due to the sewage caused to be deposited therein by the defendant city. But neither by pleading nor evidence is any particular sum allocated to each of these claims. The damages alleged are claimed as the result of both. There is approximately a distance of six hundred feet between the mouth or outlet of the municipal sewer into this ravine and plaintiff's property. No sewage from this sewer is cast directly on or against plaintiff's lot, except as it flows by in the well-defined channel formed by the gulley or ravine. The waters carried by the ravine flow southerly from this outlet. This ravine receives the surface waters of the entire basin drained by it. These united waters, derived from the sources mentioned, are carried in this well-defined channel to and along plaintiff's land. Evidence in the record sustains the conclusion that the quantity of water carried to and past plaintiff's land has not been materially increased as a result of the municipal improvement. Also, it appears that the banks of this ravine were subject to the washing of the current, and were crumbling and falling into the channel, long prior to the construction of the sewer system now under consideration. While this evidence is contradicted by some of plaintiff's witnesses, one of them testified on cross-examination, as follows:

"Q. Now, you come from Q street and as you go south of this (plaintiff's) property there is quite a drop down from the street? A. Yes; that is a gradual slope from down there. Q. In other words, the houses as you come down

south of Q street are built on a slope? A. Yes. Q. And Faiman's property is in the lowest portion? A. When you come to that ravine then you can't get up in lots of places at all. Q. You have checked over the dirt down here and seen where it was falling away? A. What? Q. Have you checked over the dirt in this bank and seen where it was falling away? A. I suppose it has been falling away there for fifty years. I seen that ravine thirty, forty years ago. Q. And the dirt was falling away then, wasn't it? A. Oh, some of it always does."

In short, the testimony as an entirety justified the conclusion by the jury that the "wash" of the waters carried by this ravine existed in a state of nature, and was not substantially increased by the city's improvement, and the plaintiff suffered no damages by reason thereof. There is no definite proof in the record of any specific damages occasioned by the odors arising from the channel, and, also, the evidence is conflicting as to whether the plaintiff has actually suffered any damage or injury in any way due to the improvement constructed by the defendant city.

Thus, it follows that the verdict of the jury is sustained by ample evidence, and the judgment based thereon is supported thereby. The judgment is, therefore,

AFFIRMED.

ED SCHLEIF V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1936. No. 29906.

1. **Criminal Law**: INSTRUCTIONS. Instructions examined, and *held* not vulnerable to the objection that they failed to describe and define, with sufficient certainty, the offense of which defendant was convicted.
2. ———: ———. Where the evidence received in a criminal case contains no testimony to which an instruction relating to "self-defense" would be applicable, no error is committed by the trial court's refusal to instruct thereon.
3. ———: EVIDENCE. The refusal of the trial court to admit evidence of the existence of a public nuisance created by the

complaining witness, and that immediately previous to the commission of the offense charged the defendant was engaged in the abatement thereof, *held* not prejudicially erroneous in view of the admitted facts of the present case.

4. ———: ———: RES GESTÆ. The admission or exclusion of evidence as constituting a part of the *res gestæ* rests largely in the discretion of the trial court; such discretion is not an absolute discretion to be exercised arbitrarily but a legal discretion, the abuse of which constitutes reversible error.

5. ———: ———: ———. In view of the facts and circumstances disclosed by the present record, the action of the trial court in the admission of the evidence complained of, as constituting a part of the *res gestæ*, did not amount to an abuse of judicial discretion.

6. Sentence determined excessive, and reduced.

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

Stanley Bartos and *Fred P. Komarek*, for plaintiff in error.

William H. Wright, Attorney General, and *Lester A. Danielson, contra.*

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

EBERLY, J.

In the district court for Thayer county, Ed Schleif hereinafter called defendant, was convicted under the provisions of section 28-411, Comp. St. 1929. From the order of the trial court overruling his motion for a new trial, he prosecutes error to this court.

The first contention of defendant is that the trial court, in its instructions, failed to describe and define the offense of which he was convicted with sufficient certainty. The rule in this state is that, in determining the sufficiency of instructions, they must be considered together "as a whole."

Instruction No. 1, given by the court, is as follows: "This action is brought under a section of the statutes of the state of Nebraska which provides a penalty to be imposed upon whoever unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds an-

other. The complaint under which the state of Nebraska prosecutes the defendant, Ed Schleif, charges that on or about the 8th day of March, 1936, in the county of Thayer and state of Nebraska, the said defendant did make an unlawful assault upon one Ralph J. Darnell, and him, the said Ralph J. Darnell, did then and there strike, beat and wound."

By instruction No. 3 the jury were informed that the defendant had pleaded not guilty, and that that plea had placed the burden on the state to prove beyond a reasonable doubt every material allegation contained in the complaint.

By instruction No. 4 the jury were instructed that the material allegations of the complaint which the state was required to prove included: "1. That the defendant, Ed Schleif, committed an assault upon the prosecuting witness, Ralph J. Darnell, on or about the 8th day of March, 1936. 2. That said assault was committed by the defendant striking, beating and wounding the said Ralph J. Darnell."

Instruction No. 5 informed the jury that "any person who strikes or lays violent hands upon another against the wish and will of such other person is in law guilty of an assault upon such person."

We are committed to the view that, in defining "assault and battery," it is not necessary that the instruction of the court employ the word "unlawful," if words of like import or meaning are used. *Carrall v. State,* 53 Neb. 431, 73 N. W. 939; *Hodgkins v. State,* 36 Neb. 160, 54 N. W. 86; *Cox v. State,* 99 Ark. 90, 136 S. W. 989; *State v. Selby,* 73 Or. 378, 144 Pac. 657; *State v. Cancelmo,* 86 Or. 379, 168 Pac. 721.

It is obvious that the instructions given by the trial court are not vulnerable to the objections now raised by the defendant.

The court did not err in refusing the instruction requested on the subject of self-defense. The record contains no evidence to which such an instruction would be applicable. The facts established by the uncontroverted evidence, including that of defendant, do not support any issue of

self-defense. *State v. Yates*, 132 Ia. 475, 109 N. W. 1005; *Sanders v. State*, 83 S. W. (Tex. Cr.) 712; *Shelton v. Commonwealth*, 210 Ky. 670, 276 S. W. 571.

Neither did the court err in refusing to admit evidence pertaining to a public nuisance alleged to have been created by the complaining witness, and in refusing defendant's tendered instruction relating thereto.

Conceding arguendo the right claimed by defendant to remove the posts planted in the public street or public roadway as a nuisance, such a right must always be so exercised as not to disturb the public peace (46 C. J. 758), and cannot be a justification of a contemporaneous assault on part of the abater. As suggested by counsel for the state, "the only possible theory under which the defendant would have been entitled to exercise force, if he were entitled to abate the alleged nuisance, would have been to have exercised reasonable force to repulse interference from the complaining witness. There is no evidence in the record to the effect that the complaining witness used or attempted to use any force whatever in the effort to interfere with the actions of the defendant. Consequently, there was no possible basis for the use of any force upon the part of defendant."

We do not find that the court committed reversible error in the admission of the testimony which defendant challenges as hearsay and not constituting *res gestæ*. *Travelers Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913.

"The admission or exclusion of such evidence rests largely in the discretion of the trial court; such discretion is not an absolute discretion to be exercised arbitrarily but a legal discretion, the abuse of which constitutes reversible error." *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456, 95 N. W. 1057.

We do not find that the trial court abused its legal discretion in the instant case, or that the rights of the defendant were materially prejudiced by the action of the trial court.

The majority of this court, giving due consideration to the facts disclosed by the record, are of the opinion that the sentence confining the defendant to the jail of the county for 30 days is excessive. We are therefore convinced that we should exercise the power given us by section 29-2308, Comp. St. 1929, and reduce the sentence in this case to a fine of $25 and payment of all costs of the prosecution, which is accordingly done. *Junod v. State,* 73 Neb. 208, 102 N. W. 462; *Lillard v. State,* 123 Neb. 838, 244 N. W. 640.

Finding no reversible error in the record before us, the judgment of the trial court, as above modified, is hereby

AFFIRMED: SENTENCE REDUCED.

CITY OF LINCOLN ET AL., APPELLEES, V. RAY JORDAN, APPELLANT.

FILED DECEMBER 23, 1936. No. 30021.

1. **Master and Servant:** WORKMEN'S COMPENSATION AWARD: APPEAL: MODIFICATION. In a workmen's compensation case, if the findings of fact of the district court are not conclusively supported by the evidence, the award may be modified or set aside by this court. Laws 1935, ch. 57, sec. 13.
2. ———: ———: ———: TRIAL DE NOVO. Where the findings of fact are not conclusively supported by the evidence, a workmen's compensation cause shall be considered *de novo* on the record by this court. Laws 1935, ch. 57, sec. 13.
3. **Evidence.** The opinion of experts cannot prevail over actual facts.
4. **Master and Servant:** WORKMEN'S COMPENSATION. Where an injured employee suffers a fracture of a vertebra from which there is no union, and as a result is unable to do any kind of work because of pain, he is totally disabled.

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

Maxwell V. Beghtol, Glen H. Foe and *J. Lee Rankin,* for appellant.

Hall, Cline & Williams and *Flavel A. Wright, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

DAY, J.

This is an appeal by a workman in a compensation case from the judgment in the district court. This case was filed in the compensation court, heard before one of the judges, an award was made, a rehearing by the court waived, and an appeal taken before the district court, as provided by section 13, ch. 57, Laws 1935.

The compensation court awarded the injured workman $12 a week for 55 weeks for temporary total disability, and $3.60 a week for 245 weeks on account of 30 per cent. permanent partial disability. When the case was heard in the district court on appeal, a judgment was entered allowing the workman the sum of $12 a week for 55 weeks for temporary total disability and $1.20 a week on account of 10 per cent. permanent partial disability for 245 weeks. In addition there was an award in both courts for medical services.

The only question presented by this appeal is the extent of the workman's permanent disability, if any. The employee, Jordan, testified that he had been a locomotive fireman on the railroad until his services were discontinued because of lack of business of the railroad; that he was then employed as a laborer; that his back was injured in October, 1934, while he was working for the city; that he was in St. Elizabeth's hospital for 25 days; that his back was put in a plaster cast for approximately eight weeks, after which he wore a canvas body brace until he was compelled in February, 1936, to remove it because it irritated his skin; that he has tried to work, but even light work causes pain to his back making it impossible; that there has been no improvement during the six or eight months immediately preceding the trial.

The employer's physician was attending Jordan professionally for the injury. After a time Jordan became dissatisfied with the results of the treatment and consulted other physicians. They testified as expert witnesses at the

trial. One of them testified that the X-rays showed at that time a fracture of the left transverse process of the third lumbar vertebra. He also testified that there was a separation of the bone which continued to the time of the trial. The two expert medical witnesses called by the defendant do not dispute this testimony. They do dispute the testimony of plaintiff's expert witnesses as to other injuries and testified that the injury was not disabling. However, upon cross-examination they fixed the permanent partial disability at 10 per cent. These witnesses testified that use of the back would cure it, ending the pain, so that Jordan would have no disability that would prevent him from taking up the type of employment he had prior to the accident. The expert medical witnesses for the injured employee testified that the injury to the back was permanent, and that he was unable to do labor of any kind.

This case would present the difficulty which frequently confronts the court in determining between two conjectural and speculative opinions of expert witnesses were it not that certain definite facts stand out in relief from the record. It is certain that the workman was injured; that he suffered a fracture of the left transverse process of the third lumbar vertebra which has never formed a bony union; that even light labor causes pain and distress; and that the pain is so severe that the workman is unable to work.

It is not overlooked that an expert medical witness testified that Jordan is not disabled and that work would cure him. Of course, says this witness, there would be some slight pain, but it would soon disappear. This opinion evidence is not impressive. Probably the man whose back is injured knows more about the pain than a medical expert who examined him for the purpose of preparing his testimony. This man was injured. Restoring him to health is a medical problem. Must he endure great pain because some medical expert employed by the employer has an opinion that such work might effect a recovery? We think not. During this disability Jordan was called back to work for

the railroad but was rejected for further employment because of the injury to his back. The findings of fact of the trial court that Jordan has a permanent partial disability of 10 per cent. are not conclusively supported by the record. Where the findings of fact of the district court are not conclusively supported by the evidence, the award may be modified or set aside. Laws 1935, ch. 57, sec. 13.

The judgment of the trial court that Jordan has a 10 per cent. disability is not supported by the evidence except by the opinion of expert witnesses. There is no factual basis for such an opinion. The opinion of experts cannot prevail over actual facts. *Reichert v. Northern P. R. Co.*, 39 N. Dak. 114, 167 N. W. 127. There is evidence that this man is unable to do even light work. He has not worked since the accident. It does not appear that he is malingering. An award of $1.20 a week or 10 per cent. disability is not supported by any credible evidence. Where the findings of fact are not conclusively supported by the evidence, a workmen's compensation cause shall be considered *de novo* on the record by this court. Laws 1935, ch. 57, sec. 13.

From the testimony heretofore discussed, this court upon a consideration *de novo* concludes that Jordan, the workman in this case, suffers permanent total disability and is entitled to an award of $12 a week for 300 weeks from date of injury, less the 55 weeks for which he was paid for temporary total disability. In addition he is awarded the sum of $100 attorney's fees in this court.

AFFIRMED AS MODIFIED.

NEVADA D. HATCH, APPELLEE AND CROSS-APPELLANT, V. THIRZA C. ELY ET AL., CROSS-APPELLEES: GEORGE D. BEYER, APPELLANT AND CROSS-APPELLEE.

FILED DECEMBER 23, 1936. NO. 29777.

Limitation of Actions: MORTGAGES. An action to foreclose a mortgage on real estate can be brought only within ten years after the cause of action accrues. Where the mortgage contains a clause accelerating the due date or maturity of a mortgage on the de-

fault in the payment of interest, and the mortgagee thereupon elects to declare the mortgage due under such option, the statute of limitations begins to run from the date of such election.

