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FRED AHRENS, APPELLEE, V. AMERICAN SMELTING & REFINING COMPANY, APPELLANT.

272 N. W. 235

FILED MARCH 26, 1937. No. 29866.

1. **Master and Servant:** ASSUMPTION OF RISKS. A servant accepting the employment of the master assumes all ordinary risks and dangers incident to his employment, or the conditions under which his work is performed, which are known to him or, in the exercise of ordinary care, would be apparent and obvious to persons of his experience, intelligence or understanding.
2. ———. When a master who operates a smelting and refining plant equips such plant with approved safety appliances and orders a servant to wear a respirator furnished by the master; instructs him generally as to the danger of contracting the occupational disease known as plumbism; informs him of the manner in which such disease may be contracted, the nature and consequences thereof, the master will not be held liable in damages to such servant who contracts such disease while in the employ of the master.
3. **Contracts.** In the absence of fraud or duress, a person of mature years, ordinary intelligence and education is conclusively presumed to have read contracts executed by him and to know the contents thereof.
4. **Evidence** examined and *held* insufficient to support a verdict.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Johnsen, Gross & Crawford, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

CHASE, District Judge.

In this action the plaintiff, as an employee of the defendant, seeks to recover damages resulting from plumbism, or lead poisoning, which he claims to have contracted while employed by the defendant. The jury returned a verdict for the plaintiff, and from a judgment thereon the defendant has appealed to this court. At the close of the testimony the defendant moved for a peremptory instruction,

based upon the insufficiency of the evidence. The overruling of this motion by the trial court is one of the principal assignments of error.

The plaintiff seems to base his right of recovery upon two specific acts of negligence, (a) that he was employed by the defendant in connection with the smelting and refining business, and that such business is extremely hazardous and dangerous to its employees, and that the defendant negligently failed to provide a safe place for the performance of his duties; (b) that the defendant failed to warn and admonish him as to the hazards in connection with his employment, known by the defendant, of which the plaintiff was ignorant.

The answer admits the relationship of master and servant, but alleges that every reasonable precaution was employed to make the premises safe for its men to perform their work, and alleges further that it fully admonished and warned the plaintiff that there was likely to result from such employment the occupational disease known as lead poisoning, or plumbism, and informed plaintiff of the nature and results thereof.

Our consideration of the matter will be confined to the proposition as to whether the evidence is sufficient to support a verdict.

The facts are not seriously in dispute except in two or three particulars. The plaintiff was born and reared on a farm. The extent of his education was the completion of the second year in high school. He was 26 years of age at the time he entered the employ of the defendant in its smelting and refining plant at Omaha, Nebraska, which was on the 3d day of November, 1933. At the outset he was engaged in the unloading from box cars lead plates taken from discarded automobile batteries. This service was performed by shoveling the plates into wheel barrows and conveying them thence to the defendant's plant. He performed this character of labor until February 17, 1934, at which time he was transferred to a part of the plant known as the tin furnaces. The purpose of these furnaces

is to recover lead chloride from slag which consists mainly of lead chloride and tin oxide. These furnaces are heated to a very high temperature in order to extract the refined products from the raw materials. The plaintiff as furnace tender was at times required to open the doors and stir this molten mass with an implement provided for that purpose. This smelting process oftentimes exhales lead oxide fumes which, if inhaled by workmen, are likely to produce very serious systematic disorders. In order to prevent as far as possible the escaping of fumes and gas, the defendant had provided various safety appliances which were attached to the furnaces. These consisted of a fan at the back located at the bottom of large metal tubes or conveyors. By the operation of this fan fumes or gases generated from the smelting process are sucked into these pipes and conveyed out of the furnace room into an adjoining room called the bag room. The latter room is equipped with many large cloth bags hanging from the ceiling, at the bottom of which the metal tubes are inserted. These appliances are designed to collect the dust and fumes coming from the furnaces into these bags which act as a filter and prevent their escape. There was a shelter or shield attached to the front door of the furnace, so shaped as to prevent dust and smoke escaping into the room upon the opening of the door. The plaintiff, as well as other workmen, was furnished with respirators for his use when working about the furnaces, and with a gas mask and coveralls when it became necessary to enter the bag room to remove the dust from the collecting filters.

On July 1, 1934, due to a partial shut-down of the plant, the plaintiff's employment was discontinued. On October 25, 1934, it was again resumed, at which time he was almost immediately transferred to a part of the refinery known as the bismuth plant. In this department he worked on the copper furnaces as tender. These furnaces were located in a spacious room which is provided with large doors and louvers for proper ventilation. The furnaces are used for the purpose of removing the refined copper from

slag. They have no doors. At the front a fan is attached to prevent the escape of dust and gases which generate in the refining process. The plaintiff, after tending the copper furnace for a short time, was transferred to the bismuth kettles which are located in a separate room adjacent to the copper-furnace room. This latter room is about 20 by 30 feet, open at the top for ventilation. In this room are three round bismuth kettles, about five feet in depth, each being covered by a cone-shaped lid resembling a funnel with the spout projecting upward through the roof so that any fumes, smoke or gases given off in this process will be discharged into the open air. The testimony shows that these appliances work very successfully except on rare occasions when the wind was in a certain direction, at which time some fumes did escape into the room. The plaintiff's work on the bismuth kettles continued about three months, and it was while so engaged that he first noticed a change in his physical condition.

Both at the time of his original employment, and when it was resumed, he was required to and did sign an agreement in which he stated that he would abide by all the rules and regulations of the company as to medical examinations and inspections, and would comply with the safety rules, admitting that he had received a copy thereof and was instructed to read them and familiarize himself with the same; that he had received warning and had knowledge that such employment was dangerous to his health, and that lead poisoning, or plumbism, oftentimes resulted from such employment; that such disease led to very serious consequences, such as paralysis and derangement of the digestive organs; that he would guard against such dangers; that he had read the agreement and understood it. In addition he was furnished with a book of rules of the company in which the dangers of the occupational disease of lead poisoning were pointed out in bold-faced type, informing him of the physical effects resulting therefrom. He was also informed that habits of cleanliness and a strict compliance with the rules and regulations would minimize

the dangers of such disease. He was instructed to keep his person and clothing clean. Monthly lectures, which he attended, were given the employees, at which were stressed the necessity for cleanliness, and the constant use of the appliances which had been furnished the workmen for their protection and the preservation of their health. Physical examinations were had at stated intervals by a physician employed by the defendant, as a means of detecting early any possible traces of lead poisoning. The testimony shows that this occupational disease, termed plumbism, may be acquired in two different manners—by lead dust or fumes being inhaled in the respiratory process, or by dermal absorption, due to a failure to keep the skin free from deposits of lead dust. The testimony shows that a few days previous to the trial the plaintiff was suffering from a mild form of this ailment. It further shows that the defendant had equipped its refinery with approved safety appliances used by other concerns in the prosecution of similar businesses.

The plaintiff testified that he knew he would be discharged if he were caught working where dust and fumes were present without using the respirator; that he received the safety rules; that he signed the agreement mentioned; and that the company had lectures in which he was informed of the dangers to health incident to his employment. He seems to rest his entire case upon the claim that he did not read these rules, notwithstanding he stated in the agreement that he had, and that he was never told by any one there was such a disease known as plumbism.

The contention that the defendant failed to provide the plaintiff a safe place to work is certainly disposed of by the fact that its plant seems to have been fully equipped with all the effective and necessary safety appliances which are known to such business.

This precise question was before this court in the case of *Wiseman v. Carter White Lead Co.*, 100 Neb. 584, 160 N. W. 985. In that case the verdict was upheld only because the evidence showed that the master had failed to

inform the servant of the nature and extent of the dangers and the serious consequences thereof. Had such information been given the servant, the court would have held him to have assumed all such risks.

The facts in the instant case indicate that the defendant must have had the *Wiseman* case in mind when it went to such extremities to inform plaintiff of the character and consequences of the disease of plumbism by its agreements, rules and lectures, and provided, as it did, an elaborate system of mechanical safety appliances.

Where an employer provides his plant with approved safety appliances to prevent the contraction of an occupational disease, and supplies the employee with safety devices, and warns him of the dangers of contracting plumbism or lead poisoning as a consequence of such employment, the master has performed his entire duty toward the servant; thereafter any damage the servant sustains by reason of contracting such disease will be held to have resulted from risks incident to such employment, which the servant has fully assumed. *Wiseman v. Carter White Lead Co., supra.; Grover v. Aaron Ferer & Sons,* 122 Neb. 755, 241 N. W. 539; *Pigeon v. Fuller & Co.,* 156 Cal. 691, 105 Pac. 976; *Glantz v. Chicago, B. & Q. R. Co.,* 87 Neb. 60, 127 N. W. 221; *Grant Storage Battery Co. v. DeLay,* opinion of Circuit Court of Appeals 8th Circuit, filed February 4, 1937.

The doctrine of assumption of risk is recognized by all the courts and often applied. The theory of the law in this connection being that such dangers were contemplated by the parties in determining the wages of the servant, and that the servant will then be held to carry his own insurance against any further damages growing out of the particular employment.

The plaintiff's claim that he did not read the rules nor understand the nature and consequences of the disease which might result from such employment is too ridiculous to be worthy of serious consideration. The record discloses him to be a normal individual, of more than ordinary in-

telligence. Under such circumstances, having signed his name to the agreement in which the hazards were pointed out, in the absence of fraud or duress, which he does not claim, the law conclusively presumes that he, being able to read, knows the contents thereof; and if he fails to read the same he is estopped to deny his lack of knowledge as to such contents. *Osborne v. Missouri P. R. Co.*, 71 Neb. 180, 98 N. W. 685; *Bradley & Co. v. Basta*, 71 Neb. 169, 98 N. W. 697; *Miller v. Gunderson*, 48 Neb. 715, 67 N. W. 769.

From a full consideration of the record, we must conclude that the plaintiff wholly failed to sustain the burden of proving actionable negligence, and the trial court committed error in overruling the defendant's motion for an instructed verdict. The judgment is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

L. A. RICKETTS, TRUSTEE IN BANKRUPTCY, APPELLEE, V. JOHN A. REICHENBACH, APPELLANT.
272 N. W. 254

FILED MARCH 26, 1937. No. 29869.

1. **Bankruptcy.** "A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense, abatement or counterclaim to which they would have been liable in the hands of the latter." *Nebraska Moline Plow Co. v. Blackburn*, 74 Neb. 246, 104 N. W. 178.
2. **Evidence.** In an action by a trustee in bankruptcy of a bankrupt payee of a promissory note against the maker, oral testimony, written instruments and documentary evidence showing any part of the transaction leading up to the giving of a note sued upon are admissible in evidence to prove the purpose for which the note was given, or that it was given for the accommodation of the payee, without consideration, and as a mere bookkeeping transaction.

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

Perry, Van Pelt & Marti and *Schlytern & Kelly,* for appellant.

R. A. Boehmer, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

ELDRED, District Judge.

Action brought by L. A. Ricketts, trustee in bankruptcy of Lincoln Safe Deposit Company, bankrupt, plaintiff, appellee, against John A. Reichenbach, defendant, appellant, to recover a balance alleged to be due upon a certain promissory note executed by said defendant, August 8, 1928, to the Lincoln Safe Deposit Company for the sum of $20,800, payable on demand. The answer of the defendant alleges, in substance, that prior to the execution of said note the Lincoln Safe Deposit Company and the Reichenbach Land Company entered into an agreement for the purchase of certain lands in Fremont county, Iowa, including land described as the northeast quarter of section 28, township 69, range 40; that on said August 8, 1928, it became necessary for said Lincoln Safe Deposit Company to make a payment for said above described land; that at the request of said Lincoln Safe Deposit Company and for its accommodation and benefit, without consideration, and solely as a bookkeeping transaction, defendant executed the instrument aforesaid. Further answering, defendant alleges that said instrument has been paid and satisfied by reason of the fulfilment of the contract between the Lincoln Safe Deposit Company and the Reichenbach Land Company, and the division of the land so purchased between them. The reply is a general denial. On trial, the court directed a verdict in favor of the plaintiff and against defendant. Judgment was entered on verdict; motion for new trial was overruled, and defendant has appealed.

In addition to the assignment of error in directing a verdict in favor of plaintiff at close of the evidence, defendant assigns error in the refusal of the court to receive in

evidence the agreement or contract (marked for identification exhibit 2) referred to in defendant's answer; as well as in the exclusion of certain proffered oral testimony.

The appellee contends that the defenses relied upon by the appellant are not available as against the plaintiff, L. A. Ricketts, as trustee of Lincoln Safe Deposit Company, bankrupt, and cites in support of his contention *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911, and some authorities from other jurisdictions. In the cited case of *Harrington v. Connor*, it is stated: "In an action by the receiver on any note or evidence of indebtedness of the assets a defense thereto cannot prevail which involves the recognition and enforcement of an agreement which, when made, was a fraud on creditors and depositors of the bank, present and future; and this is true notwithstanding the defense might have been entertainable and good against the bank." That case involved a question of fraud against creditors and depositors of bank at the time of execution of note, participated in by the maker. The case at bar is free from any intimation of fraud; and, further, the question has been disposed of by a later case of this court, adversely to appellee's contention.

"A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense, abatement or counterclaim to which they would have been liable in the hands of the latter." *Nebraska Moline Plow Co. v. Blackburn*, 74 Neb. 246, 104 N. W. 178. The holding there announced is adhered to, and this case must be disposed of as if it were a suit by the payee of the note against the maker. The contract, exhibit 2, appears to have been the inception of the transactions during which, and as a part thereof, the note sued upon was executed. The contract provides for the exchange of certain lands in Iowa by the first parties, one Wenstrand *et al.*, to Reichenbach Land Company and Lincoln Safe Deposit Company, second parties, for lands owned or controlled by the second parties in Brown county, Nebraska. The defendant contends that it developed, during the consummation of said exchange,

that the sum of $20,800 would have to be advanced to secure the title to the quarter of the Iowa land heretofore described; that one Elinor Elder, secretary of the president of the Lincoln Safe Deposit Company, C. C. Carlsen, in the absence of said Carlsen, advised the defendant that a telegram had been received from the attorney for said company at Sidney, Iowa, to the effect that it was necessary that $20,800 be wired to a bank in Iowa by a time stated, in order that said deal could be closed; that, in the absence of Carlsen, the president of the Lincoln Safe Deposit Company, his secretary, Miss Elder, presented the matter to the defendant; that she did not want to send the draft without some authorization or some instrument of some kind as a bookkeeping proposition to show that she was authorized so to do; that the defendant, as an accommodation to Lincoln Safe Deposit Company, signed a note for such amount as a bookkeeping transaction, without receiving any consideration therefor; that the land for which it was necessary to advance said payment was conveyed to the second parties to said contract, two-thirds thereof being the property of the Reichenbach Land Company, one-third the property of the Lincoln Safe Deposit Company, the payee of the note; that a loan was made upon said land in the sum of $12,000, and the proceeds thereof applied as a payment on the note; that the Reichenbach Land Company paid two-thirds of the balance unpaid, after the proceeds of loan were credited thereon; that the remaining one-third was the liability of the payee of the note, who had received title to a one-third interest in said property; and if any liability ever existed on said note, it was satisfied thereby. Some oral testimony was offered and admitted tending to establish defendant's position. The contract, exhibit 2, illuminates and helps to explain the transaction which is the subject of this action, and substantiates the oral testimony offered to show the purpose for which the note was given.

"In an action by the payee in a negotiable promissory note against the maker, oral testimony is admissible to

prove the purpose for which the note was given." *Elmcreek Ditch Co. v. St. John,* 127 Neb. 253, 255 N. W. 16. See *Spangenberg v. Losey,* 116 Neb. 112, 216 N. W. 191.

"In an action on a promissory note, the defense that the note is given for the accommodation of the plaintiff and without consideration may be established by parol evidence." *Bennington State Bank v. Petersen,* 114 Neb. 420, 207 N. W. 673; *Luikart v. Meierjurgen,* 124 Neb. 816, 248 N. W. 379. The contract, exhibit 2, should have been received in evidence.

Objection was sustained to testimony offered to show that the Reichenbach Land Company had executed a deed to the 6,760 acres of land in Brown county referred to in the contract, exhibit 2. A conveyance by the Reichenbach Land Company of the land in Brown county was not material under the issues being tried; its exclusion was not error.

By question No. 55, an appropriate offer, the appellant sought to show that the purpose of signing the note sued upon was only for the accommodation of the payee therein; which was objected to "as incompetent, irrelevant, immaterial, and attempting to vary the terms of a written instrument by parol evidence." The objection was not well taken. Proof of the purpose for which the note was given was competent and should have been admitted so far as the proffered evidence was a statement of fact and not a conclusion. The latter part of the offer to the effect that Miss Elder told the witness at the time of signing the note that he was signing said instrument for the accommodation of the payee was properly rejected.

A further offer was made to prove a conversation between the president of the Lincoln Safe Deposit Company and the defendant in 1927, and prior to the execution of the note sued on, tending to establish an agreement as to the division of the Iowa property between the two companies; that is, that the Reichenbach Land Company was to receive two-thirds of the land and pay two-thirds of any money advanced by the Lincoln Safe Deposit Company,

and that the Lincoln Safe Deposit Company was to receive one-third of the land and pay one-third of any money advanced. The evidence offered was objected to for the reason "There is not any evidence of any contract in relation to any land in evidence at all." The contract, exhibit 2, while it disclosed that the Iowa land was to be conveyed to the two companies, does not disclose their respective interests in the land. There is in the record evidence that the Reichenbach Land Company had received two-thirds of this land, or 800 acres, and that the Lincoln Safe Deposit Company had received one-third of the land, or 400 acres; that the Reichenbach Land Company had paid two-thirds of the indebtedness remaining after the application of the proceeds of the loan. The written contract being incomplete in failing to show how the land received by second parties thereto should be divided as between themselves, the evidence offered was competent and material under the issues in this case, as it tended to show that the payee of the note had received all of the land to which it was entitled.

On behalf of appellee it is urged that "a person receiving benefit, direct or indirect, upon execution of a note is not an accommodation maker;" and appellee refers to the fact that the defendant was a stockholder and vice-president of the Lincoln Safe Deposit Company, and urges that there was a consideration to him as such stockholder of that company. A number of authorities are cited in support of such proposition, all of which have been examined. In none of those cases were the facts analogous to the instant case, and the holdings there announced are not controlling here. Though the land was conveyed to the company of which the defendant was a stockholder, no part of it became the property of the defendant individually. The corporation and its stockholders are separate entities. *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911.

It is finally urged by appellee that the excluded evidence, had it been admitted, could not have changed the result of the litigation; and, therefore, the action of the court, if

erroneous, was not prejudicial. But, without expressing any opinion as to the weight of the evidence, it would appear that, had the proffered evidence been admitted, there would have been some issues for consideration by a jury. The judgment of the trial court is

REVERSED.

RONALD MARKUSSEN, APPELLEE, V. BERTHA H. MENGEDOHT, TRUSTEE, APPELLANT.
272 N. W. 241

FILED MARCH 26, 1937. No. 29826.

1. Landlord and Tenant: INJURY TO TENANT: PROOF. How an injury was sustained is a question of fact that may be established by circumstantial evidence.
2. ———: ———: TRIAL. Where facts and circumstances are established from which the manner of sustaining injuries can be logically inferred, an issue is presented for the jury.
3. ———: ———: LIABILITY. Where premises are leased with portions thereof reserved by the lessor for use in common of all the tenants, the lessor is liable only for personal injuries to a tenant due to his negligent failure to keep such portion of the premises in a reasonably safe condition for the use intended.
4. Appeal: INSTRUCTIONS. An instruction which assumes as proved a material, controverted fact is erroneous.

APPEAL from the district court for Douglas county: LOUIS LIGHTNER, JUDGE. *Reversed.*

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

Frost, Hammes & Nimtz, contra.

Heard before ROSE, GOOD, EBERLY and CARTER, JJ., and RYAN and KROGER, District Judges.

KROGER, District Judge.

Ronald Markussen, an infant, brought this suit by his father as his next friend, to recover damages for personal injuries sustained in a fall on premises belonging to the defendant. There was a trial to a jury which resulted

in a verdict in favor of plaintiff and from the order overruling defendant's motion for new trial, this appeal is prosecuted.

The evidence discloses that the defendant is the owner of a four-story apartment building in the city of Omaha, and some nine months prior to the time of the accident in controversy plaintiff's parents leased a suite on the first floor of said apartment house. The building fronts towards the east and there is a hallway extending across the same from the front entrance to the rear, running east and west, and an intersecting hallway, in approximately the center of the building, running north and south. To the rear is another building and between the two buildings is a space equipped and used for a children's playground. There is a window to the right of the rear door of the east and west hallway, the opening of which is approximately thirty-two inches wide and six feet four inches high and the window sill is approximately twenty inches above the floor and is twelve inches in width. On the outside of the building, immediately beneath the window in question, there is an area-way, or pit, approximately ten feet in depth, which serves as an outside entrance to the basement and contains a stairway leading to the basement. Along the north wall of said hallway and commencing at a point within a few inches of the window frame and extending towards the east are a number of mail boxes placed there for the reception of mail addressed to the various tenants in the building. During the summer months the lower half of the window, above mentioned, was usually kept open and from May until September or October, a screen was maintained on said window by the owner, which screen was attached to the window by two hooks, one on either side attached at approximately the center of the frame, and eyelets were fastened to the window frame into which the hooks on the screen were inserted.

On the 23d day of July, 1934, during the noon hour, the plaintiff, then two and one-half years of age, was found lying unconscious and severely injured in the pit im-

mediately beneath the hall window. There were no eyewitnesses as to how the accident occurred, but after the accident an examination was made of the window screen, and the north hook of the screen was found to be unlatched and that portion of the screen pushed outward and the point of the hook bent to such an angle that, when replaced in the eyelet, a slight pressure was sufficient to cause it to release and the screen to push out. On the floor beneath the window were bits of torn paper, which appeared to have been the name cards attached to some of the mail boxes. There was evidence that there were a number of children living in the apartment building, and that at various time they had been in the habit of playing in the halls and had been seen playing around the window in question, and one of the witnesses testified that she had seen children sitting in the window.

At the close of plaintiff's evidence, and again at the close of all of the evidence, defendant moved for a directed verdict, on the ground that the evidence was insufficient to sustain a judgment in favor of the plaintiff.

Plaintiff's action is based on the theory that plaintiff had climbed into the window in order to reach the name cards on the mail boxes along the wall and, while so engaged, leaned or fell against the screen, and that, due to the carelessness and negligence of the defendant in maintaining said screen in an unsafe and insecure condition, plaintiff fell from the window into the pit and suffered the injuries complained of.

Defendant assigns as error the overruling of her motion for directed verdict, the giving of certain instructions, refusal to give instructions requested by defendant, and misconduct of plaintiff's counsel in his argument to the jury.

In support of her contention that the court should have directed a verdict, the defendant argues, first, that there was no evidence from which the jury could find that plaintiff had fallen from the window, as alleged in his petition; that all of the proof produced by plaintiff con-

sisted of the presumption or inference that might be drawn from the condition of the premises and the further presumption that the fall was due to the negligence of the defendant in not having the screen securely fastened to the window frame; and argues that you cannot rest one presumption upon another, and that all plaintiff has proved is that he was injured in an accident, and nothing more.

This point does not seem to be well taken. All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury. *Western Travelers Accident Ass'n v. Holbrook,* 65 Neb. 469, 91 N. W. 276; *Luckey v. Union P. R. Co.,* 117 Neb. 85, 219 N. W. 802.

Defendant next argues that her motion for directed verdict should have been sustained for the reason that the premises were not being put to the use intended at the time plaintiff sustained his injuries, and that therefore the rule that the landlord is liable for personal injuries, due to his negligent failure to keep that portion of the premises reserved for the use of all tenants in a reasonably safe condition, does not apply.

This objection raises a more serious question. While it is the almost universal rule that the owner, who reserves a portion of the demised premises for the common use of all the tenants, is required to keep the portion so reserved in a reasonably safe condition (16 R. C. L. 1037, sec. 557, *Randall v. First Nat. Bank,* 102 Neb. 475, 167 N. W. 564, *Blotcky v. Gahm,* 108 Neb. 275, 187 N. W. 640) there is to this rule a quite generally recognized exception that the use must be such use as the reserved portion was intended for. 16 R. C. L. 1040, sec. 559. Thus, in the case of *Gavin v. O'Connor,* 99 N. J. Law, 162, 122 Atl. 842, 30 A. L. R. 1383, where several boys were playing in the back yard and one was swinging on a clothes line extending from the building to a clothes pole and the pole broke and

in falling killed a young boy, it was held that the owner was not liable because the pole was not being used for the purpose for which it was intended. See, also, *Robinson v. Leighton,* 122 Me. 309, 119 Atl. 809, 30 A. L. R. 1386; *Kinney v. Onsted,* 113 Mich. 96, 71 N. W. 482, 38 L. R. A. 665; *Morong v. Spofford,* 218 Mass. 50, 105 N. E. 454, L. R. A. 1915 B, 387; *Pavlovchik v. Lupariello,* 101 Conn. 567, 127 Atl. 18; *Egan v. Krueger,* 103 N. J. Law, 474, 135 Atl. 811. It has further been held that the owner is not required to provide safe-guards, not otherwise necessary to the ordinary use of the property, because of the possibility of injury to small children. *Harrison v. Mortgage Investment Co.,* 58 Fed. (2d) 881; *Doyle v. Union P. R. Co.,* 147 U. S. 413.