APPEAL from the district court for Morrill county: J. LEONARD TEWELL, JUDGE. *Reversed and dismissed.*

Neighbors & Coulter, for appellant.

Joseph B. Boe and *Fisher & Fisher, contra.*

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

PAINE, J.

This is an appeal from a decree of foreclosure.

The evidence discloses that on September 22, 1919, Moses P. Hatch and his wife, Nevada, sold 939.36 acres of land in Morrill county to Thirza C. Ely for $25,000. A warranty deed was made to the purchaser, who with her husband gave back a note and mortgage for $18,000 to the seller. The buyer was unable to pay either the taxes or the interest upon the note and mortgage, and Thirza C. Ely and her husband, Ray, met Moses P. Hatch and his son Martin in Bridgeport, Nebraska, on September 3, 1921, and, to settle the matter between the parties, Thirza C. Ely and husband reconveyed all of the same land by warranty deed to Moses P. Hatch in consideration of the surrender and settlement of the note and mortgage for $18,000. The Elys testify that the note and mortgage were surrendered when they reconveyed the premises, and that the mortgage was destroyed by them. However, it appears that the note was not destroyed.

Vinnie M. Johnson, the daughter of Nevada D. Hatch, plaintiff and appellee, testified that she lived with her mother on this land northwest of Angora from about April 8, 1926, to January, 1928, and that her mother's papers were in a box in her possession during that time. That on the 29th or 30th day of January, 1928, Sheriff E. L. Davis, in ejecting them off the place, took her mother's things and threw them out on the prairie, and she picked up this box

which had been thrown out on the prairie, and found in it this old note, exhibit No. 2, for $18,000, but did not disclose this fact to her mother until some years later.

A son, Martin G. Hatch, testified that he did not personally return the note and mortgage to the Elys on September 3, 1921, in McDonald & Irwin's office when the Elys deeded back the property, and that he did not see his father give it back, but on cross-examination admitted that in an affidavit, signed before Ruth Burgess, a notary public, on May 24, 1933, he had made the statement that the deed of the Elys, conveying the property back to his father, was signed by the Elys before George W. Irwin in his presence, and that at the time his father, Moses P. Hatch, had in his possession the $18,000 note and the mortgage deed given to secure the same, and that Moses P. Hatch in his presence delivered up and turned over to the Elys the note and mortgage, but it appears that the mortgage was never released of record. After the Elys deeded the land back, the Hatches immediately moved to and took up their residence thereon, and lived on the same as a homestead for six or seven years, during which time Moses P. Hatch became indebted to the Nebraska State Bank of Bridgeport, which bank secured a judgment against him and levied upon this land and sold it at sheriff's sale, the bank bidding in the premises. Nevada D. Hatch intervened and had her homestead interest therein determined to be of the value of $2,000, and said amount was thereupon paid into court for her benefit. The Nebraska State Bank sold and conveyed the premises to James P. Spearman, who gave back a mortgage thereon to George D. Beyer, and upon default said Beyer foreclosed said mortgage and purchased the property at sheriff's sale, and since said time has owned and occupied the same. Nevada D. Hatch instituted several actions in the district court for Morrill county, Nebraska, and alleged in each of said actions that the premises involved in the case at bar were the property of her deceased husband, Moses P. Hatch, free and clear of all liens except her homestead interest therein of $2,000.

It was deemed necessary to set out these facts as leading up to the case at bar.

On May 12, 1933, Nevada D. Hatch brought a foreclosure suit against the Elys, George D. Beyer et al., and alleged that the $18,000 mortgage was uncanceled and unreleased of record and was still in full force and effect, and that she was the owner of an undivided one-half interest in said note and mortgage, and asked to have said mortgage decreed a first lien upon the premises. On May 16, 1933, Thirza C. Ely and Ray T. Ely, her husband, entered their voluntary appearance, conditioned that no deficiency judgment be taken against them.

After a motion and demurrer had been overruled, George D. Beyer and Grace Beyer, his wife, filed an answer, alleging that the warranty deed given back to Hatch was made on the sole consideration of the full and complete satisfaction, payment and release of the mortgage of $18,000 given by the Elys; that the Hatches entered into full possession as fee owner of said real estate; that more than eleven years expired since the property was deeded back to Hatch, and before the petition was filed in the case at bar, and said mortgage is barred by the statutes of limitation, and it is the prayer of the answer that the action be dismissed and the mortgage be canceled and discharged of record and the title quieted in Beyer. To this answer the plaintiff filed a very full reply, denying all such allegations.

After trial a decree was entered, finding that the plaintiff was the owner and holder of an undivided one-half interest in the $18,000 mortgage; that the same was unreleased and unsatisfied.

The defendant and appellant, George D. Beyer, set up as ground for reversal that the court erred in not directing a verdict for the defendants at the conclusion of the plaintiff's evidence; that the decree is not sustained by sufficient evidence, and that the action is barred by the statutes of limitation.

The abstract of title shows that Moses P. Hatch homesteaded 480 acres of this land and received a patent from

the United States on January 24, 1913, Nevada D. Hatch having no interest therein except her homestead interest; that on February 23, 1912, Moses P. Hatch purchased from Allison C. Johnson and wife a tract of 459.36 acres, Nevada D. Hatch having no interest therein except her homestead right.

Nevada D. Hatch was asked whether she ever made any demand on the Elys to pay any part of the note or interest, and her answer was: "Well, I didn't see why I should ask them for any when I supposed they settled the debt. I supposed it was settled."

The appellee calls our attention to the case of *Bliss v. Schlund,* 123 Neb. 253, 242 N. W. 436, being an action in specific performance by the receiver of the Nebraska State Bank of Bridgeport to compel H. F. Schlund to carry out a contract he had made for the purchase of the same land involved in the case at bar. Schlund refused to accept the deed because the $18,000 mortgage was unreleased of record. It was shown in the opinion filed in that case that Moses P. Hatch died June 23, 1927, an inmate of the State Hospital at Ingleside, and that after his death the sheriff levied upon the land, advertised and sold the same without any revivor of the judgment in the name of the heirs of said Moses P. Hatch, and that in *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884, it was held that after the death of a judgment debtor the judgment must be revived against the persons who took title to the real estate of said deceased, and that in this case there was no such revivor. For this and several other reasons set out in said opinion, it was held that the title was not a merchantable title, and the judgment of the district court requiring the appellants to accept the deed thereto was reversed.

Section 20-202, Comp. St. 1929, provides that an action for the foreclosure of a mortgage can only be brought within ten years after the cause of action shall have accrued, and the question at once arises, when did the cause of action accrue?

There is no dispute that the defendants Ely were in de-

fault of the payment of interest and taxes in September, 1919; that said default was recognized and settlement demanded, and under the terms of the mortgage the plaintiff and her husband had the option to declare the full amount due and demand payment of the entire indebtedness.

Moses P. Hatch and Nevada D. Hatch, through her husband and her son, Martin G. Hatch, as her agents, thereupon elected to and did demand the payment of the note and mortgage in full, and the Elys, not being able to pay the same, deeded back the premises on September 3, 1921, in full settlement of the note and mortgage, and Nevada D. Hatch and her husband soon thereafter took possession of the premises under said deed adversely to the mortgagors, and lived thereon for many years.

In our opinion the cause of action accrued on September 3, 1921, at the time of such election and demand by the mortgagees, and ten years from that date it was barred by the statutes of limitation (Comp. St. 1929, sec. 20-202), because the case at bar was not filed until in May, 1933. *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085.

In *Clark v. Hannafeldt*, 79 Neb. 566, 113 N. W. 135, it was said: "The cause of action accrues when the mortgagee enters into possession, not when the money secured by the mortgage becomes due."

In our opinion, the finding of the trial court that there is due to the plaintiff and appellee $17,415 upon her undivided one-half interest in said mortgage of $18,000, and decreeing that an undivided one-half interest in the land be sold to satisfy the judgment, should be reversed. The plaintiff's cause of action is hereby dismissed.

REVERSED AND DISMISSED.

CORNHUSKER ELECTRIC COMPANY, APPELLEE, V. CITY OF FAIRBURY, APPELLEE: CHARLES M. HURLBURT ET AL., INTERVENERS, APPELLANTS.

FILED DECEMBER 23, 1936. No. 29778.

1. Parties: INTERVENTION. The interest in a matter in litigation which will authorize a person to intervene in an action under section 20-328, Comp. St. 1929, must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
2. ———: ———. An intervener must plead some interest in the subject-matter of the litigation by a statement of issuable facts, not conclusions, and a mere denial of plaintiff's right is insufficient to give him a standing in court.

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

W. J. Moss and *Melvin Moss*, for appellants.

Hartigan & Skultety, Perry, Van Pelt & Marti and *E. A. Wunder, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

Plaintiff, appellee, sought in equity to enjoin defendant, appellee, city of Fairbury, from disconnecting the connections now existing between plaintiff, its customer, and defendant's electric power plant; from in any manner preventing plaintiff from receiving electric power from defendant as now served by them; that the court find the rates now charged plaintiff to be unreasonable, and that defendant be required to fix a reasonable rate therefor. We deem it unnecessary to set forth the many allegations of plaintiff's petition. W. J. Moss, then city attorney, filed answer for defendant. E. A. Wunder, succeeding him as city attorney, later filed an answer almost identical with that already on file for the city.

After issues joined between plaintiff and defendant, in-

terveners, represented by W. J. Moss and others, filed a petition in intervention. Plaintiff and defendant both filed separate demurrers thereto, which were sustained by the court. Interveners elected to stand on their petition and the trial court dismissed them out of the case. Several propositions of law are presented in appellants' brief, but a discussion of one of them disposes of the case. Undoubtedly the trial court found that appellants' petition did not contain proper averments that they had an interest in the matter in litigation which entitled them to intervene. We declare that to be the issue.

The petition alleges in substance that interveners are residents, electors, property owners, taxpayers and patrons of the city plant, interested in having the city charge and receive a reasonable rate for electricity, and that if such rate is not maintained the city will advance the rate for service to petitioners and all other users similarly situated for whom this petition is filed. Other allegations of the petition negative plaintiff's right to recover or present the same issue against the plaintiff as appears in defendant's answer except certain parts which are conclusions rather than statements of issuable facts.

We have said that it is a universal rule of law that no one has any right to intervene in any action unless he has some right to protect which is not being protected. *Buffalo County v. Kearney County*, 83 Neb. 550, 120 N. W. 171. The petition in intervention must state such facts as, if conceded to be true, will entitle the applicant to some relief or, in other words, will sustain his right to intermeddle in the proceedings and support a decree and judgment in his favor or in favor of the party whom he undertakes to assist. Note, 123 Am. St. Rep. 289; 20 R. C. L. 690, sec. 29; 47 C. J. 112; *Welborn v. Eskey*, 25 Neb. 193, 40 N. W. 959. The petition must not merely be in argumentative form, presenting what must apparently be regarded as conclusions rather than issuable facts. Note, 123 Am. St. Rep. 289; 20 R. C. L. 690, sec. 29; 47 C. J. 112; *Bouden v. Long Acre Square Bldg. Co.*, 86 N. Y. Supp. 1080; *Clarke v. Eureka County Bank*,

116 Fed. 534; *Thibault v. McHaney*, 127 Ark. 1, 192 S. W. 183; *Moran v. Bonynge*, 157 Cal. 295, 107 Pac. 312; *Honegger v. Wettstein*, 94 N. Y. 252; *Watkins v. Citizens Nat. Bank*, 53 Tex. Civ. App. 437, 115 S. W. 304; *Welborn v. Eskey, supra; Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137, 49 N. W. 1100. An intervener must plead some interest in the subject-matter of the litigation. A mere denial of plaintiff's right is insufficient to give him a standing in court. *Moline, Milburn & Stoddard Co. v. Hamilton*, 56 Neb. 132, 76 N. W. 455; *Parker v. City of Grand Island*, 115 Neb. 892, 215 N. W. 127; *Coffey v. Greenfield*, 62 Cal. 602; *Clapp & Co. v. Phelps & Co.*, 19 La. Ann. 461, 92 Am. Dec. 545; *Shepard v. County of Murray*, 33 Minn. 519, 24 N. W. 291; *Empire Distilling Co. v. McNulta*, 77 Fed. 700; 20 R. C. L. 690, sec. 29.

The interest in a matter in litigation which will authorize a person to intervene in an action under section 20-328, Comp. St. 1929, must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. This interest must be one arising from a claim to the subject-matter of the action or some part thereof, or a lien upon the property or some part thereof. An indirect, remote or conjectural interest in the result of the suit is not enough to permit intervention. *Kansas & C. P. R. Co. v. Fitzgerald, supra; Latham v. Chicago, B. & Q. R. Co.*, 100 Neb. 173, 158 N. W. 923; *Dickson v. Dows*, 11 N. Dak. 407, 92 N. W. 798; *Smith v. Gale*, 144 U. S. 509; *Wood v. Denver City Water Works Co.*, 20 Colo. 253, 38 Pac. 239; *Cache La Poudre Irrigating Ditch Co. v. Hawley*, 43 Colo. 32, 95 Pac. 317; *Day v. Bullen*, 127 Ill. App. 155; *Wightman v. Evanston Yaryan Co.*, 217 Ill. 371, 75 N. E. 502; *Dennis v. Spencer*, 51 Minn. 259, 53 N. W. 631; *Walker v. Sanders*, 103 Minn. 124, 114 N. W. 649; *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386; *Harlan v. Eureka Mining Co.*, 10 Nev. 92; *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Coffman v. Spokane Chronicle Publishing Co.*, 65 Wash. 1,

117 Pac. 596; *First Nat. Bank v. Clark*, 21 N. M. 151, 153 Pac. 69; *City of Grand Rapids v. Consumers Power Co.*, 216 Mich. 409, 185 N. W. 852; 20 R. C. L. 684, sec. 23; Note, 123 Am. St. Rep. 298, 307.