We conclude that in this case it was the duty of the owner to keep that portion of the premises reserved for the use of all of the tenants in a reasonably safe condition for the use intended, and that this applies equally to the members of the tenant's family.

Was the plaintiff, at the time he suffered his injuries, using the premises for the purposes they were intended? There was evidence produced by plaintiff that during the winter-time and on rainy days the children were permitted to play in the halls of the building. There was also testimony that they did play in the halls at other times, but there was nothing to indicate that the latter was done with the consent of the owner. Whether the owner intended that the halls were to be used by the children of the tenants as a playground would ordinarily be a question of fact for the jury to determine, and if the jury found they were so intended, then it would be the duty of the jury to determine from the evidence whether they were kept in a reasonably safe condition for that purpose. The pleadings in this case did not present this issue. It was the duty of the plaintiff to plead and prove that, at the time of the accident, he was using the premises for the purposes intended. This he failed to do, and defendant's motion for a directed verdict should have been sustained.

In arriving at this conclusion, we have not overlooked the cases of *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, and *Ramirez v. Chicago, B. & Q. R. Co.*, 116 Neb. 740, 219 N. W. 1. Those cases can be distinguished from the case at bar on the theory that there the owners were negligent because of maintaining on their premises a nuisance or a condition amounting to a trap. No such condition existed in this case.

Complaint is made of the giving of certain instructions and the refusal to give others. In view of the disposition of this case, it is necessary to consider only one of them. Instruction No. 9 given by the court on its own motion reads as follows:

"You are instructed that the plaintiff was lawfully upon *the particular part* of the premises in question, and it was the duty of the defendant to exercise ordinary care to maintain the premises under her control in a reasonably safe condition for those lawfully upon the premises, and a failure to exercise such care would be evidence of negligence." (Italics ours.)

The plaintiff charged in his petition that he fell from the window, and offered evidence from which a jury could find that the accident happened. By appropriate pleading, defendant took issue with the allegation as to how the accident happened. Obviously, if the accident happened in some other way, not pleaded by plaintiff, there could be no recovery. The burden was on the plaintiff to establish that the accident happened as charged, and it was a question of fact for the jury whether that was the way the injury was sustained. The only part of the premises in question to which the above instruction could apply would be the window, and the court, in the instruction, assumes that the child was in the window and fell from the window. Under the rule that an instruction is erroneous which assumes a material fact as established, where the evidence on that issue is such that reasonable minds might draw different conclusions, the giving of instruction No. 9 was prejudicial error. *Meyer v. Rosenblatt & Son*, 119 Neb.

471, 229 N. W. 771; *Pratt v. Western Bridge & Construction Co.*, 116 Neb. 553, 218 N. W. 397.

We have examined the assignment as to misconduct of counsel in his argument to the jury and find no merit in it.

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

REVERSED.

C. L. MALONE, APPELLEE, V. WILLIAM BELL ET AL., APPELLANTS.

272 N. W. 312

FILED APRIL 2, 1937. No. 29802.

1. **Fraudulent Conveyances**: INTENT: QUESTION OF FACT. "The question of fraudulent intent is a question of fact and not of law, when considered in the matter of a conveyance charged to be made to hinder and delay creditors." *State Bank of Beaver Crossing v. Mackley*, 121 Neb. 28, 236 N. W. 165.
2. ———: BURDEN OF PROOF: CONSIDERATION. (1) "Where husband transfers property to wife, which prevents his creditors from enforcing payment of their claims, it is presumptively fraudulent as to them, and the burden is upon wife to prove otherwise." (2) "A *bona fide* debt due from husband to wife is a good and sufficient consideration to support conveyance of property as security for such debt." (3) "An insolvent debtor may in good faith pay or secure valid debt of one creditor to exclusion of others." *Luikart v. Tidrick*, 126 Neb. 398, 253 N. W. 414.
3. ———: PREFERENCES. A debtor in failing or insolvent circumstances may prefer a creditor, including his wife, to the exclusion of others. *Nebraska Wheat Growers Ass'n v. Johnson*, 130 Neb. 99, 264 N. W. 165.
4. ———: INTENT. To set aside a conveyance for a valuable consideration from one member of a family to another as a fraudulent transfer, fraudulent intent must be participated in by both parties to the transaction.

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

Skiles & Skiles, for appellants.

Fred C. Foster, Herbert W. Baird and *R. M. Charters, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and ELDRED, District Judge.

GOSS, C. J.

This is an appeal from a decree setting aside a conveyance of lands by a husband to a wife as made without consideration and for the purpose of hindering, delaying and defrauding plaintiff, a creditor of the husband.

Defendants William Bell and Anna C. Bell are husband and wife, who live on a farm about two and one-half miles northeast of Waverly. It is described as the west-half of the northwest quarter and of the southwest quarter and that part of the east-half of the northwest quarter lying south of Salt creek, totaling about 196 acres, all in section 2, township 11, range 8, Lancaster county. The title was in William Bell and for 30 years it had been the family home. Less than two miles west thereof in section four defendants owned jointly the southwest quarter, being a fractional quarter containing about 147 acres.

August 9, 1932, William Bell conveyed by quitclaim deed to Anna C. Bell all his interest in the above described lands for a stated consideration of one dollar. These two farms, of which Anna C. Bell previously owned a half-interest in the 147 acres, were encumbered by mortgages totaling $13,000 and interest and taxes amounting to an additional sum of about $1,900. The testimony of defendants and their two witnesses fixes the value of the land at not more than $50 an acre at the time of the conveyance. Plaintiff offered no testimony as to values.

Defendants pleaded that the deed to Mrs. Bell was for a good and valuable consideration. The evidence of defendants in that behalf shows that in 1918 Mrs. Bell received from her father a gift of $5,000 in cash; that she deposited it in the Lancaster County Bank and kept it there for two years, receiving interest on it; that in the fall of 1919 or early part of 1920 her husband bought some Kansas land

and she drew the money out of the bank and loaned it to him; that a $5,000 note in evidence, written by an officer of the bank, in favor of Anna C. Bell, dated February 26, 1920, executed by William Bell, for the loan, and which has never been paid, was the real consideration for the deed aforesaid; that Mr. Bell used the money to buy the quarter-section of Kansas land which he still owns, and that in 1919 he had bought another quarter-section of land in Coffey county, Kansas, which in 1929 he traded for the southwest quarter of section 4, township 11, range 8, in Lancaster county, being the 147 acres referred to, taking title thereto jointly in the names of himself and wife.

Plaintiff became a creditor of William Bell by the purchase from the Lancaster County Bank on August 30, 1929, for $1,700, of Bell's note to the bank. Bell renewed the note four times after Malone became the owner. Finally, being unable to get the money on the note or to obtain further security, plaintiff sued and obtained a judgment against William Bell in the district court for Lancaster county for $2,030.56 and costs. After going through the necessary formalities he brought this suit to set aside the deed from Bell to his wife and to subject the land in suit to payment of his judgment.

The testimony of defendants also shows that Mrs. Bell had owned 105 other acres in Lancaster county for 24 years. It was purchased with money she had accumulated from savings on the home farm. About 1928 she borrowed $4,000 on the security of this 105-acre farm and lent it to her husband who used it to pay certain debts he then owed. They testified that this sum had never been repaid.

Mrs. Bell testified that, when she received the conveyance sought to be set aside, she knew that it conveyed the greater part of her husband's assets, that he was in straitened circumstances and that he owed the note to Malone and owed a note to the Lancaster County Bank.

When Malone purchased the note from the bank there was exhibited to him certain property statements Bell had furnished the bank on January 4, 1927, and May 3, 1929,

showing large assets, but no indebtedness to Mrs. Bell and indeed stating that Bell owed no money to relatives. These statements were made out in the handwriting of the banker. Mr. Bell testified, in substance, that he signed them without reading them, which does little to exonerate him from notice of their contents. But Mrs. Bell testifies that she had no knowledge of the statements or of their contents. Her testimony on the subject was not rebutted.

The decree found that plaintiff's judgment was a lien upon the 196-acre home of Bell in section two, subject to mortgages, and subject to a $2,000 homestead right, and a lien upon the 147 acres in section four, although Mrs. Bell had long owned a half-interest in that tract and was not personally liable on the note which was the basis of the judgment.

"The question of fraudulent intent is a question of fact and not of law, when considered in the matter of a conveyance charged to be made to hinder and delay creditors." *State Bank of Beaver Crossing v. Mackley,* 121 Neb. 28, 236 N. W. 165. See Comp. St. 1929, sec. 36-405.

(1) "Where husband transfers property to wife, which prevents his creditors from enforcing payment of their claims, it is presumptively fraudulent as to them, and the burden is upon wife to prove otherwise." (2) "A *bona fide* debt due from husband to wife is a good and sufficient consideration to support conveyance of property as security for such debt." (3) "An insolvent debtor may in good faith pay or secure valid debt of one creditor to exclusion of others." *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414, and cases cited.

A debtor in failing or insolvent circumstances may prefer a creditor, including his wife, to the exclusion of others. *Nebraska Wheat Growers Ass'n v. Johnson,* 130 Neb. 99, 264 N. W. 165.

The evidence of fraud on which plaintiff, and evidently the trial court also, relied consists in the circumstances surrounding the parties and their dealings rather than in any direct testimony offered in the case. Defendants

deny any fraud. The property conveyed to Mrs. Bell by her husband was encumbered to substantially its full value at the time of the conveyance, as indicated by the evidence. There was the circumstance that the note was made on February 26, 1920, and Bell's deed to his wife was executed August 9, 1932. The note was a demand note. It was kept in a box in the home where both parties had access to it. It was in evidence and shows that it has never been actually canceled. We do not think, however, that these things prove any fraud on the part of either Mr. or Mrs. Bell. Even if fraud could be attributed to him alone, it would not be sufficient. To set aside a conveyance for a valuable consideration from one member of a family to another as a fraudulent transfer, fraudulent intent must be participated in by both parties to the transaction. *Farmers State Bank of Smithfield v. Renken,* 129 Neb. 416, 261 N. W. 851; Comp. St. 1929, sec. 36-406; *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130, 88 N. W. 552; *State Bank of Beaver Crossing v. Mackley,* 121 Neb. 28, 236 N. W. 165.

Some value is sought by plaintiff from the fact that Mrs. Bell borrowed $4,000 on the 105 acres, purchased by her out of savings about 24 years before the trial, and turned it over to her husband in 1928 to pay his debts, without any accounting to her in this suit or otherwise for the sum so advanced to him. It may be said that the 105-acre tract and the $4,000 borrowed on it by Mrs. Bell and turned over to her husband is, as stated by plaintiff's brief, "only important to show the course of dealing between the parties" and to show that this particular farm and this fund were "considered community property." However, Mrs. Bell testified that the farm was still hers. And it is not sought in the action to subject the farm to plaintiff's judgment. It does not seem to us that this incident has much, if any, bearing on the issues of the case.

While we try the case *de novo,* we are authorized by the rules to take into consideration that the trial judge saw and heard the witnesses and that their appearance and manner of testifying is disclosed to him as it cannot be

fully disclosed to us through the printed record. The record of the evidence does not appear to us to warrant the adoption of any such rule in this case. It indicates that defendants are not skilled in dissimulation as are some who are well used to testifying. The record of their testimony does not disclose to us any shiftiness or evasiveness which is sometimes quite apparent from the words in which testimony is recorded.

We are of the opinion defendants overcame any presumption that the deed of the husband to his wife was fraudulent as to the plaintiff-creditor, and that plaintiff has failed to establish his cause of action by a preponderance of the evidence. The judgment of the district court is reversed and the action is dismissed.

REVERSED AND DISMISSED.

DAY, J., dissenting.

This is a suit in equity by a judgment creditor to set aside as fraudulent conveyances of real estate from a husband to his wife. The defendants appeal from the decree of the trial court setting aside the conveyances and subjecting the real estate to the lien of the judgment, subject to the homestead rights in a part of the real estate.

The defendant William Bell was the owner in fee of 196 acres and also owned as a tenant in common with his wife a fractional quarter consisting of 147 acres. He conveyed all his interest in this land to his wife by a quitclaim deed executed August 9, 1932. These two farms were encumbered by mortgages securing a principal debt of $12,000. The defendants pleaded that the debt to Mrs. Bell was for a good and valuable consideration.

A transfer between husband and wife by reason of which a creditor is prevented from collecting his claim is presumptively fraudulent. *First Nat. Bank v. Bartlett* (1879) 8 Neb. 319. In that opinion, Chief Justice Maxwell said: "Transactions between husband and wife in relation to the transfer of property from him to her, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must be clearly

established that such transactions were made in good faith. *Aultman, Taylor & Co. v. Obermeyer,* 6 Neb. 260. The reason is, that there is such a community of interest between husband and wife, that such transfers are often resorted to for the purpose of withdrawing the debtor's property from the reach of his creditors and preserving it for his own use. Therefore, in a contest between the wife and the creditors of her husband, there is a presumption against her which she must overcome by affirmative proof." In a later case (1886) it was held that, in transactions between husband and wife in relation to her separate estate, the same principles of law apply as are applicable to dealings between strangers, but where the effect of such dealings is to deprive creditors of an opportunity to subject the property of the husband to the payment of their claims, the facts involved in such transactions will be viewed with suspicion and proof of their *bona fides* required. *Lipscomb v. Lyon,* 19 Neb. 511, 27 N. W. 731. Again, in 1901, it was held: "Transactions between husband and wife, to the prejudice of creditors, should be carefully scrutinized and their *bona fides* clearly established; there is a presumption against the good faith of such transactions which must be overcome by affirmative proof." *Lynch v. Englehardt-Winning-Davison Mercantile Co.,* 1 Neb. (Unof.) 528, 96 N. W. 524.

In a most recent case (1935) it was held: "In a creditor's suit to set aside a conveyance by a debtor to his wife alleged to have been made in consideration of money turned over by the wife to the husband many years before, the burden is upon the wife to show that the debt is genuine, that her purpose was honest, and that she acted in good faith in obtaining the title." *Waterbury State Bank v. O'Neill,* 129 Neb. 150, 260 N. W. 808.

Whatever may be the rule in other jurisdictions, it is established by abundant authority in this state that a transfer of property from a husband to his wife by reason of which creditors are prevented from collecting their claims is presumptively fraudulent, and the burden of proof is

upon the wife to establish that it was made in good faith for a consideration. *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414. "The question of fraudulent intent is a question of fact and not of law, when considered in the matter of a conveyance charged to be made to hinder and delay creditors." *State Bank of Beaver Crossing v. Mackley,* 121 Neb. 28, 236 N. W. 165. See Comp. St. 1929, sec. 36-405.

These rules applied to the present case would require Mrs. Bell to establish by a preponderance of the evidence that the land in question was transferred to her in good faith and for a consideration. In the absence of evidence to establish the good faith of the transaction, it is presumptively fraudulent. The evidence in this case does not establish that the transfer was made in good faith for a consideration. There is evidence in the record that in 1918 Mrs. Bell received from her father a gift of $5,000 in cash, which she deposited in the bank and kept intact for a period of two years. She withdrew this money from the bank and permitted her husband to use it in the purchase of some land in Kansas. The purchase was made for $10,000 in cash, which included Mrs. Bell's money, and the assumption of a $6,000 mortgage. In 1929 a part of this Kansas land was traded for the 147-acre tract herein involved. This tract was acquired by Bell in exchange for the Kansas land and a payment of $1,000 cash, and a mortgage was assumed for $6,000, the same amount as the encumbrance on the Kansas land. So that, at the time of the acquisition, Bell had over $11,000 in cash in this tract, which was encumbered for $6,000. Mr. Bell caused the title to this 147-acre tract to be placed in the name of himself and his wife. There is evidence in the record that in 1929 this land was worth more than $10,000 in excess of the mortgage. One-half of this valuation was at least equal to the amount of money Mrs. Bell advanced her husband in the Kansas deal. Of course, Mrs. Bell testifies that this land was not put in her name to satisfy the debt to her. Apparently the indebtedness was to remain a family ghost to scare away honest creditors of her husband, a family custom which courts of equity have condemned.

It is true that the note was not destroyed at that time or canceled. It was kept as an amulet against evil days. Specifically, it was kept in a box with valuable papers, accessible to both Mr. and Mrs. Bell. The same thing is true as to this note after the transfer of the title to the land which caused this litigation. This note continued to repose in the same place, unsurrendered and uncanceled, possessing an apparently latent power to be used when and if necessity arose.

Now, if we apply the rule of strict accountability to the transaction between this husband and this wife, the husband was not indebted to the wife after the transaction of 1929. In 1932, when it was sought to make the transfer of all his property upon the consideration of this $5,000 note, there was strictly nothing owing by Mr. Bell to Mrs. Bell, and the transaction was not a good faith transfer for the purpose of paying an indebtedness to the wife by her husband. Under the decisions of this court, it was presumptively fraudulent and for the purpose of hindering, delaying, and defrauding a creditor.

The indebtedness of the husband to the plaintiff in this case is represented by a note which had been renewed from time to time for years. The note was originally executed by the bank and later bought by the plaintiff in this case. Much stress was placed in the argument upon the fact that the note from the husband to the wife was filled out by some one who worked in this same bank, and that the bank therefore had knowledge of the indebtedness to the wife. It is argued from this that the loan was not made upon the faith of this property. But this argument is untenable because this note was renewed four times by this plaintiff, and there is no evidence that the plaintiff had either direct or constructive notice that there was any indebtedness of the husband to the wife.

In fact, the husband made several financial statements to the bank in which he stated that he had no indebtedness to any relative. This property statement was shown to the plaintiff by the bank at the time he purchased the note.

Mr. Bell seeks to avoid the consequences of these statements by saying that he signed them without reading them, which does not exonerate him from notice of their contents. It was upon the faith of this property statement that he was originally loaned approximately $1,700. It is insisted by the appellants that the wife did not sign this statement and did not know anything about it, and that her rights could not be affected by it. But she knew her husband's financial condition and actively participated in his business affairs for years. Anyhow, this signed statement, which was made for the purpose of securing this loan, contains statements contradictory to his testimony in this case. Are we to credit fully his testimony now that he was indebted to his wife in the sum of $5,000 at the time of the execution of the note, when at the time he signed a written statement for the purpose of securing the loan, he said that he was not so indebted? This would seem to tax unduly the credulity of this court.

There is also evidence in the record by Mrs. Bell herself that when this land was conveyed to her, which conveyance is now sought to be set aside, she knew that it was all of her husband's assets in the state of Nebraska and was the greater part of his assets; that he was in straitened circumstances and owed a note to the Lancaster County Bank, and that he could not pay his debts. All the circumstances of the transactions between this husband and his wife are sufficient to establish that this transfer of property was not a good faith transfer for a consideration, and that this transfer was a fraudulent conveyance for the purpose of hindering, delaying, and defrauding creditors, and as such it should have been set aside by the trial court.

But there were other transactions between Mr. and Mrs. Bell which, while not directly bearing upon the issues in this case, do, however, indicate the business relationship between them. In 1912 Mrs. Bell acquired in her name a 105-acre tract which was mortgaged at the time of purchase. The money with which this land was purchased was accumulated by the sale of farm products from the

land here involved. The mortgage upon it was paid off in the same manner. As to this, Mrs. Bell testified: "We got a loan when we bought it and then we worked and paid it off and then I borrowed the money of Mr. Price again, $4,000." This $4,000 was paid on the debts they owed in 1928. Even this transaction, for all the record shows, might well have extinguished the debt created in 1920 due Mrs. Bell from her husband. No note was given representing this as a debt. There is no evidence that this was even considered a debt until the exigencies of this case incubated the idea. A fair inference as to this is that the mortgage debt on this 105-acre tract was paid from Mr. Bell's money, and that it was merely borrowed again from the bank to pay some of his debts.

There is evidence in the record that this transfer was not inspired by an honest desire of the husband to pay a debt due his wife. In 1932, when this transfer was made, there was pending against him an action for damages for $10,000 as a result of an automobile accident, an automobile collided with a load of corn Mr. Bell's hired man was driving. There is testimony that Mr. Bell stated this was the reason for the transfer, which however Mr. Bell denied. He does admit that he probably talked to Mr. Malone about the accident and the case.

It is not necessary in this case for the court to invoke the rule that a transfer of property by a husband to a wife is presumptively fraudulent, and that the defendants must show that it was a good faith transfer for a consideration. There is sufficient evidence to establish the fact affirmatively that it was not a good faith transfer. In *Waterbury State Bank v. O'Neill, supra,* it was said: "The court will carefully scrutinize a conveyance from husband to wife by which other creditors are prevented from collecting their claims, will consider the fact that knowledge probably rests solely with the parties to the transaction, and will take into account reasonableness or unreasonableness of their evidence, their manner of testifying, and all facts and circumstances in evidence bearing upon the *bona fides* of the

transaction." If Mrs. Bell had a claim against her husband, she did not assert it, but rather concealed it, for a period of twelve years and allowed her husband to obtain credit from the bank and this plaintiff because of his apparent ownership of the land.

Although we try this case *de novo*, the finding of fact made by the trial court is entitled to our consideration. While this court in an equity suit must reach an independent conclusion as to questions of fact, it will consider that the trial court observed the witnesses and their manner of testifying in determining the weight of the evidence. *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670; *Gentry v. Burge*, 129 Neb. 493, 261 N. W. 854; *Eichholz v. Luikart*, 128 Neb. 368, 258 N. W. 869; *Krelle v. Bowen*, 128 Neb. 418, 259 N. W. 48. This case was tried before an able, careful, and experienced trial judge, whose conclusions in this case are entitled to our consideration. Even the cold record as it comes to this court shows a failure on the part of Mrs. Bell to account for the various transactions between herself and her husband. Take, for example, when she was asked, "What debt was that (the transaction) intended to pay you, if any?" and she answered, "I don't know." This is not an isolated instance. When she was asked why she had not collected the debt before, the reply was that she did not want to, and her reason for asking payment at this time was that she wanted to be paid.

I respectfully submit the foregoing analysis of the record in this case with the firm conviction that the judgment of the capable and experienced trial judge should be affirmed. While respecting the opinion of the majority, I am amazed that they are unwilling to apply the well-established rules relative to such transactions here, and in effect, although not intentionally, approve a transaction between husband and wife reeking with fraud. An impartial examination of the record produces an abiding conviction that the transfer of the property was fraudulent and made for the purpose of defrauding an honest creditor of the husband, and that there was no consideration for

the conveyance. The conveyance of the land from the husband to the wife was (to use the language of former Chief Justice Maxwell of this court) "for the purpose of withdrawing the debtor's property from the reach of his creditors and preserving it for his own use." *First Nat. Bank v. Bartlett, supra.*

Carter, J., and Eldred, District Judge, authorize me to state that they concur in this dissent.

BARBARA RUNDALL, APPELLEE, V. SAMUEL GRACE, SR., ET AL., APPELLANTS.
272 N. W. 398

FILED APRIL 2, 1937. No. 29921.

1. Trial. Where the evidence, in an action at law, is conflicting on a material issue of fact, the matter must be submitted to a jury.
2. ———. "The jury may take into account the result of their observations at the *locus in quo* and make it, in connection with the other evidence, the basis of their verdict." *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb. 322, 83 N. W. 71.
3. Record reviewed and judgment affirmed.

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

Wear, Boland & Nye, for appellants.

Weaver & Giller, contra.

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

GOSS, C. J.

The petition charged that Barbara Rundall, a minor four and a half years of age, was struck and injured by the family-purpose car of Samuel Grace, Sr., as she was crossing Lake street near Creighton boulevard in Omaha, shortly after 4 p. m. February 14, 1934. The jury fixed the damages at $1,000, for which judgment was rendered. Defendants appealed. The errors relied upon are that the

court refused to instruct a verdict for defendants and overruled their motion for judgment notwithstanding the verdict.

The grounds of negligence alleged in the petition are that defendant Samuel Grace, Jr., (1) was driving the car at a high and negligent rate of speed and at a rate contrary to a city ordinance, and (2) without keeping a proper lookout, without having his car under proper control to avoid striking plaintiff, and in failing to give any warning.