The parties all discussed the case of *City of Grand Rapids v. Consumers Power Co., supra,* in argument and briefs submitted to this court. It is conceded that the trial court based its decision thereon. In our opinion it is as near a precedent for this case as can be found in the books. The Michigan statute, section 12362, 3 Comp. Laws 1915, with reference to intervention, is broader than our own section 20-328, Comp. St. 1929, yet the Michigan court held under similar circumstances that the right of a consumer of electricity to intervene in a suit by a city to enforce rates does not exist, his interest being indirect, remote and conjectural.

Interveners herein appear to be in the same position. They are simply interested, according to their petition, in having the city charge and receive a reasonable rate for electricity and allege that if such rate is not maintained by the city it will advance the rates of service to them. Their petition discloses no interest of such a direct and immediate character that they will either gain or lose by the direct operation and legal effect of whatever judgment might be returned by the court. The demurrers were properly sustained, and the decision of the trial court is right and it is

AFFIRMED.

IN RE ESTATE OF GEORGE W. MATTINGLY. JOSHUA COLEMAN ET AL., APPELLEES, V. CHARLES O. CROSTHWAITE, ADMINISTRATOR, APPELLANT: NORA MATTINGLY BURNHAM ET AL., INTERVENERS, APPELLANTS.

FILED DECEMBER 23, 1936. No. 29720.

1. **Judgment.** Section 30-619, Comp. St. 1929, is for the protection of claimants, by providing for the entry of orders on disputed claims against estates when the claims are settled. The section is not all-embracing and claimants may waive its benefits.

2. **County Courts:** EQUITY POWERS. The county court has exclusive original jurisdiction as to probate matters, and in allowing claims it does so as in a civil law action, but the county court while acting in the allowance of claims by virtue of its plenary powers in such matters may exercise, within constitutional limitations, full and complete equity powers and may apply equitable principles.
3. **Judgment:** ESTOPPEL. A party who is instrumental in securing the entry of a judgment on claims against an estate on a stipulation will not be permitted in a collateral proceeding to set up the invalidity of the judgment against an administrator or other parties who are affected in the allowance of the claims, even though not parties to the stipulation.

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

Coufal & Shaw, Thomas & Thomas, Perry, Van Pelt & Marti, L. B. Fuller, Deutsch & Young and *James E. Brittain*, for appellants.

Crossman, Munger & Barton and *John G. Pegg, contra.*

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

MUNDAY, District Judge.

Two cases with identical facts were consolidated and tried together in the district court. They will be so considered in this court.

This is an appeal from an order of the district court directing the administrator with will annexed of the estate of George W. Mattingly, deceased, to pay Blanche and Joshua Coleman the balance claimed due them on decrees on claims they had filed against said estate.

The Colemans in 1934 filed their applications before the county court of Butler county to require the administrator to distribute the sums claimed due them on the claims. The decision of the county court was adverse to claimants and they appealed to the district court of that county, where they prevailed.

The applicants in their petitions in the district court

alleged that prior to August 23, 1924, they filed claims against said estate; that upon such claims judgments were entered; that the claims were allowed in the sum of $3,150 each, and that $1,650 thereof had been paid to each petitioner; that the petitioners were entitled to the additional sum of $1,500 each and interest thereon from August 23, 1924; that said orders of the county court in 1924 were final; and that there was an ample amount in the hands of the administrator for the payment of said orders.

The administrator answered in substance that objections to said claims were filed by the administrator; that, by the agreement of the claimants and the court orders pursuant thereto $750 thereof was payable to each of such claimants only on the condition that the primary beneficiaries of the will consented to the payment of the same from their respective shares; that such beneficiaries had not only failed to consent thereto, but were objecting to the payment of the same; that the shares of said claims allowed, and not subject to the conditions that payments should not be made unless said beneficiaries consented, were directed to be paid by the county court and were fully paid and satisfied by said administrator, and said claimants and assigns have duly receipted for such payments and filed their receipts in the county court.

The appellants, Nora Mattingly Burnham *et al.*, intervened, and in their petition alleged in substance that the deceased died in 1924, and alleged the probate of his will; that such interveners were the children of Joseph Mattingly; that said Joseph Mattingly predeceased said testator; that said interveners had theretofore been determined by the district court to be the persons entitled to the fund provided in said will; that said petitioners filed their claims on July 24, 1924; that at the time of the death of said testator his estate had a value of approximately $100,000; that the greater portion of said estate was distributable to Charles W. Bennison and I. T. McCaskey, as residuary beneficiaries; that said applicants entered into a stipulation and agreement for the compromise of their claims; that pursuant

thereto said administrator consented to the rendition of decrees upon said stipulation, and in full faith and reliance upon said stipulation said administrator and said residuary beneficiaries did not prosecute objections to the said claims and that the said claims were disallowed as such and decrees entered according to the terms of said stipulation; that at all times subsequent to the rendition of said decrees, all parties to the said stipulation have construed the same, together with said decrees thereon, to provide for the payment of the sums therein designated from specific funds, and that the said applicants are estopped to now contend that the said decrees were ordinary judgments on claims, or that the sums therein determined were general charges against the assets of the estate; that with the belief that a large sum would be distributable to said residuary beneficiaries under the will, the administrator prematurely paid the sum of $1,650 to each of said applicants without knowledge of these interveners; that at the time of said payments said applicants knew that the administrator then had ample funds with which to pay the full amounts provided in said stipulation and decrees; that the said estate has since depreciated in value; that said interveners were not parties to said stipulation and were not present at the rendition of such decrees, and did not know of the death of said deceased until thereafter, and that they have never approved of said decrees so far as they attempted to charge their distributive shares, and that they have filed objections to the payment of any sums from said estate to their prejudice.

The interveners, Elias Mattingly *et al.*, filed answer alleging in substance the same as the other interveners.

For replies, claimants denied that the administrator consented to the allowance of the claims but opposed same, and denied that appellees relied on the stipulation; alleged that appellees were prevented from proceeding to enforce judgments claimed, due to continuous litigation involving the estate; that appellees' attorneys abandoned the case and advised appellees nothing could be done to collect balance of judgments due to prolonged litigation and that assets had

been impounded; that all interveners knew of appellees' claims and judgments in the year 1925, and took no steps to set same aside nor filed any objections thereto; that the county court of Butler county could only allow appellees' claims against the general assets of the estate; that the stipulation was a fraud on appellees' rights; that the stipulation was void, not authorized by statute and contrary to the statute of Nebraska, to wit, section 30-619, Comp. St. 1929; denied laches; alleged that the court exceeded its powers in conditioning the judgments with means of enforcement; that interveners were guilty of laches and now are estopped in resisting these judgments, and denied all other allegations of the answers.

As the dispute between the parties in this court hinges principally on the orders of the county court on said claims, and on the stipulation referred to in said orders, it seems necessary to set out a copy of the stipulation and a part of one order so that an intelligent understanding of the actual issues may be had.

On or prior to August 23, 1924, the parties entered into the following stipulation:

"In the County Court of Butler County, Nebraska.

"In the Matter of the Estate of George W. Mattingly, Deceased.

"Whereas, on June 13, 1924, Joshua Coleman filed a claim against the aforesaid estate in the sum of $9,600, which claim was later withdrawn and again reinstated and filed on the 24th day of July, 1924, and

"Whereas, on June 13, 1924, Blanche Coleman filed a claim against the aforesaid estate in the sum of $12,600, which claim was later withdrawn and again reinstated and refiled on the 24th day of July, 1924, and

"Whereas, I. T. McCaskey and C. W. Bennison are beneficially interested in said estate in that each is a beneficiary of the residue of said estate under the terms and provisions of the last will and testament of the said George W. Mattingly, deceased, which has been offered for probate; and

"Whereas, said claimants and said beneficiaries desire to

avoid litigation in the premises and to settle, adjust and compromise their differences;

"Now, therefore, it is stipulated and agreed between said claimants and said beneficiaries above named:

"(1) That an order may be made and entered by the county court of Butler county, Nebraska, having jurisdiction in the premises on the first claim day fixed by the order of that court allowing:

"(a) The sum of $3,300 of said claims to both of said claimants, and not to each, on the two claims of said claimants by treating said claims as a joint claim or the sum of $1,650 to each on the respective claim of each if said claims of the said Joshua Coleman and Blanche Coleman shall be treated as separate and several claims and that said allowance shall be a valid charge against that part of the estate of said George W. Mattingly, deceased, bequeathed to the said I. T. McCaskey and the said C. W. Bennison;

"(b) That in addition to the allowance of said aggregate sum of $3,300 as aforesaid there shall be made a further allowance to said claimants, an aggregate sum of $1,500 to said claimants jointly or the sum of $750 to each, which said allowance shall, however, be valid and enforceable only against the portion of said estate and the means thereby represented which is bequeathed in paragraph 6a of said will, and which allowance shall be enforceable against all persons now or hereafter entitled to such bequest, providing, however, that allowance shall not be valid or enforceable over the objection of the beneficiary, Joseph Mattingly, or over the objection of the children of said Joseph Mattingly if any such is made;

"(c) That in addition to the aforesaid allowance there shall be a further allowance to said claimants of an aggregate sum of $1,500 to said claimants jointly, or the sum of $750 to each which said allowance shall, however, be valid and enforceable only against the portion of said estate and the means thereby represented which is bequeathed in paragraph 6b of said will, and which allowance shall be enforceable against all persons now or hereafter entitled to

such bequest, providing, however, that allowance shall not be valid or enforceable over the objection of the beneficiary, Elias Mattingly, or over the objection of the children of said Elias Mattingly if any such is made;

"(2) It is further expressly understood and agreed that the allowances provided for in said subparagraphs (b) and (c) shall not, in any event, be a charge on or be paid out of any other part or portion of the estate of which George W. Mattingly died seized save and except the bequests upon which it is made a specific charge and except as to the means represented by each of said bequests.

"(3) That a suitable order of allowance, conforming to the terms of this stipulation, shall be made and entered into in this matter.

"(4) That said claims and each of them shall be disallowed in all other respects save and except in the respects and to the extent that it is hereby stipulated and agreed the same may be allowed.

"(5) And that in consideration of the agreements herein made said claimants and each of them release, relinquish and discharge said estate and each and all beneficiaries under said will from each and all other claims of every name and nature that each may now or hereafter assert and make, save and except in respect of the allowances which by this agreement are to be made.

"(6) It is understood that said allowances are not in lieu of and do not affect any provision expressly made for the benefit of said claimants under the provisions of the last will of the said George W. Mattingly, deceased.

"(Signed) Coufal & Shaw, Attorneys for C. W. Bennison and I. T. McCaskey,

"Joshua Coleman,

"Blanche Coleman,

"F. H. Mizera, John Adams, Attorneys for Joshua Coleman and Blanche Coleman."

On the same day the county court made an order identical in form on each claim. The substance of the order on the Blanche Coleman claim is: Date of order given as August

23, 1924; names of the parties present, then the following finding: That the county court had jurisdiction; that the claimant was employed by the deceased; that the value of said services was $3,150; that the stipulation of the parties was fair and equitable and in all things approved by the court. Then follows four paragraphs setting out findings which are in the main the same as in the judgment proper of the order, which is hereinafter set out. The last finding is: "That said claim is hereby allowed in the sums, and under the conditions hereinbefore specified, and said claim is hereby disallowed in all other respects." The order then concludes:

"Wherefore, it is ordered, adjudged and decreed by the court:

"That the sum of $3,150 be, and the same is hereby allowed upon the claim of said Blanche Coleman, filed herein on the 13th day of June, 1924, and refiled on the 24th day of July, 1924, against the estate of said George W. Mattingly, deceased, to be a charge upon and paid in the manner and means hereinafter set out.

"That as to the method of payment of said sum and as to the portions of said estate against which the same or parts thereof shall be and constitute a valid charge and lien, the stipulation of I. T. McCaskey and C. W. Bennison, on the one part, and Blanche Coleman and Joshua Coleman, on the other part, is hereby adjudged to be fair, reasonable and controlling and just, and that such stipulation be, and the same hereby is in all things and in all its terms and provisions, approved by the court, is incorporated herein in its provisions verbatim, and made a part of this judgment and order of allowance.

"That of said sum of $3,150 heretofore allowed to claimant, the sum of $1,650 is hereby adjudged to be a valid charge against that part of the estate of said deceased, bequeathed to said I. T. McCaskey and C. W. Bennison.

"That the sum of $750 of said sum of $3,150 shall be and the same is hereby adjudged to be a valid charge against only that portion of said estate and the means thereby rep-

resented which is bequeathed in paragraph 6a of said will, and which allowance shall be enforceable against all persons now or hereafter entitled to such bequest, providing, however, that such allowance of $750 shall not be valid and enforceable over the objection of the beneficiary Joseph Mattingly, or over the objection of the children of said Joseph Mattingly, if any such is made." (The next paragraph is the same as the last, except it relates to Elias Mattingly's interest.)

"That said allowances mentioned in the last two preceding paragraphs of this decree shall not, in any event, be a charge on or be paid out of any other part or portion of said estate save and except the bequests upon which it is made a specific charge and except as to the means represented by each of said bequests.

"That said allowances shall draw interest at the rate of 7 per cent. per annum from this date until paid.

"By the Court. (Signed) W. W. Stowell, Acting Judge."

The appellants insist: That there is a variance with the decree of the county court based on the stipulation; that the decree of the county court on the claims was a final order and that the district court did not have jursdiction to modify or reverse the same; that the stipulation governed the judgment on claims and not said section 30-619; that the Colemans were guilty of laches and were estopped by acting under and accepting the stipulation for years and then attempting to change their status in 1934.

When the stipulation was entered into, it seems as though the claimants were represented by counsel who signed the same as did the claimants. Also the residuary legatees, McCaskey and Bennison, were represented by counsel, who signed the stipulation for them, and the same counsel represented the administrator.

By a careful examination of the record, we cannot find where there was an actual controversial hearing on the merits of the claims in the county court. The administrator had filed objections to the claims, amounting to $22,200. There was a delay apparently in an attempt to settle the

claims. Then there was a hearing on the claims and the Colemans testified as to their claims. The stipulation seems to have been presented to the court. All the parties in this court agree that the orders are final orders.