The undisputed evidence shows that the Grace car came across the boulevard from the west on Lake street; the child was crossing Lake street from the south at a point at about in front of a grocery store, the entrance to which is 75 feet east of the east curb line of the boulevard; the grocery store entrance is 18 feet south of the south curb line of Lake street and the latter street is paved for 30 feet from curb to curb.

Samuel Grace, Jr., testified that he had stopped at the boulevard to let a car coming thereon, at his right, cross; after the car crossed he started across the boulevard in low gear, then shifted into second gear and started up the hill, and that he never changed his gears from that time; there was a "tow car parked out in front of the grocery store * * * right directly opposite the east entrance, out in the street;" he drove far enough north in the street to miss the tow truck two or three feet and did not see the little girl, who came running out from in front of the tow truck, until she ran right into the right front fender of his car; his car was still in second gear, going "uphill," and he estimated its speed at less than 15 miles an hour; his car did not go more than a car length when he stopped it in the middle of the street and ran back to her; he stood looking at her and Mr. McGowan drove up; the witness got in McGowan's car, and the latter picked the child up, handed her to the witness, and they took her to the Methodist Hospital; the witness remained at the hospital and gave his keys to McGowan, who was going back to the scene of the

accident; later McGowan returned to the hospital, brought him his keys and told him he drove the car over to the curb to get it out of the center of the street and locked it.

James McGowan testified that he was driving west on Lake street when the accident happened. His attention was first attracted to defendant's car when some object "rustled out between the wheels, or came back, I could not tell. And the car proceeded towards me." As he got within 25 feet he thought it was an old coat. He pulled over to the north curb and as he got in line with it he could see a child's head. Defendant's car was parked up next to the south curb and the driver had his head out of the window. McGowan called to Grace "This is a child." Defendant got out of the car and came back. They took the child to the hospital. This witness testified that the child was lying two or three feet north of the center of the street and approximately 30 or 40 feet east of the boulevard. He asked Grace how it happened, and he answered: "She darted out in front of me. * * * There was a car parked there." McGowan did not see any car parked there at the time of the accident, but when he came back from the hospital 20 or 30 minutes after the accident "there was a car parked there on the inside of the curbing." The witness testified that the driver did not slow down immediately after striking the child but went approximately 100 feet before stopping. The witness estimated the speed of Grace's car as "a normal rate of speed" which he defined as "between 25 and 30 miles an hour." In view of the fact that the witness was between one and two blocks away, coming from the opposite direction, and testified that he did not notice Grace's car until after the child rolled out from beneath it, we attach very little, if any, probative value to his estimate of the speed of the car. That of itself would not prove that it was being driven at any rate of speed an hour. McGowan further testified that the tow car was inside the curbing at the filling station.

Joe Costello testified that he has a place of business on the southeast corner of Creighton boulevard and Lake

street, where he sells trucks, cars, gasoline, tires and auto parts; he saw the Grace car stop 100 feet east on Lake street and saw McGowan, who parked his car on the north side of Lake street, pick the little girl up in the middle of the street; there was no other car in the street, but there was a car parked inside the curb at the gasoline station. This testimony corroborated that of McGowan.

The only acts of negligence submitted by the trial judge in his instructions were that defendant Samuel Grace, Jr., was (1) "operating said automobile at a negligent rate of speed," and (2) "failed to have said automobile under proper control." These instructions are not criticized. The jury were carefully instructed that, if plaintiff ran out from the curb at a time when defendant was unable by exercising reasonable care to avoid contact with her, the verdict should be for defendant. All appropriate phases were stated in the instructions on this theory.

The verdict was evidently based upon the charge that defendant was operating his car at a negligent rate of speed in the circumstances (even though at only 15 miles an hour or less, as he testified), or that he did not have the car under proper control in the circumstances, or on both points.

McGowan's testimony was sought to be impeached by a statement he had signed as to the distance Grace's car had gone before stopping after the collision. That statement said the car had stopped "10 or 12 feet east of where the girl lay." McGowan's excuse for the statement is that he was not under oath, did not read the statement as closely as he should have done, and that he wanted to let the young fellow down as easily as possible when he asked him to sign the statement. The whole matter was for the jury to decide as to when the witness was telling the truth—whether in the written statement or on the witness-stand in the trial.

There were issues of fact arising on account of the difference between the testimony of McGowan, on the one hand, corroborated by Costello, and that of Samuel Grace, Jr.

These issues of fact were submitted to the jury and were decided by them in favor of plaintiff. It should be stated that the bill of exceptions discloses that during their deliberations the jury requested to be permitted to view the scene of the accident, and, by consent of both parties, they were taken there in charge of a sworn officer of the court. Comp. St. 1929, sec. 20-1108. "The jury may take into account the result of their observations at the *locus in quo* and make it, in connection with the other evidence, the basis of their verdict." *Chicago, R. I. & P. R. Co. v. Farwell,* 60 Neb. 322, 83 N. W. 71.

There were material and disputed issues of fact to be submitted to the jury. The judgment based upon their verdict is

AFFIRMED.

CARTER, J., dissenting.

I cannot concur with the opinion adopted by the court. It does not disclose a single act of negligence upon which a judgment for the plaintiff can be supported. It is conceded by the opinion that the testimony of James McGowan, an eyewitness, as to the speed of the car has little probative value. The defendant Samuel Grace, Jr., testified that he was traveling less than 15 miles an hour. No one else testified to the speed of the car. Excessive speed was therefore not established.

Samuel Grace, Jr., testified that the child ran in front of his car unexpectedly and that he was unable to avoid the injury. It is true that Grace testified that his view of the child was obstructed by a tow truck parked in the street, while other witnesses placed it inside the curb line. I fail to see that this difference is important as long as the truck was in a position to obscure his view of the child. There is no evidence that Grace failed to have his car under control or keep a proper lookout. The burden of proof is upon plaintiff to prove the negligence of Grace by a preponderance of the evidence. This plaintiff has failed to do.

The majority opinion disposes of this feature of the case by saying: "The verdict was evidently based upon the

charge that defendant was operating his car at a negligent rate of speed in the circumstances (even though at only 15 miles an hour or less, as he testified), or that he did not have the car under proper control in the circumstances, or on both points." It is quite apparent from this statement that the writer of the majority opinion was unable to find evidence in the record of any specific act of negligence and had to venture into the realm of conjecture as to what the jury found in order to sustain this judgment.

The majority opinion fails to disclose evidence of anything the driver of the car did that he ought not to have done or anything that he failed to do that he should have done. He is liable only for his negligence which is established by a preponderance of the evidence. No act of negligence being proved, the jury should not have been permitted to express their sympathy and charity by directing another to pay that for which he is not liable. The trial court should have directed a verdict for the defendants.

FEDERAL CREDIT COMPANY, TRUSTEE, APPELLEE, V. H. B. REYNOLDS, APPELLANT: IRA E. ATKINSON, ADMINISTRATOR, ET AL., APPELLEES.
272 N. W. 397

FILED APRIL 2, 1937. No. 29934.

1. **Homestead.** When a husband and wife have a homestead in property, title to which is in the husband, and the wife is divorced from the husband, the latter may continue to claim a homestead interest in the property.
2. **Mortgages: FORECLOSURE: HOMESTEADS: RECEIVERS.** It is erroneous for a trial court in a foreclosure action to appoint a receiver for defendant's homestead interest in real estate.

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

Joseph J. Cariotto, for appellant.

H. J. Whitmore, contra.

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

GOSS, C. J.

Defendant appeals from an order appointing a receiver in an action foreclosing a mortgage on real estate.

The decree of foreclosure entered February 11, 1936, found there was due plaintiff as trustee for bondholders $7,450.24, with 10 per cent. interest from November 20, 1935, as a first lien; and that there was due Ira E. Atkinson, as administrator of the estate of C. E. Reynolds, deceased, $10,446, on a judgment rendered December 1, 1934, which is a second lien. Defendant was granted a stay of eleven months in lieu of his statutory stay of nine months.

The application for a receiver was by motion filed April 30, 1936. The notice of hearing thereon stated that the hearing would be May 2, 1936. Section 20-1082, Comp. St. 1929, requires at least five days' notice, but the record shows that, on May 2, 1936, defendant asked and by order was granted a week to prepare to resist the application. This was a waiver of the defect of time in the motion. After the showing the court appointed a receiver.

The evidence shows that the property under receivership is a twelve-room house, consisting of two living rooms, a dining room, two bedrooms, a kitchen, a sleeping porch, and a bathroom downstairs; the upstairs has four sleeping rooms and an apartment consisting of a living room, a kitchen and a sleeping porch; defendant Reynolds, in whose name the title stands, rents the rooms and apartment out separately for a total of approximately $100 a month and reserves one of the downstairs sleeping rooms for his own use; when he purchased the property in August, 1932, he lived there with his wife and they claimed it as their homestead; his wife got a divorce from him in 1934, but he continued to live in the house and to claim the property as his homestead. The evidence justified the court in concluding that the property was not of sufficient value to pay the liens decreed against it.

The first and chief error assigned is that the court failed and refused to find that the property was the homestead of defendant Reynolds, and was therefore not subject to receivership.

The record seems to raise no doubt that, when the property was mortgaged by Reynolds and wife, it was their homestead. The first question suggested for consideration is whether, after they were divorced, it could and did continue to be his homestead.

In *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884, it is said: "The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such. *Palmer v. Sawyer,* 74 Neb. 108; *Dorrington v. Myers,* 11 Neb. 388; *Galligher v. Smiley,* 28 Neb. 189. The same rule obtains where the marriage relation has been dissolved by decree of court."

It would seem, therefore, that the trial court erred in granting a receivership that covered defendant's homestead rights in the property. The farthest the court had a right to go in that respect was to appoint a receiver for such of the property as did not constitute defendant's homestead. It may be that, upon reversal, there will be no need for the selection by claimant of his homestead or for adjudication of what his homestead rights are or shall be in the particular property, the stay of the order of sale having expired. We content ourselves with holding that the court erred in appointing a receiver, and reverse the judgment, with directions to proceed further in harmony with this opinion.

REVERSED.

RAY G. GRIFFIS, APPELLANT, V. VILLAGE OF BRADY ET AL., APPELLEES.
272 N. W. 306

FILED APRIL 2, 1937. No. 29867.

Electricity: LICENSEES. Where a mere licensee, without invitation, acting solely in his own interest, enters upon a rural right of way occupied by a pole line carrying electric light and power wires and is injured by a broken or a sagging wire, he is not entitled to recover damages for negligence, if licensor did not wilfully or wantonly inflict the injury upon him.

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

Beeler, Crosby & Baskins and *Albert A. Mann,* for appellant.

Hamer & Tye, Rosewater, Mecham, Shackelford & Stoehr, Halligan, Beatty & Halligan, Lowell C. Davis and *J. T. Keefe, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

ROSE, J.

This is an action by Ray G. Griffis, plaintiff, to recover damages in the sum of $5,400 for alleged negligence resulting in personal injuries caused by contact with an electric light and power wire attached to a wooden pole line, the injuries being electric shock and electric burns on his right shoulder, right arm and right wrist.

The defendants are the villages of Brady and Maxwell and the Gothenburg Light and Power Company. They operate and maintain an electric light and power line for the transmission of electrical energy to the two villages, between which plaintiff resides as a tenant on a quarter-section of farm land. South and southwest of the farm buildings plaintiff had a 20-acre pasture with the unfenced southern boundary along the right of way of the Gothenburg Light and Power Company's canal, where there was a growth of willows and cottonwoods. The pole line carry-

ing the light and power wires ran through timber on the right of way north of the canal. Plaintiff's cows grazed in the pasture and drank water from the canal.

By the barking of a dog and the bawling of a cow just before midnight July 8, 1934, or shortly afterward, July 9, 1934, plaintiff was awakened, arose from his bed, dressed, saddled a horse and rode into the 20-acre pasture hunting for his cows. Shortly afterward his wife heard a horse running, went into the pasture in search of her husband and found him injured in the manner stated and unconscious on the ground by timber near the place where a pole in the light and power line had been broken and where two other poles were leaning out of line, thus lowering live wires, one of which was broken and louped over another. Evidence of the foregoing facts was adduced in support of the petition which alleged negligence of defendants in the care and maintenance of the light and power line, resulting in the injuries sustained by plaintiff.