Thus, reduced to the last analysis, the question is: Did the county court under the aforesaid circumstances and facts have the power and authority to make the conditional orders on the claims? Incidental to this question is the question of laches and estoppel claimed by each against the other.

The appellees earnestly contend that the claims, being founded on services rendered the deceased and being disputed, were finally allowed in reduced amounts by the county court and that the county court must order them paid out of the general assets of the estate to the same extent as other creditors where no stipulation was had. They claim that section 30-619, Comp. St. 1929, so requires. This section is as follows:

"When the disputed claim shall have been finally settled, the court shall order the same to be paid out of the assets retained, to the same extent and in the same proportion as the claims of other creditors."

Appellees also contend that the county court exceeded its authority in stating in the orders on claims the method of their enforcement and making them chargeable to specific bequests; that the matter of allowance of claims was a purely legal proceeding and not equitable; that the judgments ended with the finding of amounts due claimants; that the stipulation was void and contrary to the statute, and that the parties thereto had no authority to bind the estate or the specific legacies, and the county court had no jurisdiction to incorporate the stipulation in the orders of the allowance of the claims; that the administrator and interveners were strangers to the stipulation and as such cannot avail themselves of the doctrine of estoppel against appellees; that the estate became bound for payment of these claims upon their allowance in August, 1924, when no appeal was taken.

Did the county court have authority and jurisdiction to incorporate the substance of the stipulation in its orders on the claims? If not, the orders are void. See 34 C. J. 130; 15 R. C. L. 643, sec. 86; *In re Estate of Kierstead,* 128 Neb. 654, 259 N. W. 740.

Proceedings for the settlement of estates in this state are largely statutory and in the absence of regulatory statutory provisions the trial court in such matters is governed by the rules of civil cases at law rather than equity. *In re Estate of O'Connor,* 117 Neb. 636, 222 N. W. 57; *Williams v. Miles,* 63 Neb. 859, 89 N. W. 451. This is so as to the allowance of claims against estates. *Nebraska Wesleyan University v. Craig's Estate,* 54 Neb. 173, 74 N. W. 605.

Although the county court, as a court of probate, has exclusive original jurisdiction as to all matters of probate, and in allowing claims it does so generally as in a civil law action, still the county court while so acting by virtue of its plenary powers in probate matters has power to try and determine matters of an equitable character in connection with such law matters and grant equitable relief to the same extent as the district court has in the exercise of its general equitable jurisdiction. *Williams v. Miles, supra; In re Estate of Frerichs,* 120 Neb. 462, 233 N. W. 456; *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700. A court exercising equitable powers may prescribe and supervise the manner of performance of its decrees. 1 Pomeroy, Equity Jurisprudence (4th ed.) p. 128; 21 C. J. 641.

The orders of the county court in the instant case were clearly in the nature of consent judgments. In 1 Freeman, Judgments, p. 170, the rule in such cases is stated thus:

"Ordinarily it is no proper part of a judgment at law to make provision for its enforcement. * * * Where, however, the contract on which it is based contained a valid waiver of exemptions or rights to which the debtor would otherwise be entitled, the judgment should doubtless contain corresponding directions, particularly where the statute so provides. So if the contract limits liability to specific property or a special fund, or contemplates that such a fund,

set aside for the purpose, shall be answerable for a breach, the judgment should contain a corresponding limitation, or subject the fund, as the case may be."

See *In re Estate of Vance,* 152 Cal. 760, 93 Pac. 1010.

When the cause came on for hearing in the county court on the allowance of claims, the objections by the administrator were still on file against these claims. The residuary legatees had a right to object to these claims, as they were interested as the allowance of the claims would affect the amount they would receive. 24 C. J. 388. The residuary legatees did not file objections, but their attorneys entered into a stipulation as to these claims as to the amount, nature and terms of payment. The administrator apparently pressed his objections no further, but his attorneys were present; no controversial hearing was had, but the claimants testified as to their claims and were represented by counsel, and the county court entered judgment on the claims, stipulation and evidence. The court had jurisdiction in the allowance of the claims and exercised its equity powers in connection therewith by impressing on certain legacies certain conditional liens in accordance with the stipulation. It was within power of the court to do so in the exercise of its equity powers in connection with a matter in which it had plenary power.

Under the Civil Code distinction between actions at law and suits in equity have to a great extent been abolished and equitable defenses may be interposed in law actions. In code states the courts sometimes enter judgments in accordance with the agreements of the parties. Freeman, Judgments, *supra.* This would seem an additional reason why the county court had authority to make the orders in question.

But is section 30-619 such that it cannot be waived? The general rule is stated in 60 C. J. 49, as follows:

"The benefit of a statute or constitutional provision enacted for the protection of a party, or of a rule of law, may be waived by him by stipulation where it is a matter of private right and no considerations of public policy or

morals are infringed by so doing, and, having once consented to forego his right, he cannot afterward assert it."

Section 30-619 appears to be for the benefit of claimants as to the entry of their claims by the probate court. There seems to be nothing in this section that the appellees could not waive. The waiver is not unreasonable, nor against public welfare or good morals. Appellees undoubtedly desired to avoid litigation and a contest of their claims. The same presumably may be said of the residuary legatees and the administrator. Stipulations are favored by courts. *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469, 93 N. W. 766. A fair and legal stipulation is binding on the parties and the court. 60 C. J. 69. Also, see *Rickenberg v. Capitol Garage*, 68 Utah, 30, 249 Pac. 121, 50 A. L. R. 1303; *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 54; 3 Freeman, Judgments, p. 2764.

The California supreme court, in *In re Estate of Vance, supra*, had before it a claim on a promissory note which provided payment by cash or stock in a corporation. The contention was that the probate court could only render a money judgment. Of this contention the court said:

"The contention that the probate court was without jurisdiction to make the order appealed from is, in a measure, answered by what has already been said. If the option reserved in the note was a right that passed to the estate, and was to be exercised by the executrix, it will hardly be questioned that the exercise of that option for the purpose of satisfying an approved claim was a matter to be passed on by the probate court. 'The objects of probate proceedings are to administer, settle and distribute the estate of deceased persons.' * * * The presentation, allowance, and payment of claims are subjects especially committed to the care of the probate court. * * * The order in question is to be regarded as an order for the payment of an allowed and approved claim. The appellant submitted itself to the jurisdiction of the court by presenting its claim, and it has no ground for complaint in that the court has made an order directing that it be paid in the manner provided by the contract which is the basis of the claim."

In the instant case the parties were not attempting to defeat the jurisdiction of the court, nor to do anything unlawful. Section 30-619 is not all-embracing and exclusive. Claimants simply waived their rights thereunder and adopted another method, which they had a right to do.

If the county court could only render a judgment for a definite amount in allowing the claims, regardless of the stipulation and agreement, which as far as this record is concerned was without fraud or over-reaching, and in face of the apparent fact that there was no controversial litigation at the time of the allowance of the claims, and that the decree was undoubtedly based in the main on the stipulation, should appellees be permitted to take the benefit of that part of the decree which was favorable to them and repudiate the remainder? We think not.

When the county court decrees provided "that said claim is hereby allowed in the sums, and under the conditions hereinbefore specified, and said claim is hereby disallowed in all other respects," it is surely as much of a disallowance of the claim as an allowance.

This case should not be confused with one where the decree covered matters not in the pleadings and was objected to at the trial, or contained matters absolutely void. In such cases the surplusage is a nullity. It would be unjust to permit the violation of the stipulation, under the conditions herein, to the county court as well as the appellants.

The appellees in 1926 filed motions asking the probate court for orders directing payment to them under the decrees of the sum of $1,650 each. No further action on the decrees was taken until these applications, which are the basis of this appeal, were filed in 1935. The appellees acquiesced in the mutual construction and interpretation of the decrees for a period of over eight years, and filed applications thereunder, and caused the other parties interested in this case to rely thereon, and they are estopped thereafter to claim a different construction. *Home Street R. Co. v. City of Lincoln,* 162 Fed. 133.

The appellees claim appellants are estopped in resisting

the orders as they are guilty of laches. Elias and Joshua Mattingly's status was established in 1935, and soon thereafter they filed objections to the allowance of the claims against their legacies. Claimants secured other attorneys and made application to change the decrees and charge the general estate with the payment of the residue of their claims. The assertion of estoppel by appellees is somewhat inconsistent with the contention that the original orders were a nullity. However, we are not deciding this question, but we do not think the appellants are in any way estopped.

On the other hand, the appellants also contend that the appellees were estopped because they acquiesced in these orders based on the stipulation and in a mutual interpretation thereof for over eight years and accepted the benefits thereof and caused the appellants to rely thereon, to thereafter claim a different construction. Their contention receives support in the *Home Street R. Co. v. City of Lincoln, supra.* 21 C. J. 690, puts the rule:

"Stipulations between the parties, or signed by the party to be bound, which are filed with the papers in the cause, may be considered in determining the true interpretation of a decree; and a party may be held to the practical construction which he has given to a decree."

To this contention appellees reply that as the administrator and interveners were strangers to the stipulation they cannot avail themselves of the doctrine of estoppel. This is undoubtedly the rule in estoppels *in pais.* 21 C. J. 1179; *City of Omaha v. Gsantner,* 4 Neb. (Unof.) 52, 93 N. W. 407. But in the instant case the orders were made in 1924, in an estate in which appellants are interested and in which they have a right to intervene, and in an estate in which an administrator has a right to contest claims being allowed against the general assets of the estate, and the orders were made which were based on a solemn stipulation to which the appellees were parties. Under these circumstances is mutuality required by the courts? Estoppel in such cases is not estoppel in the true sense of the word.

Assuming that the county court had no authority on which it made the orders for payment on condition of the claims, the claimants are in no equitable position to question the validity of the orders. They were instrumental with others in procuring the relief on the conditions of the stipulation and now ask the courts to repudiate the conditions, which by the stipulation they invited the court to incorporate in the orders. Courts will not permit litigants to so take an undue and unfair advantage, nor subsequently, in a collateral attack, to so set aside decrees of a court obtained at their instance, especially where the jurisdiction of the court has been invoked, without a showing of fraud, illegality, detriment to the public welfare or extreme injustice to the parties seeking to be relieved. None of these conditions exist in this case. The Kansas supreme court states the rule in *Bledsoe v. Seaman,* 77 Kan. 679, 95 Pac. 576:

"A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment and, after having obtained the relief desired, repudiate the action of the court on the ground that it was without jurisdiction. The question whether the court had jurisdiction, either of the subject-matter of the action or of the parties, is not important in such cases. Parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated. People who invoke the action of a court, and, through negligence or falsehood, mislead the court as to the existence of the facts upon which its jurisdiction depends, and obtain a judgment for relief, will not afterward be heard to deny the validity of such judgment."

Also, see *Matter of Morrisson,* 52 Hun, 102, 5 N. Y. Supp. 90; *Marvin v. Foster,* 61 Minn. 154, 63 N. W. 484. In 3 A. L. R. 535, there is a very instructive note on the question of a collateral attack on a judgment by a party at whose instance it was entered.

We believe the district court erred in its judgment re-

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REVERSED.

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7. The county court has exclusive original jurisdiction in probate matters, and in allowing claims it may exercise equity powers and may apply equitable principles. *In re Estate of Mattingly*..... 891

Creditors' Suit.

In creditors' suit to set aside claimed fraudulent mortgage, wide latitude of cross-examination of defendants should be permitted where the inquiry is to determine the good faith of transactions between close relatives. *Wilson v. Gerhard* 809

Criminal Law.

1. Sentence under statute penalizing cattle stealing *held* not error, though judge considered previous convictions in passing sentence. *Buthman v. State* 385
2. Defect in an information as to date which might have been attacked by motion to quash is waived by a general demurrer. *Buthman v. State* 385
3. In prosecution for shooting with intent to kill, a non-expert witness who had not seen accused for four years prior to the shooting and had never had intimate personal relation with accused, *held* incompetent to testify to sanity of accused, over objection. *Henton v. State* 622
4. Where accused interposes defense of insanity and offers competent evidence in support thereof, the state has the burden to establish sanity beyond a reasonable doubt. *Henton v. State* 622
5. In prosecution for shooting with intent to kill, evidence as to circumstances surrounding commission of offense and defendant's conduct and appearance at time of shooting *held* to sustain finding that defendant was sane at time of shooting. *Henton v. State* 622
6. Petition in error dismissed on motion for failure to file transcript and petition in error in time. *Goodman v. State* 662
7. In a prosecution for embezzlement, an expert accountant may testify to his audit of books. *Buckley v. State* 752
8. In prosecution for embezzling trust funds on a certain date, evidence of embezzlement of different amounts at different times before that date and manner in which he conducted business *held* admissible. *Buckley v. State* 752
9. Defendant is entitled to an instruction, if requested, limiting the purpose of evidence of other offenses. *Buckley v. State* 752
10. The supreme court will not interfere with a conviction based on conflicting evidence, unless, as a matter of law, it is insufficient. *Buckley v. State* 752
11. Instructions should be considered as a whole. *Frades v. State* 811
12. Error cannot be predicated on failure of the court to instruct as to a particular phase of the case, where no

proper instruction has been requested by the complaining party. *Frades v. State* 811
13. In a prosecution for assault, instructions *held* to sufficiently describe and define the offense of which defendant was convicted. *Schleif v. State* 875
14. Refusal of the court in prosecution for assault to instruct on the subject of self-defense *held* not error where there was no evidence supporting the issue. *Schleif v. State* 875
15. Admission of evidence as part of the *res gestæ* rests largely in the discretion of the court, the abuse of which constitutes reversible error. *Schleif v. State* 875

Crops.

Annual crops on land do not pass to purchaser at judicial sale but are regarded as personalty for the purpose of saving the debtor's rights thereto. *First State Bank v. Prudential Ins. Co* 730

Damages.

A claim for damages must be pleaded. *Pester v. Dean* 800

Deeds.