Defendants denied the negligence charged, and pleaded that plaintiff's injuries, if any, were caused by his own negligence. After plaintiff adduced his evidence and rested, the district court directed a verdict in favor of each defendant for insufficiency of the evidence to support a finding in favor of plaintiff. From a dismissal of the action plaintiff appealed.

The controlling question presented by the record is the sufficiency of the evidence to prove actionable negligence on the part of defendants. They were at least chargeable with knowledge that plaintiff's cows grazed on the right of way and drank water from the canal. Defendants did nothing to prevent this use of their property. It fairly may be inferred that plaintiff was severely injured by contact with a broken or a sagging wire on the defective pole line, but it would be carrying inference too far to assume defendants should have anticipated the presence of plaintiff at the place of his injury at midnight. The failure to inspect, to discover the defect and to make repairs is charged as negligence, but plaintiff, himself, was familiar with the

premises and the surroundings. He had made his home on the quarter-section of land and had used the 20-acre pasture for five years. He knew the location of the pole line and the dangerous agency of the transmission wires. He testified that he saw a flash of light before he became unconscious; that he never requested permission from the Gothenburg Light and Power Company to use the right of way as a pasture for his stock; that he never procured such permission from defendants; that he never had any agreement to that effect. He did not promote any interest of any defendant by entering upon or using the right of way. There was no mutuality of interest to imply an invitation to run live stock on the premises of defendants or even to search for cows there at reasonable hours. He was on a mission of his own, serving his own purposes and interests. He was not, therefore, an invitee entitled to ordinary care. He was not induced by allurements of defendants to go to the place of danger. There was no proof of any affirmative act of defendants creating a pitfall or trap or new and sudden danger. The flash of light before plaintiff was injured gave its own warning when he was present and defendants were absent. The most plaintiff can properly claim for himself under the evidence is that he was a licensee. Immediate inspection, discovery of defects and repairs were not duties owing to a bare licensee. In this relation to defendants, the law has often been stated as follows:

"Where one, solely for his personal pleasure, convenience, or benefit, enters upon the premises of another with his consent, but without an invitation, express or implied, he is a bare licensee, and the occupier of the premises owes no duty to him save to refrain from wilfully or wantonly inflicting injury upon him." *Kruntorad v. Chicago, R. I. & P. R. Co.*, 111 Neb. 753, 197 N. W. 611. See, also, *Collins v. Sprague's Benson Pharmacy*, 124 Neb. 210, 245 N. W. 602; *Spence v. Polenski Bros., Schellak & Co.*, 110 Neb. 56, 193 N. W. 101; *Shults v. Chicago, B. & Q. R. Co.*, 91 Neb. 587, 136 N. W. 834; *Trouton v. New Omaha Thomson-Houston Electric Light Co.*, 77 Neb. 821, 110 N. W. 569; *New Omaha*

Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89.

Within the meaning of this principle of law, the evidence on behalf of plaintiff shows conclusively that he did not and cannot make a case in his favor. The judgment against him, therefore, will be affirmed without discussion of other questions presented.

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLEE, V. BANK OF BENKELMAN, APPELLANT.
272 N. W. 324

FILED APRIL 2, 1937. No. 29954.

1. Mortgages: FORECLOSURE: PLEADING. The provision of section 20-2144, Comp. St. 1929, requiring complainant, filing a petition for foreclosure of a mortgage, to state therein whether any proceedings have been had at law for recovery of the debt secured thereby, applies alone to formal mortgages, and not to liens arising out of the equities between the parties.
2. Pleading: GENERAL DENIAL. "A general denial in an answer puts in issue only such pleaded facts as are necessary for the plaintiff to prove in order to enable him to recover." *Herpolsheimer v. Citizens Ins. Co.*, 79 Neb. 685, 113 N. W. 152.

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

Victor Westermark and *Perry, Van Pelt & Marti*, for appellant.

C. D. Ritchie and *F. C. Radke, contra.*

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

GOOD, J.

This action was instituted by E. H. Luikart, as receiver of the Farmers & Merchants State Bank of Benkelman, insolvent (hereinafter referred to as the F. & M. bank), for foreclosure of a contract entered into between the F.

& M. bank and defendant prior to insolvency of the former. Plaintiff had decree, and defendant has appealed.

In March, 1930, the contract in question was entered into, and by its terms the F. & M. bank agreed to assume and, upon demand, pay the following liabilities of defendant as they appeared on its bank statement as of March 20, 1930: (a) Deposits of corporations, individuals, firms, county and state; certificates of deposit; cashier's checks and certified checks; (b) bills payable plus interest to March 24 on such of the above-mentioned items as draw interest. In consideration of this the defendant executed to the F. & M. bank a collateral note in the face amount of $250,000, with the president and two directors of defendant signing as guarantors, and on the same day a contract was entered into between the F. & M. bank and defendant whereby defendant agreed to transfer and deliver to the F. & M. bank:

"a. All cash on hand of Bank of Benkelman.

"b. All moneys due Bank of Benkelman from other banks, bankers and trust companies. Interest due from such banks, bankers, and trust companies is to be added. * * *

"c. All of the bills receivable of Bank of Benkelman (including interest due thereon). * * *

"d. All real estate, leasehold interests, and all other character of property, real, personal or mixed owned by Bank of Benkelman and not included in the preceding property itemizations shall be transferred and delivered to a trustee. Said trustee to be chosen by Farmers & Merchants State Bank and Bank of Benkelman. Such property to be liquidated and the proceeds credited on the above-mentioned note." Then follow other provisions as to credit to be made upon the collateral note from the cash and liquidation of assets. The contract further provided for the appointment of a liquidating agent by defendant, and that, in the event the obligations assumed by the F. & M. bank do not amount to $250,000, then credit shall be given upon said promissory note for the difference, and if such

obligations exceed $250,000, then defendant is to make good that amount to the F. & M. bank. This contract was executed under seal by both contracting parties and contained many other provisions which it is not necessary to consider.

In plaintiff's petition it was alleged: "No proceedings at law have been had for the recovery of the debt evidenced by said contract and 'collateral note.' " This allegation was denied in defendant's answer. Section 20-2144, Comp. St. 1929, provides in part: "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof." Defendant contends that this allegation in the petition for foreclosure of the contract is necessary and, when denied, as in the case at bar, the burden is upon plaintiff to establish such allegation by the evidence before he is entitled to a decree of foreclosure.

This court has on numerous occasions held that, in the foreclosure of a formal mortgage, it was necessary for the plaintiff, not only to allege that no action at law had been instituted for recovery of the debt, but, if such allegation was denied, to establish it by evidence. Among the cases so holding are *Reed v. Good,* 114 Neb. 777, 209 N. W. 619; *Quesner v. Novotny,* 113 Neb. 827, 205 N. W. 566; *Young v. Thompson,* 114 Neb. 804, 210 N. W. 407. This court on a number of occasions has also held: "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." Cases so holding are *Dimick v. Grand Island Banking Co.,* 37 Neb. 394, 55 N. W. 1066; *Connecticut General Life Ins. Co. v. Leahy,* 125 Neb. 644, 251 N. W. 278; *Bankers Life Ins. Co. v. Ohrt,* 131 Neb. 858, 270 N. W. 497.

An examination of the record discloses that the contract sought to be foreclosed in this action was one between the

contracting parties; that both banks executed the instrument under seal. The contract contained many provisions that are unusual in a formal mortgage; it did not provide for the payment of a specified sum by defendant, but required the F. & M. bank to do many things that a mortgagee is not ordinarily required to do. We are constrained to hold that the contract sought to be foreclosed in this action is not a formal mortgage, and that, under the decisions above quoted, the statutory provision has no application.

Defendant seems to contend that, plaintiff having alleged in his petition that no proceedings at law had been had for collection of the debt, denial of this allegation in the answer required plaintiff to sustain the allegation by evidence. The contention is unsound.

Section 20-1102, Comp. St. 1929, provides in part: "An issue of fact arises: First. Upon material allegation in the petition denied by the answer." In *Herpolsheimer v. Citizens Ins. Co.*, 79 Neb. 685, 113 N. W. 152, this court held: "A general denial in an answer puts in issue only such pleaded facts as are necessary for the plaintiff to prove in order to enable him to recover."

The only error of which defendant complains is not well taken. Judgment

AFFIRMED.

CLEMENTS, District Judge, dissents.

MAURICE W. SNYDER, APPELLANT, V. ROBERT SMITH, APPELLEE.

272 N. W. 401

FILED APRIL 2, 1937. No. 29958.

1. **Attorney and Client: LIENS.** An attorney is not entitled to a lien on a judgment in favor of client, unless such attorney has been employed in that action by the client, or has performed services in that action for the client with the latter's knowledge and consent.
2. ———: ———. An attorney is not entitled to a lien for attorney's fees upon a judgment in client's favor, unless such

attorney was entitled to charge and collect from such client an attorney's fee for services in that action.

3. Clerks of Courts. Where a clerk of the district court disburses the proceeds of a judgment, rendered in that court in a personal injury action, he incurs no liability to an attorney, or his assignee, for a claimed attorney's fee in that action, in the absence of a showing that such attorney was actually vested, in law, with a valid claim against the judgment which has ripened into a lien.

APPEAL from the district court for Douglas county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

S. L. Winters, for appellant.

Brome & Thomas and *Harold A. Moore, contra.*

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

GOOD, J.

Plaintiff brought this action against Robert Smith, clerk of the district court for Douglas county, and Herman Corenman, to recover $550, which plaintiff alleged was due him by reason of an assignment from Lawrence B. Goldman of part of an attorney's fee, due the latter from the plaintiff in the case of Hardman against Union Pacific Railroad Company, and which attorney's fee was protected by notice of an attorney's lien filed in that action. Plaintiff alleged that the proceeds of a settlement and adjustment of that action were paid into court, and such proceeds disbursed by Smith as clerk, disregarding the claim of plaintiff under the assignment. After plaintiff had adduced his evidence, the court sustained a motion for a directed verdict in favor of Smith. Thereupon, plaintiff made some adjustment between himself and Corenman, and, as to the latter, the action was dismissed. The trial court entered judgment on the directed verdict in favor of Smith. Plaintiff has appealed.

The record reflects the following facts: Lawrence B. Goldman and Herman Corenman, as attorneys, represented plaintiff in an action against the Chicago, Burlington &

Quincy Railroad Company. Goldman received the proceeds of an adjustment of that action, but failed to turn over to plaintiff the full amount to which he was entitled. Goldman retained $550 of the money which should have been turned over to plaintiff. To adjust the matter between Goldman and plaintiff, the former gave to the latter three promissory notes aggregating $550, signed by Goldman, and attempted to secure these notes by an assignment of a part of an attorney's fee to which he claimed he was entitled from the plaintiff in the case of Hardman against Union Pacific Railroad Company, then pending in the district court for Douglas county. Plaintiff discovered that Goldman's name did not appear as one of the attorneys for the plaintiff in that action. He returned to Goldman, and the latter gave to plaintiff an assignment from one Ralph Wilson, purporting to assign a part of an attorney's fee, claimed by Wilson as an attorney in the Hardman action. This assignment purported to transfer $550 to plaintiff.

The appearance docket in the case of Hardman against Union Pacific Railroad Company showed Wilson as an attorney for plaintiff, and notice of lien was filed in that case by Corenman and Wilson. There is no evidence in this case to show that Wilson ever had anything more to do with the Hardman case than listing his name on the appearance docket and in the notice of an attorney's lien. There is no evidence that Hardman ever employed Wilson as an attorney in that action, but there is evidence from which it appears that Hardman did not know and had never seen Wilson, and knew nothing of him as an attorney in that action. It also appears that some time later one Brumbaugh was also employed as an attorney to represent plaintiff in the Hardman case, and that when that cause was tried Brumbaugh and Corenman were the only attorneys representing plaintiff in that action. Trial of the Hardman case resulted in a judgment for the plaintiff, which was afterwards settled by defendant in that action paying into court for plaintiff the sum of $4,000.

The record discloses that Goldman was indebted to Robert

Smith in the sum of $215.40. Smith appears to have learned that Goldman claimed some interest in the proceeds of the settlement of the Hardman case, and obtained from Goldman authority to deduct that amount from any money that might be due Goldman in that action; whereupon, Smith took up the matter with Brumbaugh and Corenman. It appears that the attorneys were entitled to a fee of 40 per cent. of the amount recovered and that Brumbaugh was to receive one-third of this amount. He stated that he had no objection to the proposed payment to Smith, provided the amount claimed by Smith did not come out of his, Brumbaugh's, share of the fee. Corenman, who was entitled, apparently, to the other two-thirds of the fee, consented to the deduction of $215.40 from his share of the fee. This was accordingly done, and the entire proceeds of the settlement were disbursed, $215.40 to Smith, the balance of the 40 per cent. attorney's fees to the attorneys, and the remainder to Hardman, plaintiff in that action.