1. "Valuable consideration" defined. *Asmus v. Longenecker* 608
2. A deed does not create privity between grantor and grantee as to land not described in the deed, although occupied by grantor in connection therewith. *Kramper v. St. John's Church* 840
3. Delivery of deed by grantor to third person without reservation of control over it, and with directions to deliver it to grantee upon grantor's death, is effectual to pass title to grantee. *Newell v. Pierce* 844
4. A grantor who has delivered a deed to third party to be delivered to grantee upon grantor's death cannot affect grantor's rights by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention. *Newell v. Pierce* 844
5. Where deeds of realty were left with a depositary to be delivered to grantees after grantor's death, testimony of depositary that he would have returned the deeds to grantor if grantor had asked for them and the fact that the deeds were returned prior to grantor's death, *held* immaterial in determining the legal effect of the conveyances. *Newell v. Pierce* 844

Deposits in Court.

Proceeds of an insurance policy paid into court constitute a constructive trust to be distributed as demands of equity require. *Williams v. Volz* 392

Divorce.

1. The trial court, on granting of an absolute divorce, may assign between the parties the property, both real and personal, acquired during the marriage by their joint efforts as demands of equity may require. *Bigelow v. Bigelow* 201
2. Where defendant in divorce action prays for divorce, the court will determine from the evidence which party, if either, is entitled to a divorce. *Felton v. Felton*..... 488
3. The degree of corroboration required in a divorce suit depends upon the facts and circumstances of each case. *Felton v. Felton*..... 488
4. Factors for determining amount of alimony, stated. *Felton v. Felton*..... 488
5. Decree awarding custody of minor child sustained. *Vaughan v. Vaughan*..... 775

Election of Remedies.

A futile attempt to assert a nonexistent remedy does not preclude resort to a legal remedy or operate as an estoppel to assert it. *Live Stock Nat. Bank v. Marshall* 185

Embezzlement.

1. An indictment charging embezzlement is sufficient when material elements of crime are set forth in language of the statute. *Buckley v. State*..... 752
2. The gist of the offense of larceny as bailee is conversion of property without the knowledge and consent of the owner thereof with intent to steal it. *Frades v. State*.... 811

Eminent Domain.

1. The words "or damaged," within constitutional provision that private property shall not be taken "or damaged" for public use without just compensation, include all damages arising from exercise of right of eminent domain which cause diminution in value of private property. *Heflin v. City of Lincoln*..... 484
2. The constitutional provision against taking private property for public use without just compensation applies to public authorities exercising the right of eminent domain in establishing and opening public highways. *Heflin v. City of Lincoln*..... 484

Estates.

Generally, when two unequal estates vest in the same person at the same time without an intervening estate, the smaller is merged in the greater, and whether two estates have coalesced will depend on facts and circumstances in the particular case, intention of parties, and

equities of parties affected. *Anderson v. Lincoln Joint Stock Land Bank* 150

Estoppel.

Claimants who were instrumental in securing entry of judgment on claims against an estate on stipulation *held* not entitled subsequently to set up invalidity of judgment against an administrator or other persons affected in allowance of the claims, though not parties to the stipulation. *In re Estate of Mattingly* 891

Evidence.

1. Where there is integration of part of the terms of a contract, prior written agreements and contemporaneous oral agreements are operative to vary such terms only to the same extent as if the whole contract had been integrated. *Elvidge v. Brant* 1
2. An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and is made for separate consideration, or is such an agreement as might be made as a separate agreement. *Elvidge v. Brant* 1
3. Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative. *Elvidge v. Brant* 1
4. Party pleading a set-off or counterclaim has the burden of proving it. *Citizens Nat. Bank v. Rawley* 10
5. In action for injury, physician's testimony *held* not incompetent because he had examined plaintiff on day before trial for the sole purpose of qualifying him as a witness; and his opinion, based on observation and deductions from such examination, and on assumed facts of which there was evidence, *held* properly received. *Kennedy v. Woods* 217
6. Ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties. *Helfrich v. Baxter* 285
7. The grantee in a deed may deny by parol evidence a recital in the deed that he assumed and agreed to pay certain mortgages. *Stowers v. Stuck* 409
8. That grantee in a deed did not resort to reformation to eliminate a clause reciting that he assumed a mort-

gage on land purchased does not necessarily prevent oral proof, on motion for deficiency judgment in foreclosure suit, that he did not assume the mortgage. *Stowers v. Stuck* 409

9. In foreclosure suit, sustaining objection to a question eliciting oral proof that grantee in a deed, reciting that he assumed a mortgage on the land purchased, did not assume the mortgage, *held* error. *Stowers v. Stuck* 409
10. In an action against a public official for alleged defalcation, records of the office kept in regular course of business and containing entries pertinent to the matter under inquiry are admissible on behalf of plaintiff upon being identified as such records, and without the preliminary foundation necessary where plaintiff offers his own books of account. *State v. Bass* 592
11. A record in the office of a public officer, provided for and required by law to be kept, is strong presumptive evidence of the truth and accuracy of entries regularly made therein. *State v. Bass* 592
12. To sustain a judgment in favor of the state, the state must produce evidence of sufficient weight and credibility as any other litigant. *State v. Bass* 592
13. A declaration which is merely a narrative of a past transaction is not part of *res gestæ*. *Price v. Burlington Refrigerator Express Co* 657
14. The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by conjecture. *Hayes v. Chicago, B. & Q. R. Co* 687
15. A fact, relation or state of things once shown to exist may be presumed to continue. *Reitz v. Petersen* 706
16. In an action on a fraternal benefit certificate involving the issue as to the member's good standing at time of death, a statement by the member tending to show his understanding of his standing in the association is admissible in favor of the association. *Whitehorn v. Royal Arcanum* 713
17. Expert testimony on the subject of handwriting is "circumstantial evidence" and is admissible to determine authenticity of a signature on a note. *In re Estate of Parvin* 853
18. Oral testimony as to conversations designed to modify a written contract *held* inadmissible. *Bankers Life Ins. Co. v. Ohrt* 858
19. Opinions of experts cannot prevail over actual facts. *City of Lincoln v. Jordan* 879

Execution.

1. No lien is created by mere issuance of an execution; debtor's goods and chattels being bound only from time they are "seized in execution." *Miller v. Crosson* 88
2. To constitute a sufficient levy, the levying officer should have the property under his control and openly and expressly assert dominion over it by virtue of the writ. *Miller v. Crosson* 88
3. The district court has power to stay execution on a judgment in order that instalment payments may be made under another judgment in accord with a stipulation to that effect received in evidence on trial of the action. *General Car Advertising Co. v. Barnebey* 850

Executors and Administrators.

1. Proceeds of a life insurance policy in which a third person is named beneficiary belong to such beneficiary as an individual, and are not assets of his estate. *In re Estate of Reynolds* 557
2. Proceeds of life insurance policy by its terms payable to a creditor inure to the creditor to the extent of his debt free from claims of other creditors or representatives of insured's estate. *In re Estate of Reynolds* 557
3. An heir who consents to a final decree of distribution without making claim for improvements made by him on estate realty cannot subsequently sue other heirs for contribution on such claim. *Winn v. Winn* 650
4. On appeal from judgment of county court on final settlement of administrator's account, the administrator must file a petition in district court within 50 days from rendition of judgment in county court. *In re Estate of Kothe* 780
5. Where an appeal bond from a probate proceeding to district court is defective, the proper practice is to move for a proper bond. *In re Estate of Kothe* 780
6. Administrators will not be deprived of commissions and compensations because of unusual delay in settlement of an estate, where there appear reasonable grounds for such delay. *In re Estate of Kothe* 785
7. On appeal to district court from allowance of final report of administrator in county court, the cause must be tried on the same issues raised in the county court. *In re Estate of Kothe* 785
8. Allowance by county court of claims duly filed against estate of decedent is conclusive unless appealed from. *In re Estate of Kothe* 785
9. Irregularities in settlement of one estate will not be

inquired into on a hearing in another estate. *In re Estate of Kothe* 785
10. Evidence *held* to sustain allowance of fees to administrators and of fees to their attorneys for extraordinary services. *In re Estate of Kothe* 785
11. Statute providing for entry of orders on disputed claims against estates when claims are settled is for the protection of claimant by whom it may be waived. *In re Estate of Mattingly* 891

Fixtures.

1. Requisites of fixture, stated. *Bankers Life Ins. Co. v. Ohrt* 858
2. Lawn-fence, light-plant, and hot-air furnace *held* to be part of mortgaged realty. *Bankers Life Ins. Co. v. Ohrt* 858

Food.

The remedy for fraud in the sale of a wholesome and nutritious food product is by legislative regulation and not by destruction of the business. *Carolene Products Co. v. Banning* 429

Fraud.

Petition in action for fraud is sufficient as against a demurrer *ore tenus*, although the words "fraud" or "fraudulent" are not used, if acts complained of in petition are in their nature fraudulent, and similarly it is unnecessary, in pleading due diligence, to use the word "diligence." *Rucker v. Ward* 25

Fraudulent Conveyances.

1. In a creditor's bill, intent with which a son transfers chattels to his mother, while indebted to others, is a question of fact. *Saline State Bank v. Stipek* 100
2. A transaction whereby an insolvent son mortgages chattels to secure claim of mother is presumptively fraudulent as to other creditors, but the presumption may be overcome by clear and convincing evidence. *Saline State Bank v. Stipek* 100
3. Fraudulent intent of both parties to a transfer is necessary in proving it void as to creditors, where the consideration is adequate. *Saline State Bank v. Stipek* 100
4. An insolvent debtor may in good faith secure one creditor to the exclusion of others. *Saline State Bank v. Stipek* 100
5. Chattel mortgage from son to mother to secure a preexisting debt *held* not fraudulent as to other creditors of son. *Saline State Bank v. Stipek* 100

6. Sale of chattels *held* not fraudulent as to creditors of seller. *Saline State Bank v. Stipek* 100
7. Fraudulent intent is a question of fact. *Carlson v. Kirchman* 229
8. In a contest between vendee and creditors of vendor, adequacy of the consideration, if valuable, will not be inquired into except for the purpose of throwing light on the intention of the parties. *Carlson v. Kirchman* 229
9. In absence of intent to defraud participated in by both parties to a conveyance, payment of fair market value of premises purchased is a sufficient consideration to sustain the transaction. *Carlson v. Kirchman* 229

Guaranty.

A contract regular on its face, guaranteeing prompt payment of a note when due, if delivered to and accepted by payee and guarantee in good faith, without knowledge of any defense of guarantors, is binding on them, though they signed the guaranty on the unperformed condition that others also sign it. *Live Stock Nat. Bank v. Marshall* 185

Homicide.

On trial for first degree murder, the court should instruct only on such degrees of homicide as find support in the evidence. *Clark v. State* 370

Husband and Wife.

1. To justify recovery for criminal conversation, acts of sexual intercourse need not be established by testimony of a disinterested eyewitness, but evidence on such subject may be wholly circumstantial. *Cantin v. Howard* 192
2. In an action for criminal conversation, where the evidence tends to prove improper conduct and undue familiarity between the wife and defendant, weight of evidence and inferences to be drawn therefrom are questions for the jury. *Cantin v. Howard* 192
3. A married woman's contract can only be enforced against separate estate she possessed at date of entering into contract. *Harbine Bank of Fairbury v. McCune* 419
4. When a bank gives an extension of time on indebtedness of a husband and wife by taking a new note therefor, such extension is sufficient consideration to support the wife's contract to bind her separate estate therefor. *Harbine Bank of Fairbury v. McCune* 419
5. A wife may purchase at tax sale land of which her husband is a tenant in common and acquire a lien for the purchase price, interest and costs. *Winn v. Winn* 650

Injunction.

1. One who has knowledge of an injunction and is in privity with the party enjoined is bound thereby. *Wilcox v. Ashford* 338
2. The court not being authorized to assess damages on dissolution of a restraining order, defendant must resort to an independent action on plaintiff's bond. *Higgins v. Adelson* 820

Insurance.