Plaintiff contends that he had a valid assignment of an attorney's fee, which was protected by an attorney's lien in the Hardman case, and that Smith and Corenman conspired together and caused the disbursement of the entire fund in disregard of his rights under the assignment. Plaintiff contends that Goldman was one of the attorneys for the plaintiff in the Hardman case, but because he was under charges for disbarment he did not care to have his name appear, and that he procured Wilson's name to be used in his stead; that Wilson was really a dummy representative for Goldman. It appears in the record that Hardman did not know Wilson and never employed him. The only place in which it is shown that he had any connection with the case at all is that his name appears on the appearance docket and on the notice of lien; he did not appear in or have anything to do with the trial of that case. If Wilson was employed in the Hardman case, it must have been by Corenman, or possibly by Goldman.

It is a well-established rule that an attorney, who is employed by a client, has no implied authority to employ as-

sistant or associate counsel at the expense of the client, and that such assistant or associate counsel is not entitled to a lien on the judgment for his fees. *Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483; *Dillon v. Watson*, 3 Neb. (Unof.) 530, 92 N. W. 156. If Wilson was not entitled to charge a fee against Hardman in that case, certainly he could have no lien for an attorney's fee, and could transfer no right by his assignment to the plaintiff in this action. Plaintiff seems to think, however, that Goldman had a lien, and that Wilson was representing Goldman alone. There is no evidence to sustain this contention. Moreover, Goldman's name did not appear as an attorney in the proceeding, nor did he appear in the trial of the cause. He was present when the money was paid into court in the Hardman case. There is no evidence in the record, except suspicion, that Goldman was ever employed by any one in the Hardman case, and no evidence that he ever performed any service, and, in any event, he never filed any notice of an attorney's lien. The assignment which Goldman gave to plaintiff was never presented to Smith, the clerk of the court, nor did the latter have any knowledge or notice thereof until long after the funds in the Hardman case had been disbursed.

Where a clerk of the district court disburses the proceeds of a judgment, rendered in that court in a personal injury action, he incurs no liability to an attorney, or his assignee, for a claimed attorney's fee in that action, in the absence of a showing that such attorney was actually vested, in law, with a valid claim against the judgment which has ripened into a lien.

The record seems to be free from error prejudicial to plaintiff. Judgment

AFFIRMED.

WILLIAM E. HAHN, APPELLEE, V. GENERAL AMERICAN LIFE INSURANCE COMPANY, APPELLANT.
272 N. W. 321

FILED APRIL 2, 1937. No. 29947.

1. Insurance: CONTRACT: ELECTION. Where a contract between a reinsurer and the statutory liquidating agent of an insolvent insurance company provides that the policy shall remain in force unless the insured shall elect, by filing a claim, to accept a stipulated cash settlement, such claim to constitute an election must be filed under the provisions and with a knowledge of the terms of said contract.
2. Contracts: ABANDONMENT. The provisions of a contract will be considered abandoned where each party performs acts inconsistent with its existence and acquiesces in such acts by the other.

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

Brown, Fitch & West, for appellant.

Abrahams & O'Connor, contra.

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

DAY, J.

In this, an action on a life insurance policy, the insurer appeals from an adverse judgment. The defense proffered was that the insured during his life elected to accept a settlement of the anticipated cash surrender value as hereinafter described. The policy was issued in 1910, by a company which later reinsured in another company and later reinsured in the Missouri State Life Insurance Company. September 7, 1933, the General American Life Insurance Company purchased the assets and assumed the liabilities of the then insolvent Missouri State Life Insurance Company, specifically including this policy. It is unnecessary to set out all the provisions of this contract between the insurance commissioner of Missouri as liquidating agent and the company. It is sufficient that by its terms the com-

pany assumed the risk of insuring the life of the policyholder without any action on the part of the insured. It is conceded that the policy was in force as a contract of insurance unless the insured elected to file a claim with the insurance commissioner for one-half of the anticipated cash surrender value. Therefore, a pertinent part of the contract is: "The filing by any policyholder with such commissioner or commissioners of his claim under any policy for payment under article 1 hereof (of one-half the cash surrender value) shall constitute an election to surrender all other rights under such policy."

The company contends that the insured filed such a claim as surrendered all other rights under the policy including the obligation to pay in the advent of death the sum stipulated in the policy. What did the insured do?

He filed an action against the Missouri State Life Insurance Company in the district court for Douglas county for the cash surrender value of the policy on September 7, 1933. This is the very day the General American Life Insurance Company executed the contract as to the assets and liabilities of the Missouri State Life Insurance Company. A special appearance was filed therein which was sustained on December 9, 1933. December 7, 1933, the insured filed a claim in the circuit court of the state of Missouri for the city of St. Louis, in an action pending entitled "O'Malley, Superintendent of the Insurance Department of the State of Missouri, v. Missouri State Life Insurance Company" for the cash surrender value of this policy. This claim was filed by the insurance commissioner in an office he maintained adjacent to and connected with the offices of the General American Life Insurance Company. If this claim had been considered regular and in proper form by the assistant to the insurance commissioner, it would have been referred to the actuarial department of the insurance company to determine the amount of the anticipated cash surrender value and the amount to be paid thereon under the contract. But it was not considered regular and was not so referred because the insured stated

in his affidavit that the filing of this claim was not to jeopardize his lawsuit then pending in the district court for Douglas county, Nebraska. And this claim was for the entire anticipated cash surrender value. It was not for one-half thereof, for which the company was liable under the contract of assumption.

This was not regarded as a filing of a claim under the contract either by the insurance commissioner or by the General American Life Insurance Company. The assistant actuary of the company testified: "By having a claim filed, I mean in order, because there were numerous cases that were not properly filed by the policyholder where they had to go back at him and we weren't notified the claim had been filed because the representative of the superintendent of insurance didn't consider the claim had been filed." He further testified that, assuming the claim had been filed December 7, 1933, their records, which were in a confused state in the beginning because so many claims were filed, would have shown the claim by May, 1934. The claim was placed in the files of the commissioner in an office adjacent to and connected with the offices of the company, which files were accessible to the officials and employees of the company. It appears that the officers and employees consulted these files and checked their records with them. The legal department of the company knew about the claim but took no action upon it as a claim until more than a year later, after the death of the insured. The claim department knew about it also. The legal department of the company did not regard the suit in Douglas county as a pending action. The special appearance filed in that action was sustained December 9, 1933. A member of the law department testified as follows: "But so far as I know, at some time after December 9, 1933, it was regarded as finally terminated."

In the appellant's brief it is stated: "Clearly, there was never a meeting of the minds, never a contractual relation between Richard J. Hahn and the defendant company that his policy should be in force." This is not a correct state-

ment, since under the contract the policy was in force as a liability of the General American Life Insurance Company unless the insured by his acts contracted to accept instead one-half of the anticipated cash surrender value of the policy and surrender all other rights thereunder. It is not established by the record that the insured had any knowledge of the terms of the contract. The action in Douglas county, Nebraska, was predicated upon the original contract of insurance and so also was the claim filed with the insurance commissioner. There is nothing in either the action or the claim which indicates that the insured had any intention to avail himself of the provisions of the contract between the insurance commissioner and the General American Life Insurance Company, and accept one-half of the cash surrender value provided by the original contract. It seems conclusive that the insured never by such act elected to accept a fraction of the surrender value in lieu of a contract insuring his life.

The light in which the General American Life Insurance Company regarded the effect of the filing of the claim, as filed, has already been discussed somewhat. There is other evidence upon this question. A letter written by the attorney for the insured dated March 6, 1934, inquires as to the status of the claim. This has not been overlooked. A reply from the attorney for the superintendent of insurance states that nothing has been done in the matter "because of the fact of the commissioner's office to date having been fully occupied with disposing of the *ordinary* claims for cash surrender." (Italics ours.) This fits perfectly in the pattern that the claim filed was not considered as coming within the purview of the contract. This is the last date upon which any communication with insured relative to the claim occurred. The status of the matter at this time was that the special appearance in the case in Nebraska had been sustained December 9, 1933.

But that is not all. Thereafter, on November 8, 1934, the insured filed a request for a change of beneficiary under the policy with the company's agent in Omaha, Ne-

braska. The agent sent the request with the policy to the office of the General American Life Insurance Company at St. Louis. The policy was returned to the insured with the change of beneficiary requested indorsed upon the policy, by the "General American Life Insurance Company, Chas. Kell, Ass't Secretary." This indorsement was dated November 14, 1934. It is interesting to note that this is fourteen months after the filing of the action in Nebraska and eleven months after the filing of the claim with the insurance commissioner in St. Louis. During all these months it was not considered by any one as a claim under the contract for the sale of assets and assumption of risk. This conclusion is reached without consideration of the acts and statements of the Omaha agent to the effect that the claim had been dismissed. There is testimony that the insured asked the agent to make sure that such was the case and that the agent replied that he was sure. But the efficacy of this policy does not rest upon the statements of the agent made at that time, nor upon those made by him after the death of insured. The policy was sent to the general office of the company and the indorsement was made by an officer of the company. Thus, the General American Life Insurance Company recognized the policy of insurance on the life of Richard J. Hahn as in force on November 14, 1934, and never questioned its vitality until January 25, 1935, a month after his death.

Assuming that the insured filed a claim under the contract by which the defendant assumed the risk, the parties by their subsequent acts abandoned the provisions thereof, the insured by his request of a change of beneficiary and the insurer by complying with the request. The provisions of a contract will be considered abandoned where each party performs acts inconsistent with its existence and acquiesces in such acts by the other. *Reichert v. Mulder*, 121 Neb. 11, 235 N. W. 680; *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382.

The circumstances commend the application of this rule to this case. More than 4,700 claims were filed under the

provision of the contract. More than 500 of them were withdrawn. No formality was required for a withdrawal of such claim. A mere suggestion was sufficient. Practically, it was not an irrevocable election as contended by the appellant. The request for a change of beneficiary was a notice to the company that such claim was withdrawn. The company's consent was an acquiescence. And in this case the Omaha agent was told that the insured wanted assurance that the claim as filed was withdrawn.

Much of the testimony relates to the defendant's system of handling its business, the great number of claims, and the condition of the books at the time of the reorganization. The officials of the company in the claim and legal departments knew all about the status of the policy. The change of beneficiary was made by another department, which acted upon the information in the records of the company showing this policy in force. The official who indorsed the change of beneficiary did not have knowledge of the nature of the claim filed with the insurance commissioner, but the information was available to him, and the company had knowledge of the facts through other officials. This is a problem of business administration for the company, but it certainly is not a risk the insured must assume.

A jury was waived and the case tried to the district court. The judgment of the trial court is supported by the evidence.

AFFIRMED.

ROBERT BUTKE, APPELLEE, V. HERMAN NACHSCHOEN ET AL., APPELLANTS.
272 N. W. 326

FILED APRIL 2, 1937. No. 29849.

Pleading: AMENDMENT. When the defendant offers in court an amended answer, which is proper in form and in furtherance of justice, the court should permit said amended answer to be filed under section 20-852, Comp. St. 1929, under such terms and upon such conditions as the court may provide.

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

O'Sullivan & Southard, for appellants.

Floersch & Floersch, contra.

Heard before GOSS, C. J., DAY, PAINE and CARTER, JJ., and TEWELL and YEAGER, District Judges.

PAINE, J.

Plaintiff brought an action in the nature of a creditor's bill to set aside certain conveyances of real estate. The decree of the trial court, entered December 7, 1935, found for plaintiff, and set aside certain conveyances as fraudulent, and ordered the two pieces of real estate sold as on execution to satisfy the deficiency judgment which the plaintiff had secured against Herman Nachschoen, principal defendant, in the sum of $18,843.07, upon which judgment an execution had been issued and returned unsatisfied.

The decree had granted the prayer of the petition of plaintiff in all respects. The defendants' answer to the petition had set up that from July 24, 1923, Anna Nachschoen, wife of defendant Herman Nachschoen, had been the owner of an apartment property in fee simple and that a deed of said property given to Joseph Bohan on November 28, 1932, was simply given him as security for a loan of $1,000.