1. Under a group insurance policy, the policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each constitute the contract between the employee and the insurer. *Hemmer v. Metropolitan Life Ins. Co* 14
2. Ambiguous language in a policy should be construed most strongly against the insurer. *Hemmer v. Metropolitan Life Ins. Co* 14
3. "Windstorm" within policy insuring against loss or damage by cyclone, tornado, or windstorm signifies wind of unusual violence or tumultuous force. *Hoagland & Co. v. Insurance Co* 105
4. In action on policy insuring against loss by windstorm, whether wind has attained proportions of a windstorm is a question of fact. *Hoagland & Co. v. Insurance Co.* 105
5. In action on policy insuring lumber against loss by windstorm, reasonable cost of assorting, removing and repiling lumber *held* recoverable. *Hoagland & Co. v. Insurance Co.* 105
6. In action on windstorm policy, evidence as to violence of storm a short time before damage occurred and about four miles from insured lumber *held* competent to show stormy condition in the general vicinity. *Hoagland & Co. v. Scottish Union & Nat. Ins. Co* 112
7. Act of local agent of several insurance companies who choose one company to carry insurance, and who advanced premium for insured, in accepting cancelation of policy written for such insured and in good faith substituting a policy in another company, *held* ratified by insured who accepted benefit of unearned premium on former policy before loss and with knowledge of all facts brought action on latter policy after loss. *Sanks v. St. Paul Fire & Marine Ins. Co* 266
8. Knowledge of local insurance agent *held* imputed to principal. *Sanks v. St. Paul Fire & Marine Ins. Co* 266
9. Neither insured nor insurer can effect cancelation of policy without consent of the other, except as cancela-

tion is provided by statute or reserved in contract. *Sanks v. St. Paul Fire & Marine Ins. Co.* 266
10. A court will construe policy so as to effectuate the purpose of the contract. *Sanks v. St. Paul Fire & Marine Ins. Co.* 266
11. Tarpaulin *held* covered by fire policy on truck used in commercial hauling. *Sanks v. St. Paul Fire & Marine Ins. Co.* 266
12. Breach of a promissory warranty contained in a theft policy to the effect that, in case of damage to the property, insured will use due care to protect the property from loss by theft, will prevent recovery for loss by theft when such breach existed at time of loss and contributed thereto. *Sanks v. St. Paul Fire & Marine Ins. Co.* 266
13. Under a life policy providing that disability benefits shall not accrue until proof of disability has been furnished insurer, furnishing of such proof is a condition precedent to commencement of liability of insurer to pay benefits. *Thomas v. Prudential Ins. Co.* 274
14. The phrase, wholly and permanently unable to engage in any occupation for compensation of financial value, within life policy providing for disability benefits when such condition of health exists, construed. *Thomas v. Prudential Ins. Co.* 274
15. Insured, though totally disabled for more than three months, *held* not entitled to recover, where disability was neither total nor permanent when he claimed benefits under a policy raising presumption of permanence of disability after three months' disability. *Reed v. New York Life Ins. Co.* 330
16. Where there is no uncertainty as to the meaning of a legal insurance contract, it will be enforced as made. *Shambaugh v. Great Northern Life Ins. Co.* 415
17. Insured cannot recover on a policy indemnifying against disability resulting from accidental injury provided disability is continuous from date of accident, where disability first occurred ten days after injury. *Shambaugh v. Great Northern Life Ins. Co.* 415
18. Insured *held* guilty of laches in not sending proof of injury within time fixed in policy. *Haack v. Midwest Life Ins. Co.* 501
19. Insured has burden of furnishing proof of circumstances which excuse failure to give notice of accident within required time. *Haack v. Midwest Life Ins. Co.* 501
20. By-laws of a fraternal benefit association providing for payment of assessments monthly and for suspension if

assessment is not paid are self-executing. *Whitehorn v. Royal Arcanum* 713
21. A suspended member of a fraternal benefit association can be reinstated only in strict conformity to the by-laws, and has no rights under his certificate until so reinstated. *Whitehorn v. Royal Arcanum* 713
22. If assessments are paid by the lodge for a member of a fraternal benefit association as a loan, at his request, failure to pay loan as agreed will not establish a custom to extend time of payment. *Whitehorn v. Royal Arcanum* 713
23. If local council of a fraternal benefit association advances assessments for a member and afterwards is reimbursed by him, the presumption is that it was at request of member and as a loan. *Whitehorn v. Royal Arcanum* 713
24. A fraternal benefit association did not waive right to suspend member for nonpayment of assessment, by reason of local council having previously advanced payment of assessment for member. *Whitehorn v. Royal Arcanum* 713
25. Where language of policy is susceptible of more than one construction, that most favorable to insured will be adopted. *Updike Investment Co. v. Employers Liability Assurance Corporation* 745
26. A risk clearly covered by insuring clause of policy and not clearly excluded by a subsequent limiting clause will be deemed covered by the policy. *Updike Investment Co. v. Employers Liability Assurance Corporation* 745
27. The term "accident," as used in a Standard Workmen's Compensation and Employers' Liability Policy, construed. *Updike Investment Co. v. Employers Liability Assurance Corporation* 745
28. Provision in policy for immediate written notice of an accident *held* not to require notice to be given until such facts have developed as would suggest to a person of ordinary prudence that liability may arise therefrom. *Updike Investment Co. v. Employers Liability Assurance Corporation* 745

Intoxicating Liquors.

1. It is a penal offense for the owner and operator of a truck who has not been designated as a carrier of liquor by the state liquor control commission, and who has no permit, to transport from another state a cargo of unstamped alcoholic liquors, consigned to a bonded warehouse or wholesaler of liquors in Nebraska. *State v. Hyslop* 681

2. Liquor imported into Nebraska need not have stamps placed thereon, when brought in by a bonded carrier with a permit, until it reaches a bonded warehouse or duly licensed distributor. *State v. Hyslop* 681

Judges.

To be eligible as a candidate for judge of a municipal court, one must have been a practicing attorney in Nebraska for five years. *Spier v. Thomas* 579

Judgment.

1. A court can vacate a judgment after the term only for reasons stated and within time limited by statute. *Elvidge v. Brant* 1
2. Newly discovered cumulative evidence will not warrant a new trial, nor justify vacating a judgment. *Kielian v. Kent & Burke Co* 308
3. A party should assume that his adversary will produce evidence to sustain his pleading. *Kielian v. Kent & Burke Co.* 308
4. In a suit to vacate a judgment for fraud, plaintiff must allege and prove due diligence, and want of negligence. *Kielian v. Kent & Burke Co* 308
5. A judgment will not be vacated for fraud unless fraud and due diligence are shown. *Kielian v. Kent & Burke Co.* 308
6. A district court may vacate or modify a judgment during the term on application and tender of an answer disclosing a meritorious defense. *Britt v. Byrkit* 350
7. A declaratory judgment confirming the validity of a trust agreement and directing the trustee to pay the trust funds with interest to the parties entitled thereto *held* final and binding on the parties to such proceeding, their privies and successors in interest. *In re Estate of Reynolds* 557
8. To vacate a judgment after the term on the ground of fraud, applicant must show that he exercised due diligence at the former trial, and that failure to secure a just decision was not attributable to his own fault or negligence. *Pinches v. Village of Dickens* 573
9. A judgment may be vacated, set aside, amended or corrected during the term for fraud, accident or mistake. *State Life Ins. Co. v. Heffner* 700
10. Either of two judges of district court may set aside judgment rendered by one at the same term on the ground that it was obtained by mistake. *State Life Ins. Co. v. Heffner* 700
11. A proceeding to vacate a void judgment must be brought

in the court in which the judgment was rendered. *Rasmussen v. Rasmussen* 724

12. A judgment for instalments of interest on a note will not bar a subsequent action for principal and interest after maturity, although both were due when the former action was commenced. *Peters v. Meyer* 847
13. Where the court incorporated in a judgment a stipulation of the parties agreeing to stay of execution contingent on certain payments being made by defendant on a prior judgment and required a showing of default as a prerequisite to issuance of execution, the judgment creditor *held* required to make a showing of default in payments on prior judgment to be entitled to issuance of execution on subsequent judgment. *General Car Advertising Co. v. Barnebey* 850

Judicial Sales.

A court of equity, when justice requires it and its powers are seasonably invoked, may vacate an order confirming a judicial sale and discharge the purchaser who has become such through fraud, accident or mistake. *State Life Ins. Co. v. Heffner* 700

Justices of the Peace.

A justice of the peace is a constitutional officer, and legislative action relative thereto is limited by the Constitution. *State, ex rel. Wright, v. Brown* 239

Landlord and Tenant.

A landlord who failed for a long period of time to exercise an option to declare forfeiture of a lease for failure to pay rent according to its terms, while the tenant was constructing a building, with the knowledge and consent of the landlord, may be estopped to exercise such option when the improvements are completed. *Platner Lumber Co. v. Krug Park Amusement Co.* 831

Larceny.

In prosecution under statute penalizing stealing cattle "of any value," state need not allege in information nor prove value of property described. *Buthman v. State* 385

Licenses.

1. A city of the first class may by ordinance classify different occupations for taxation and impose different taxation in different amounts upon different classes without interference by the courts, unless the classification is manifestly unreasonable and arbitrary. *Gooch Food Products Co. v. Rothman* 523

2. An ordinance imposing an excise or license tax upon a business or occupation will be upheld when it is definite in its application to those upon whom the burden falls, reasonable in amount, and uniform as to the class upon which it operates. *Gooch Food Products Co. v. Rothman* 523
3. An occupation tax is not to be measured by profits of business, but is to be considered as one incident to local self-government, and when, thus considered, it appears *prima facie* reasonable in amount, courts should not declare the ordinance void, unless the license charge is clearly unreasonable or confiscatory. *Gooch Food Products Co. v. Rothman* 523
4. A municipal occupation tax ordinance is not void because it imposes a tax on a business not wholly carried on within the city imposing the tax. *Gooch Food Products Co. v. Rothman* 523
5. A municipal occupation tax must be reasonable. *Speier's Laundry Co. v. City of Wilber* 606
6. Taxes levied by a municipal occupation tax ordinance must apply uniformly and equally to the classes on which they are imposed. *Speier's Laundry Co. v. City of Wilber* 606
7. A municipal ordinance classifying occupations for the purpose of levying a tax thereon must not be arbitrary in its classification. *Speier's Laundry Co. v. City of Wilber* 606
8. A privilege or franchise tax, to be valid, must operate equally and uniformly upon all members of the class brought within its operation. *Continental Ins. Co. v. Smrha* 791

Life Estates.

1. The holder of a life estate cannot forfeit that life estate simply by claiming to own the fee therein. *Bretschneider v. Farmers Nat. Bank* 495
2. The possession of the holder of a life estate will not be construed to be adverse to that of remaindermen until such knowledge is clearly brought to them. *Bretschneider v. Farmers Nat. Bank* 495

Limitation of Actions. SEE MORTGAGES, 14, 15.

1. An action for fraud must be commenced within four years after discovery of facts constituting fraud, or of facts sufficient to put a person of ordinary intelligence on inquiry, which, if pursued, would lead to such discovery. *Rucker v. Ward* 25
2. One wrongfully concealing a material fact necessary to accrual of a cause of action against him, thereby caus-

ing the opposite party to delay filing suit, cannot rely on statutes of limitation as a defense. *Rucker v. Ward* 25
3. The defense of recoupment survives as long as plaintiff's cause of action exists, notwithstanding affirmative action on the subject of recoupment is barred by limitations. *Oft v. Dornacker* 644
4. Where mortgagee elected to declare mortgage due for nonpayment of interest, statutes of limitation began to run from date of election. *Hatch v. Ely* 882

Malicious Prosecution.
1. Generally, one who, before instituting a criminal prosecution, makes a full statement of the facts to an attorney, and in good faith acts upon his advice, will not be liable for malicious prosecution. *Clausen v. Omaha Loan & Bldg. Ass'n* 666
2. Want of probable cause is an indispensable element of an action for malicious prosecution. *Clausen v. Omaha Loan & Bldg. Ass'n* 666
3. In an action for malicious prosecution, where there is undisputed evidence to sustain defense of probable cause, the court should direct a verdict for defendant. *Clausen v. Omaha Loan & Bldg. Ass'n* 666

Master and Servant.
1. Death of a traveling salesman who was shot by a highwayman while traveling in furtherance of the employer's business *held* compensable as arising out of the employment. *Goodwin v. Omaha Printing Co* 212
2. Evidence *held* to sustain finding that injury to city fireman was caused by accident arising out of and in course of employment. *Mulvey v. City of Lincoln* 279
3. Notice to city of injury to fireman *held* insufficient. *Mulvey v. City of Lincoln* 279
4. Evidence *held* to show that injury to city fireman was the efficient cause of mental incapacity. *Mulvey v. City of Lincoln* 279
5. In case of physical or mental incapacity resulting from injury, limitations as to notice and commencement of action under compensation law do not begin to run until six months after removal of such incapacity. *Mulvey v. City of Lincoln* 279
6. Latent injuries entitle employee to compensation when disability is discovered to exist, and failure to make claim within six months after accident will not deprive employee of his rights. *Mulvey v. City of Lincoln* 279
7. Evidence *held* to show that injury to employee was latent and resulted in permanent mental incapacity

which relieved him of duty of giving notice within six months. *Mulvey v. City of Lincoln* 279
8. In workmen's compensation case, where on appeal date of commencement of payment under the award was fixed at a later date than that fixed by the commissioner, such change amounted to "reduction of award," precluding allowance of attorney's fee. *Mulvey v. City of Lincoln* 279
9. In compensation cases plaintiff has the burden to prove with reasonable certainty that the employee met with injury or death in an accident arising out of and in the course of his employment. *Porter v. Brinn-Jensen Co.* 611
10. A compensation award cannot be based on mere possibilities or probabilities. *Porter v. Brinn-Jensen Co.* 611
11. Claim for compensation *held* barred for failure to file petition within time prescribed by statute. *Dunlap v. City of Omaha* 632
12. A compensation claimant has the burden to show that he suffered an injury resulting from accident arising out of and in the course of his employment. *Price v. Burlington Refrigerator Express Co.* 657
13. Awards for compensation cannot be based upon possibilities or probabilities. *Price v. Burlington Refrigerator Express Co.* 657
14. Claim for compensation *held* barred for failure to make claim for compensation within six months after injury or to file petition therefor within a year from date of accident. *Price v. Burlington Refrigerator Express Co.* 657
15. Statutory bar to claim for compensation during lifetime of injured employee is a bar to claim by his dependents after employee's death. *Price v. Burlington Refrigerator Express Co.* 657
16. The defense of assumption of risk was not abolished by the federal employers' liability act, but an employee assumes ordinary risks of his employment and those unusual or extraordinary risks which he knows and appreciates or which an ordinarily prudent man would have known and appreciated. *Hayes v. Chicago, B. & Q. R. Co.* 687
17. Negligent operation by plaintiff's intestate of a track-motor, of which he had complete control, *held* the sole proximate cause of his injuries and death. *Hayes v. Chicago, B. & Q. R. Co.* 687
18. A claimant may amend his petition and change his testimony, prior to judgment in compensation court, to correct a mistake in his claim and testimony as to date of injury. *Faith v. Hamilton County* 777

19. A workmen's compensation award may be modified or set aside by the supreme court if findings of court are not conclusively supported by evidence. *City of Lincoln v. Jordan* 879
20. A workmen's compensation case is considered *de novo* on the record by the supreme court, where the findings of fact are not conclusively supported by evidence. *City of Lincoln v. Jordan* 879
21. An employee who suffered a fracture of a vertebra and as a result thereof was unable to work *held* entitled to compensation for total disability. *City of Lincoln v. Jordan* 879

Mechanics' Liens.

A tenant cannot without authority of the landlord charge land with a lien for materials for constructing a building thereon. *Platner Lumber Co. v. Krug Park Amusement Co.* 831

Mortgages. SEE TRUSTS, 2, 4, 19.

1. Denial of request for continuance in foreclosure suit approved. *Fremont Joint Stock Land Bank v. Lebo* 119
Lincoln Joint Stock Land Bank v. Lebo 121
2. Where it is sought to vary the effect of a deed absolute on its face by parol testimony, so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory. *Anderson v. Lincoln Joint Stock Land Bank* 150
3. A moratory stay will be denied where mortgage liens exceed value of land. *Howarth v. Becker* 233
4. Where a renewal mortgage was taken without knowledge of an intervening mortgage *held* that original mortgage lien could be restored, rights of innocent parties not being involved. *Union Loan & Savings Ass'n v. Simmons* 260
First State Savings Bank v. Martin 403
5. Where mortgagee, on advice of abstracter, released first mortgage and took a renewal mortgage, action for damages against abstracter who overlooked intervening mortgage *held* not an adequate remedy at law, and equity court could give relief. *Union Loan & Savings Ass'n v. Simmons* 260
First State Savings Bank v. Martin 403
6. Holder of renewal mortgage taken in ignorance of intervening mortgage *held* not required to rescind his contract, but could affirm it and have his mortgage adjudged a first lien. *Union Loan & Savings Ass'n v. Simmons* 260

7. Where mortgage trustee negligently or fraudulently failed to advise bondholders of default in interest and it became necessary for a successor-trustee to take over the security, the measure of damages was difference between value of security at time of default and value when it could have been taken over by or for benefit of bondholders. *First Trust Co. v. Carlsen* 325
8. The presumption that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening lien, applies although through ignorance of such intervening lien he may have discharged the mortgage and canceled the notes. *First State Savings Bank v. Martin* 403
9. The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act taking away the court's power to enter deficiency judgment in mortgage foreclosure. *Stowers v. Stuck* 409
10. Where a mortgage lien exceeded the value of the land, denial of moratory stay *held* not error. *First Trust Co. v. Airdale Ranch & Cattle Co* 475
11. Inadequacy of price alone is not ground for refusing confirmation of mortgage foreclosure sale. *First Trust Co. v. Airdale Ranch & Cattle Co* 475
12. Assignment of mortgage, though not executed in form to permit of recording, *held* valid as between the parties, and as against creditors not equipped with deed, mortgage or other instrument duly recorded, or execution or attachment duly levied. *Burke v. Frederickson* 548
13. Denial of application for a moratory stay of mortgage foreclosure proceeding is not an abuse of discretion where applicant has no equity in the land. *Willson v. Quein* 615
14. Defense of reduction or recoupment arising out of the same transaction as plaintiff's claim survives as long as the cause of action on plaintiff's claim exists, notwithstanding affirmative action on the subject of recoupment may have been barred by limitations. *Mettlen v. Sandoz* 625
15. In a suit to foreclose a purchase-money mortgage, mortgagor's claim for damages sustained by reason of mortgagee's alleged misrepresentation concerning water and irrigation rights *held* not barred by limitations, notwithstanding an independent action by mortgagor to recover such damages would have been barred by limitations. *Mettlen v. Sandoz* 625

16. In a suit to foreclose a purchase-money mortgage, mortgagor's claim, by way of recoupment, of damages sustained through mortgagee's misrepresentations concerning water rights, *held* not barred by laches where claim was pleaded in answer at first opportunity. *Mettlen v. Sandoz* 625
17. Inadequacy of price will not prevent confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience or amount to evidence of fraud. *State Life Ins. Co. v. Heffner* 700
American Central Life Ins. Co. v. Brown 761
American Central Life Ins. Co. v. Brown 764
18. A moratory stay will be denied where mortgage liens exceed value of land. *State Life Ins. Co. v. Heffner* 700
American Central Life Ins. Co. v. Brown 761
American Central Life Ins. Co. v. Brown 764
19. Mortgages are considered as recorded from time of delivery to register of deeds. *Reitz v. Petersen* 706
20. Recording a mortgage first does not necessarily give it priority over one recorded later, but as between themselves priority may be changed by intent and agreement of parties. *Reitz v. Petersen* 706
21. A mortgagor is not entitled to possession of land after foreclosure sale, but may reenter for the purpose of harvesting crops. *First State Bank v. Prudential Ins. Co.* 730
22. The statutory provision that plaintiff in suit to foreclose a mortgage shall state in his petition whether any proceedings had been had at law for recovery of the debt *held* not to apply to mortgages or liens arising out of equities between the parties. *Bankers Life Ins. Co. v. Ohrt* 858

Municipal Corporations.

1. Generally, only property owners whose property abuts on vacated part of street need join in deeds vacating part of a village plat, and such proprietors need not own property back any particular distance from the street line. *Village of Hay Springs v. Hay Springs Commercial Co.* 170
2. Owners of property in other portions of plat whose right of ingress and egress is not interfered with and whose injuries, if any, are no other or different from those suffered by the community generally, cannot complain of vacation of street which is part of village plat. *Village of Hay Springs v. Hay Springs Commercial Co.* 170
3. A nominal street designated on a village plat, but not opened up or used as a public highway, *held* not a "pub-

lic highway laid out according to law." *Village of Hay Springs v. Hay Springs Commercial Co.* 170
4. Vacation of recorded plat of addition to village *held* to divest rights of the public in the streets shown therein, and that such vacated streets revert to proprietors of adjoining lots. *Village of Hay Springs v. Hay Springs Commercial Co.* 170
5. Power of the legislature to change boundaries of municipalities and to apportion municipal debts upon such change of boundaries is absolute, in absence of specific constitutional limitations, and when the statute authorizing change of boundaries is silent as to apportionment of municipal debts, the territory embraced within new boundaries becomes liable for all prior debts, and territory excluded is released therefrom. *Hustead v. Village of Phillips* 303
6. A decree detaching farm land from boundaries of a municipality will not be set aside, unless it clearly appears that the trial court made an important mistake of fact or an erroneous inference of fact or of law. *Hustead v. Village of Phillips* 303
7. That unplatted agricultural land was included in incorporated limits of a village with tacit permission of former owner *held* not to estop his successor in title from having the land disconnected. *Hustead v. Village of Phillips* 303
8. A municipality may not annex, or retain within its boundaries, strictly farm land for revenue purposes only. *Hustead v. Village of Phillips* 303
9. One dealing with a village does so with knowledge that its territory may be enlarged or diminished in the manner prescribed by the law in existence at the time. *Hustead v. Village of Phillips* 303
10. A creditor of a village has no vested right to have the territorial boundaries thereof remain constant so long as the village continues to exist with a substantial part of its original territory unimpaired. *Hustead v. Village of Phillips* 303
11. Where a bondholder became a creditor of a village, disconnecting of lands from the village under a statute then existing *held* not impairment of the bondholder's contract. *Hustead v. Village of Phillips* 303
12. City council, under home rule charter, cannot assess and levy taxes on exempt property. *East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln* 379
13. A tax levied on exempt property is one levied for an unauthorized purpose, and collection thereof may be

enjoined. *East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln* 379
14. Immunity from negligence resulting in damage to private property is not included in municipal power to grade and pave streets. *Heflin v. City of Lincoln* 484
15. Review of action of city council of city of second class sitting as board of equalization to levy special assessments for paving is by proceedings in error. *Roberts v. City of Mitchell* 672
16. Evidence *held* to sustain judgment denying plaintiff damages to realty from flooding. *Faiman v. City of Omaha* 870

Negligence.

1. Whether plaintiff's contributory negligence precludes recovery in action for negligent injury is determined by the law of the place of wrong. *Olson v. Omaha & C. B. Street R. Co* 94
2. In Iowa, the burden is on plaintiff suing for damages for injuries in a collision to plead and prove freedom from contributory negligence. *Olson v. Omaha & C. B. Street R. Co* 94
3. Plaintiff who is injured in a state where he has no cause of action until he has shown that his own negligence did not contribute to his injury, and sues in a state where contributory negligence is an affirmative defense, must establish freedom from contributory negligence. *Olson v. Omaha & C. B. Street R. Co* 94
4. In action under automobile guest statute, whether host was negligent and the degree thereof *held* questions for jury. *Hendren v. Hill* 163
5. If injury results from the negligence of two persons both are liable. *Hendren v. Hill* 163
6. The rule that two disconnected and self-operating acts of negligence may concur to form the proximate cause of an injury applies only when acts from separate sources and injury would not have occurred but for the existence of both acts. *Bergendahl v. Rabeler* 538
7. Negligence of automobile driver may be imputed to injured passenger who is a minor, and rejection of evidence tending to show right of minor to control driver *held* error. *Bergendahl v. Rabeler* 538
8. In a personal injury action, plaintiff must establish by a preponderance of evidence that the injury complained of was caused by the negligence of defendant, or by the joint negligence of two or more defendants. *Peterson v. Omaha & C. B. Street R. Co* 676

New Trial.

1. A verdict should be set aside as excessive only where it is apparent that the jury have misapplied the law or have been influenced by prejudice and passion rather than by the evidence. *Watson v. Miller* 74
2. Statement by juror in jury room of knowledge of a fact not in dispute is not ordinarily misconduct requiring a new trial. *Parkert v. Department of Public Works* 346
3. Proof of statements by jurors in jury room in nature of gossip and not bearing on any issue in the case is not sufficient to avoid a verdict, unless the statements were of such a character that prejudice may be presumed. *Parkert v. Department of Public Works* 346
4. The jury's disregard of material testimony which, if given due weight, would require a different verdict is ground for a new trial. *Peterson v. Omaha & C. B. Street R. Co.* 676

Parties.

1. The interest in a matter in litigation which will authorize a person to intervene in an action must be such direct and immediate interest that the person seeking to intervene will either lose or gain by the direct operation of the judgment. *Cornhusker Electric Co. v. City of Fairbury* 888
2. An intervener must plead some interest in the subject-matter of litigation by a statement of issuable facts. *Cornhusker Electric Co. v. City of Fairbury* 888

Payment.

Defense of payment must be pleaded and proved. *Citizens Nat. Bank v. Rawley* 10

Pleading.

1. Where objection that petition does not state a cause of action is not interposed until after commencement of trial, the pleading will be liberally construed. *Elvidge v. Brant* 1
   Rucker v. Ward 25
2. "Cause of action" means, not the formal statement of facts, but the subject-matter on which plaintiff grounds his right of recovery. *Zelen v. Domestic Industries* 123
3. Amended petition *held* not to state a new cause of action. *Zelen v. Domestic Industries* 123
4. New matter may not be pleaded in a reply which constitutes a new cause of action not charged in the

petition or to aid averments of petition. *Anderson v. Lincoln Joint Stock Land Bank* 150
5. A demurrer admits all facts well pleaded. *Department of Banking v. Walker* 732

Quieting Title.
A suit to quiet title may be maintained by a person not in possession. *Morse v. Cochran* 424

Receivers.
1. In absence of circumstances precluding an accounting by a receiver in proceedings in which he acts, no action to adjudicate the receiver's default may be maintained against the surety on his bond until final settlement of the receiver's account and adjudication of amount of his default by the court having charge of the receivership. *Britt v. Byrkit* 350
2. Surcharges against a receiver arising from negligence in failing to rent property, or from wrongfully having reduced rent, or from having used property for his personal benefit, are a part of the estate under receivership, and must be recovered by procedure required for recovery of money received by such receiver. *Britt v. Byrkit* 350

Sales.
1. Delay in rescission by buyer is excusable where the delay is induced by seller. *Slagle v. Securities Investment Corporation* 319
2. Section 60-310, Comp. St. 1929, *held* not to provide exclusive method of transferring ownership of a motor vehicle. *Slagle v. Securities. Investment Corporation* 319

Schools and School Districts.
1. Where voters of rural school district decided at annual school meeting not to hire a bus and transport pupils to an adjoining district during ensuing year, the school board could not lawfully enter into a contract for such purpose, where other lawful ways remained by which the pupils could be provided with school privileges. *Morfeld v. Huddin* 180
2. A widow who, with her children, lived with her father-in-law *held* member of his "family," and not entitled to mileage for transportation of her children to school. *Hollibaugh v. School District* 727

Set-off and Counterclaim.
1. A counterclaim which is not connected with the subject

of the action and does not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim is not proper under the statute. *Live Stock Nat. Bank v. Marshall* 185
2. Connection of counterclaim with subject of action must not be casual or incidental, but immediate and direct. *Live Stock Nat. Bank v. Marshall* 185
3. The defense of recoupment must arise out of the same transaction as plaintiff's claim. *Oft v. Dornacker* 644

Sheriffs.

1. Sheriff, sued by judgment creditor for releasing levy on automobile claimed by a third person, had the burden to establish ownership in third person. *Miller v. Crosson* 88
2. Failure of sheriff, sued by judgment creditor, to comply with statute relating to trial of right to property seized on execution and claimed by third person does not fix liability on sheriff, but if property is released, the burden is on sheriff to establish ownership in third person. *Miller v. Crosson* 88

Specific Performance.

A contract for sale of securities which are not procurable and have no market value may be specifically enforced. *Goodall v. Stanosheck* 720

States.

The law of another state cannot make lawful in Nebraska an act which would be unlawful under the Nebraska law. *State v. Hyslop* 681

Statutes. SEE CONSTITUTIONAL LAW.

1. Where sections of a statute are repugnant to each other, such construction must be given as will harmonize them. *School District of Omaha v. Gass* 312
2. Statutes must be construed in the light of a clearly apparent legislative policy. *School District of Omaha v. Gass* 312
3. A statute should not be given such interpretation as would render superfluous, redundant, and meaningless entire sections thereof. *School District of Omaha v. Gass* 312
4. If language of a statute is ambiguous, the court will consider its purpose as a whole, and seek to carry out such purpose. *School District of Omaha v. Gass* 312
5. The extraordinary session of the legislature which assembled on October 28, 1935, was properly constituted as a bicameral legislature under the Constitution as it

existed prior to November 6, 1934, when the Constitution was amended to provide for a unicameral legislature after the first Tuesday in January, 1937. *Steinacher v. Swanson* 439
6. Title to act providing for instalment payments of real and personal taxes *held* valid. *Steinacher v. Swanson* 439
7. The legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding members of the class, relative to the subject of the legislation, which render appropriate its enactments. *Steinacher v. Swanson* 439
8. Classification in instalment delinquent tax act *held* unreasonable and arbitrary. *Steinacher v. Swanson* 439
9. Title to chapter 82, Laws 1929, relating to municipal courts, *held* sufficient to include a section providing for eligibility of judges of such courts. *Spier v. Thomas* 579
10. Chapter 82, Laws 1929, relating to municipal courts, *held* to be a complete and independent act. *Spier v. Thomas* 579
11. A legislative act complete in itself is not within the constitutional provision requiring a new act to contain section or sections of law as amended, even though it specifically repeals prior acts or parts thereof. *Spier v. Thomas* 579

Subrogation.

1. Subrogation may be either legal or conventional, "legal subrogation" being allowed where one who pays the debt of another stands in the situation of a surety and is compelled to pay the debt to protect his own rights, and "conventional subrogation" arises when one pays the debt of another under an agreement existing at time of payment with either debtor or creditor that the person paying it shall be subrogated to rights of the creditor. *Luikart v. Buck* 866
2. To be entitled to legal subrogation a person's equity should be strong and his case clear, and he must act equitably and be free from fault. *Luikart v. Buck* 866
3. Subrogation will not be allowed where subrogee would derive advantage or establish his claim through his own negligence or from his own wrong-doing or from wrong-doing of another under whom he claims. *Luikart v. Buck* 866
4. The object of subrogation is to prevent injustice and to

promote justice by compelling ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it. *Luikart v. Buck* 866
5. The doctrine of subrogation applies where a person is compelled to pay the debt of a third person to protect his own rights or to save his property. *Luikart v. Buck* 866
6. The doctrine of subrogation is not available to one who pays his own primary obligation. *Luikart v. Buck* 866

Taxation. SEE CONSTITUTIONAL LAW, 10.
1. The act providing for instalment payments of delinquent real and personal property taxes *held* void. *Fillmore County v. Burke* 438
2. Act providing for instalment payments of delinquent real and personal property taxes *held* violative of the constitutional provision prohibiting "commutation for taxes in any form whatever." *Steinacher v. Swanson* 439
3. The words "interest," "penalties," and "costs," as generally used in taxing statutes, are considered as penalties and not part of tax. *Steinacher v. Swanson* 439
4. The legislature has no power to release or discharge a tax. *Steinacher v. Swanson* 439
5. The legislature has no power to extend time of payment of a tax after it has been regularly assessed and levied. *Steinacher v. Swanson* 439
6. Mode of redemption from tax foreclosure sale, stated. *Moffitt v. Reed* 696
7. A purchaser at a tax foreclosure sale from which there is a redemption is not entitled to rents and profits from the land pending appeal to date of redemption. *Moffitt v. Reed* 696

Tenancy in Common.
1. A tenant in common who pays taxes on the common property is entitled to contribution therefor from his cotenants. *Winn v. Winn* 650
2. A tenant in common who makes lasting improvements on the common property with permission of his cotenants is entitled to contribution therefor from his cotenants. *Winn v. Winn* 650
3. A tenant in common who holds possession of the common property is liable to his cotenants for its rental value. *Winn v. Winn* 650

Trial. SEE APPEAL. CRIMINAL LAW.
1. Where there is any testimony by which a finding for the party having the burden of proof can be upheld, the

trial court cannot disregard it and direct a verdict against him. *Petersen v. Ohio Casualty Ins. Co.* 128
2. Objection to a question should be explicit. *Kennedy v. Woods* 217
3. Where, at close of evidence, each party requested a directed verdict in his favor and the court decided the case on the law and the evidence, the losing party is estopped from reviewing issues of fact on which the evidence is conflicting. *Slagle v. Securities Investment Corporation* 319
4. In impaneling a jury in a personal injury action, counsel should scrupulously avoid any act, statement or question which might inform the jurors as to whether defendant is indemnified by one not a party. *Bergendahl v. Rabeler* 538
5. In a jury trial, counsel should not make mention of the result of the jury's verdict, as distinguished from what the verdict should be under the law and the evidence. *Bergendahl v. Rabeler* 538
6. In a law action on an annuity clause in a deed, where defendant prayed for reformation of the deed, the issue was triable to the court. *Oft v. Dornacker* 644
7. Where the trial court makes personal examination of topography of land and water involved in determining title to accretion land, his findings are entitled to great weight. *Higgins v. Adelson* 820

Trusts.

1. Where owner of property gratuitously transfers it and properly manifests an intention that transferee should hold the property in trust but the trust fails, transferee holds the trust estate on a resulting trust for transferor or his estate, unless transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality. *In re Estate of Mooney* 52
2. Under a trust deed providing that, upon default under the mortgage for 30 days, the trustee may at its option accelerate the maturity date and foreclose the mortgage, the trustee is not liable for honest mistakes of judgment in failing to so do. *Fleener v. Omaha Nat. Co.* 253
3. Parties to a trust relation may limit their liability by agreement, but a trustee may not contract for immunity from liability for gross negligence or acts done in bad faith. *Fleener v. Omaha Nat. Co.* 253
4. The exculpatory provisions of a trust deed providing that "the trustee shall be liable only for its own gross

negligence and wilful default" *held* valid and invocable by the trustee as a defense. *Fleener v. Omaha Nat. Co.* 253
5. Trustee *held* not liable for electing to pay taxes instead of declaring a default and foreclosing mortgage under power granted in trust deed. *Fleener v. Omaha Nat. Co.* 253
6. A trustee is chargeable with any loss or depreciation in value of the trust estate resulting from breach of trust. *First Trust Co. v. Carlsen* 325
7. A court of equity can remove a trustee for hostility between himself and beneficiaries, which, with other circumstances, interferes with proper administration of the trust. *Pavel v. Hotovy* 373
8. Acrimony is not ground for removing a trustee. *Pavel v. Hotovy* 373
9. While it is the duty of trustees to report their fiduciary transactions and accounts to the beneficiary, a harmless delay in reporting them is not ground for removing the trustee. *Pavel v. Hotovy* 373
10. The beneficiary of a life policy need not be designated by name, but other proper description suffices, and trustee may be designated in the policy to hold for beneficiaries ultimately intended to receive the proceeds thereof. *In re Estate of Reynolds* 557
11. "Insurance trust" defined. *In re Estate of Reynolds* 557
12. No one except a beneficiary or one suing on his behalf can maintain suit against the trustee to enforce the trust or to obtain redress for a breach of trust. *In re Estate of Reynolds* 557
13. The duty of the trustee of an insurance trust is to take and keep exclusive control of the trust funds and perform the duties enjoined, without delegating to others the doing of acts which the trustee can reasonably be required to perform personally. *In re Estate of Reynolds* 557
14. In executing a trust, trustee must pay over trust estate or proceeds thereof to the person or persons entitled thereto, directly or through his or their representatives, and liability to beneficiaries is not discharged by payment to one not entitled thereto, even though the trustee acts under advice of counsel, unless the beneficiary elects to proceed against the payee. *In re Estate of Reynolds* 557
15. Legal remedies for breach of insurance trust are confined to the named beneficiaries, and representatives of insured's estate have no duties with reference thereto. *In re Estate of Reynolds* 557

16. One buying land in his own name with the money and for the use of another holds the title in trust. *Bell v. Reed* 587
17. To give rise to a resulting trust in land purchased, payment must have been a part of the original transaction of purchase; a subsequent payment to a third party to discharge an existing encumbrance will not suffice. *Bell v. Reed* 587
18. "Trust" defined. *Parker v. Bourke* 617
19. Insertion of the word "trustee" after name of grantee in a real estate mortgage does not of itself establish the existence of a trust relationship so as to render the mortgagee liable for a deficiency judgment to the assignee of the mortgage. *Parker v. Bourke* 617
20. While a decree in foreclosure finding personal liabilities is to an extent interlocutory, yet as to findings on issues properly pleaded it cannot be reviewed on objections to a deficiency judgment. *Parker v. Bourke* 617
21. Where a foreclosure petition does not show a personal liability of defendant for a deficiency, a finding of personal liability in the decree will not preclude defendant from resisting application for a deficiency judgment. *Parker v. Bourke* 617

Vendor and Purchaser.

1. In absence of specific provision to the contrary, the vendor must convey a title free from encumbrances. *Elvidge v. Brant* 1
2. Application for strict foreclosure of land contract for default in payment of purchase price is directed to discretion of court. *Stroble v. Smith* 291
3. Strict foreclosure of land contract may be decreed for failure of vendee to pay delinquent instalments of purchase price, where denial of such relief would be inequitable. *Stroble v. Smith* 291
4. In suit for strict foreclosure of land contract for nonpayment of delinquent instalments of purchase price, evidence *held* insufficient to prove that payments specified were subsequently changed by oral agreement of parties so as to justify denial of foreclosure. *Stroble v. Smith* .. 291
5. A vendor rescinding a contract for sale of realty, while vendee is in default, by selling the realty to third party prior to time fixed for final performance, cannot collect a note given by vendee in lieu of advance payment of purchase price, in absence of an agreement for forfeiture. *Pester v. Dean* 800

Waters.

1. In assessment of recovery for permanent damages to land, the evidence must show with reasonable arithmetical certainty the values before and after the event giving rise to the action, and jurors' view of the premises may supplement, but cannot be a substitute for, testimony thereon. *Meister v. Krotter* 35
2. Whether erection of dam in river was cause of overflow of upper proprietor's land *held* question for jury. *Meister v. Krotter* 35
3. Irrigation statutes construed, and *held* to be mandatory regulations which in effect limit location and construction of irrigation canals and ditches, as well as lands irrigated by same, to the basin containing the source of water used, and to require that all unused waters shall be returned to stream from which diverted; that these principles thus legislatively declared constitute the controlling public policy of the state in conservation of public waters and in protection of public interest. *Osterman v. Central Nebraska Public Power and Irrigation District* 356
4. Slight temporary deviations from year to year, in the course of a lateral irrigation ditch across a field, do not affect an easement therein, where the lateral has followed substantially the same course for more than the statutory period of ten years. *Clark v. Meeker Ditch Co* 506
5. Agreement by parties for an easement for a joint irrigation lateral across their lands is supported by their mutual covenants, which are a sufficient consideration. *Clark v. Meeker Ditch Co* 506
6. "Accretion" defined. *Mercurio v. Duncan* 767
7. "Avulsion" defined. *Mercurio v. Duncan* 767
8. Where banks of a running stream are changed by accretion, the stream remains as the riparian owner's boundary. *Mercurio v. Duncan* 767
9. Where a boundary stream suddenly changes its channel and seeks a new bed, the boundary remains at center of the old channel. *Mercurio v. Duncan* 767
10. Evidence *held* to sustain decree quieting title to land added by accretion. *Mercurio v. Duncan* 767
11. Where a meander line was employed to indicate the shore line of an island in a nonnavigable stream platted by the federal government prior to its conveyance, such meander line was not a boundary line but one designed to point out the sinuosity of the island's shore line

and provide a means of ascertaining the quantity of land to be paid for. *Higgins v. Adelson* 820
12. Ownership of an island in a nonnavigable stream conveyed by government patent carries with it the bed of the stream to the center of each surrounding channel. *Higgins v. Adelson* 820
13. As respects extent of ownership of a riparian owner, the thread of a channel is that line which would give owners on either side access to water, whatever its stage might be, and particularly at its lowest flow. *Higgins v. Adelson* 820
14. Right of title and possession of land formed by accretion follows ownership of riparian lands to which it is attached. *Higgins v. Adelson* 820

Wills.

1. The court in construing a will must ascertain intent and purpose of testator as disclosed by the language of the will. *In re Estate of Mooney* 52
2. Intention of testator must be given effect, if not contrary to law or public policy. *In re Estate of Mooney* 52
3. Testator's intention must be determined from the language of the will in connection with attendant circumstances. *In re Estate of Mooney* 52
4. A will which devises property to trustee, providing for maintenance of a person and payment of an annuity under certain conditions, creates a testamentary trust. *In re Estate of Mooney* 52
5. Whether a trust has been created in a will is largely a question of intention, to be determined from the will in connection with surrounding circumstances. *In re Estate of Mooney* 52
6. A testator who understood the nature and extent of his property, his relation to the persons who were, or might have been, natural objects of his bounty, and understood what he was doing when he made a will, possessed testamentary capacity. *In re Estate of Frazier* 61
7. As respects capacity to make a will, it is not medical soundness of mind that governs, but testamentary capacity as defined in law; a high degree of mentality not being required if will is free from undue influence. *In re Estate of Frazier* 61
8. If verdict against a will on ground of incapacity would have to be set aside as against weight of the evidence, issue of mental capacity should not be sub-

mitted to jury. *In re Estate of Frazier* 61
9. To justify direction of verdict on testator's competency, it is sufficient if there is no evidence which ought reasonably to satisfy the jury that alleged incompetency has been established. *In re Estate of Frazier* 61
10. In construing a will, the court will ascertain the testator's intention as shown by the will, in the light of the circumstances under which it was made. *Schmidt v. Schmidt* 478
11. To revoke a will by implication, the testator's acts must raise a presumption that such result was intended. *Schmidt v. Schmidt* 478
12. Under devise to wife as long as she remained a widow, with limitation over to children in case of remarriage or death, wife *held* to take only a life estate. *Bretschneider v. Farmers Nat. Bank* 495
13. Will *held* to devise life estate to wife, notwithstanding provision authorizing wife to sell so much of realty as might be necessary to pay debts. *Bretschneider v. Farmers Nat. Bank* 495

Witnesses.

1. Restriction on cross-examination in creditors' suit *held* prejudicial error. *Wilson v. Gerhard* 809
2. In an action by payee on a note against an estate, calling of expert witnesses in handwriting to testify as to whether deceased executed the note *held* not waiver of provision of statute precluding payee of note signed by deceased from testifying in regard to its execution. *In re Estate of Parvin* 853