To this a reply had been filed, and said cause had gone on trial before the district court, and at the close of the day's trial the defendants' attorney had asked leave to file an amended answer, which had been served upon the plaintiff's counsel, which leave was denied by the court and such original amended answer, with the written acknowledgment of service, was thereupon offered in evidence as exhibit No. 33, but was refused admission by the court, but is shown in the bill of exceptions. The defendants' counsel, in asking leave to file the amended answer

and making his offer, stated that, if the plaintiff's attorney was taken by surprise, or if he desired further time to plead, or further time to produce evidence to meet the allegations, the same would be consented to by the defendants. The defendants set out such ruling as prejudicial error and an abuse of discretion on the part of the court.

Examination of the amended answer which was offered indicates that it included a paragraph setting up that the conveyance to the wife of the apartment property under date of July 24, 1923, was made more than ten years before the commencement of the action, and more than ten years before the recovery of the plaintiff's judgment, and that plaintiff knew of the conveyance at the time the same was made, and that the statute of limitations had run against any action to set aside said conveyance, and plaintiff had been guilty of laches in bringing said action. In addition, said amended answer, offered by defendants and refused by the court, set up that a full, fair, and adequate consideration was paid for making said conveyance, and alleged that said conveyance was made without any fraudulent intent on the part of the defendant. Said amended answer proffered in court contained many other material allegations which were necessary and proper to allege, and, if proved by competent evidence, would tend to establish a defense to the allegations in the petition.

Section 20-852, Comp. St. 1929, provides generally that the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, allow an amendment of any pleading by inserting additional allegations material to the case, and this court has held on numerous occasions that to deny the right to file such amended answers, under such terms as are reasonable and just, may be highly prejudicial to the defendant. *Zancanella v. Omaha & C. B. Street R. Co.*, 96 Neb. 596, 148 N. W. 158.

The testimony taken on July 8, 1935, being the first day of the trial, disclosed that the original mortgage given by the defendants to the plaintiff in 1922 had been released,

and another mortgage obtained and filed October 2, 1923, and that the transfer of the property by the husband to the wife was made on July 24, 1923, and upon this evidence being produced the defendants requested leave to file an amended answer, as set out hereinabove, setting up the statute of limitations and several other defenses somewhat in line with the evidence which had been produced during the day's trial, and this offer of the amended answer was denied by the court, and on account of other engagements of the court the trial was thereupon continued until some later date convenient to the court, and no further testimony was taken in this case until November 8, 1935, upon which date the defendants again requested leave to file the amended answer, and tendered the same in evidence, and again the request to file such amended answer was denied by the court. The defendants consented to any extension of time which the court might deem proper, as provided in section 20-855, Comp. St. 1929, and the court could have specifically provided in the extension of time that the plaintiff should have leave to file motion or demurrer to test out the allegations of said proffered amended answer.

It is also insisted by the defendants that the testimony upon which some of the new allegations in the offered amended answer were based had been received in evidence without objection and without any motion to strike them out on the part of the plaintiff. In our opinion, the request of the defendants for permission to file the proposed amended answer should have been granted upon such terms as to the trial court seemed proper, and that the denial thereof was prejudicial error and an abuse of discretion, and the decree of the trial court is reversed in so far as the transfer of the apartment property is involved.

The petition in this case also complained of a transfer on May 28, 1932, from Herman Nachschoen to his daughter, Lillian Nachschoen, of lot 226, Mountclair addition to Omaha, for a consideration of one dollar and of a transfer by the daughter to the wife of this same property. The decree found that such transfer of this property was

fraudulent and void as to the judgment of the plaintiff herein, and directed that said property be sold on execution, subject to the encumbrance thereon, and subject to the homestead rights of the defendants therein. The court finds that the evidence clearly supports this finding by the trial judge, and the provision of the decree in reference to this homestead property is hereby affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

MIKE EGAN, APPELLANT, V. STANDARD OIL COMPANY OF NEBRASKA, APPELLEE.

272 N. W. 327

FILED APRIL 2, 1937. No. 29805.

1. Appeal. An order of a district court setting aside the verdict of a jury and granting a new trial is not a final order from which a direct appeal may be taken to this court.
2. Dismissal. Where a plaintiff refuses to again try his case after a new trial has been granted, the trial court may properly dismiss the action for want of prosecution.

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

Allen G. Fisher and *Charles A. Fisher,* for appellant.

W. H. Herdman and *Nichols & Johnson, contra.*

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

CARTER, J.

This is an action brought by the plaintiff, Mike Egan, against the defendant, Standard Oil Company, to recover damages for false imprisonment. The jury returned a verdict for plaintiff for $1,412.60. The trial court set aside the verdict and granted a new trial. Plaintiff refused to again try the case and stood upon the pleadings and the evidence offered. The trial court thereupon dismissed the action, and plaintiff appeals.

The verdict of the jury was returned on April 12, 1934. On April 14, 1934, defendant filed its motion for a new

trial which was sustained on September 12, 1935. On October 13, 1934, plaintiff filed a motion for judgment on the verdict, which was argued on May 26, 1935, together with plaintiff's motion for a reconsideration of defendant's motion for a new trial and the court's order sustaining it. On October 5, 1935, these motions were overruled and plaintiff's action dismissed, the court's order showing that "at this present session the plaintiff states that he elects to stand upon his petition and the proof as stating and establishing a cause of action for false imprisonment and refuses to amend his petition to state a cause of action for false imprisonment or again try this action on the present petition as an action for malicious prosecution only or at all."

The order of the trial court sustaining defendant's motion for a new trial is not a final order from which a direct appeal can be taken to this court. *Brown v. Edgerton,* 14 Neb. 453, 16 N. W. 474; *Artman v. West Point Mfg. Co.,* 16 Neb. 572, 20 N. W. 873; *Johnson v. Parrotte,* 46 Neb. 51, 64 N. W. 363; *Ward v. Geary,* 115 Neb. 58, 211 N. W. 208. The order of the trial court overruling plaintiff's motion for judgment on the verdict and for a reconsideration of the court's order granting a new trial is not an appealable order for the same reason. The plaintiff is not, therefore, in position to complain of the court's rulings on these orders on this appeal.

Did the court err in dismissing plaintiff's action? Plaintiff failed to have a bill of exceptions settled and filed in this appeal. We have no way of knowing what happened in the trial court except what is shown by the transcript. There it appears that plaintiff refused to again try the case after a new trial was granted. Under such circumstances, the trial court has but one course to pursue and that is to dismiss plaintiff's case for want of prosecution. This the trial court did. There being no error affirmatively appearing from the record that is before us, we necessarily conclude that the trial court's action was in all respects proper.

AFFIRMED.

STATE, EX REL. CHARLES SMRHA, DIRECTOR OF THE DEPARTMENT OF INSURANCE OF THE STATE OF NEBRASKA, PLAINTIFF, V. GENERAL AMERICAN LIFE INSURANCE COMPANY, DEFENDANT.

272 N. W. 555

FILED APRIL 3, 1937. No. 30078.

1. **Action:** DECLARATORY JUDGMENTS ACT. Under the uniform declaratory judgments act (Comp. St. 1929, secs. 20-21,140 to 20-21,155), power is given to this court to declare the rights, status, and legal relations of "any person" arising out of statute, etc. *Held*, that the state of Nebraska and executive departments thereof may seek relief thereunder.
2. ———: ———. When a concrete, contested issue is presented, clearly within this act, where there is a definite assertion of legal rights and a positive denial thereof, the required condition of being a justiciable issue is met.
3. ———: ———. Proceedings under the uniform declaratory judgments act are governed by applicable established rules of pleading.
4. **Insurance.** A tax upon gross premiums of foreign insurance companies under section 77-902, Comp. St. 1929, is not a tax upon property, but is an excise tax on the privilege of doing business in this state.
5. ———. Plaintiff may not refuse on ground set out in petition to issue certificate of authority to defendant to do business in Nebraska.

Original action by the state against the General American Life Insurance Company. Demurrer to petition. *Demurrer sustained and judgment for defendant.*

John S. Logan and *Milton C. Murphy*, for plaintiff.

Loren H. Laughlin, Allen May and *John R. Griffiths*, for defendant.

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

PAINE, J.

This is an original action, praying for a declaratory judgment and decree of this court adjudging $4,623.59, with interest, due as gross premium tax from defendant

to plaintiff, and also finding that plaintiff is authorized to refuse to issue a certificate of authority if defendant fails to pay said sum.

This original proceeding in this court is brought under authority of section 2, art. V of the Constitution as amended, giving this court jurisdiction in all cases relating to revenue. The action is alleged to be within the provisions of the uniform declaratory judgments act, as found in sections 20-21,140 to 20-21,155, inclusive, Comp. St. 1929.

The action was begun in this court on January 12, 1937, by the State of Nebraska, ex rel. Charles Smrha, director of the department of insurance, as plaintiff, filing an application for leave to file petition for declaratory judgment against General American Life Insurance Company, a corporation, defendant, and on February 19, 1937, said plaintiff filed an amended petition, and on February 23, 1937, the defendant filed a demurrer to such amended petition.

The amended petition alleges that the Missouri State Life Insurance Company, hereinafter referred to as the old company, was first licensed to do business in the state of Nebraska March 11, 1902, and thereafter, on or before March 1 in each year, made the annual statements required by law, and paid into the state treasury 2 per cent. of the gross amount of premiums received by it during the preceding calendar year for business done in Nebraska. The last date said gross premium tax was so paid by said old company was at the time of filing its annual report on March 1, 1933, which made annual statement for the full year 1932; that 2 per cent. of the gross premiums collected in Nebraska from January 1, 1933, to September 7, 1933, amounted to the sum of $4,623.59; that the superintendent of the insurance department of the state of Missouri, pursuant to an order of court, had taken over said old company and all of its assets, and on September 7, 1933, he had entered into a written contract and purchase agreement with the General American Life Insurance Company, defendant herein, by which said defendant company acquired title to

all of the assets of the old company, and said contract provided, as part of the consideration, that the defendant would assume and agree to pay all lawful taxes and debts due by the old company to the United States, the state of Missouri, and to all other states in which the old company did business; that the plaintiff herein has made repeated demands upon the defendant to pay said unpaid taxes upon the gross premiums collected, which taxes amounted to $4,623.59 with interest at 7 per cent. from March 1, 1934, and defendant denies liability therefor, either on the part of the old company or on the part of the defendant company under the assumption agreements, and denies that the plaintiff has any lawful right to revoke the authority of the defendant to do business in Nebraska by reason of the nonpayment thereof. The plaintiff alleges that it is charged by law with the enforcement of section 77-902, Comp. St. 1929, and that the defendant, in disregard of said section of the statute, has failed to pay the same, and plaintiff has notified defendant that, unless said taxes are paid prior to March 1, 1937, its certificate of authority will be revoked and said defendant will be prohibited from conducting any business of any kind in the state of Nebraska.

The amended petition further alleges that the defendant denies the authority of the director of the department of insurance to revoke said certificate of authority and prohibit the defendant to continue in business in Nebraska, and that defendant would suffer severe loss and injury by any attempt to exercise such power and authority on the part of the director of the department of insurance. It is further alleged that there is an actual controversy between the parties, and that the two justiciable issues presented are: (1) Whether said gross premium taxes, in the amount of $4,623.59, with interest at 7 per cent. from March 1, 1934, are now due and owing from defendant to plaintiff; (2) whether by reason of the failure of the defendant to pay said amount of taxes the director of plaintiff has the power and authority to revoke the certificate of authority of defendant company to continue in business in

Nebraska, and the plaintiff prays for a declaratory judgment of the supreme court determining the issues involved.

To this amended petition the defendant company files its demurrer, alleging that said amended petition does not state facts sufficient to constitute a cause of action for a declaratory judgment as prayed, and further alleging that the old company was not transacting business in Nebraska in 1934, and therefore was not required to make, and did not make, an annual statement required under said section 77-902, and that the tax of 2 per cent. of the gross amount of the premiums received by the old company up to September 7, 1933, which is sought to be imposed upon the defendant company by reason of its assumption of all lawful taxes due the state of Nebraska from the old company is unconstitutional, unlawful, and void as an attempt to collect a privilege or license tax for a privilege or license not asked or granted, and is an attempt to deprive the defendant company of its property without due process of law, contrary to section 3, art. I of the Constitution, and contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

It is further set out in said demurrer that domestic life insurance companies, incorporated under the laws of the state of Nebraska under the provisions of section 77-904, Comp. St. 1929, were only required to pay four mills upon the gross premiums collected in the state during the preceding calendar year, less reinsurance paid on Nebraska business and dividends paid policyholders in Nebraska during that period, which taxes were in lieu of all other taxes upon intangible property, and the requirement under said section 77-902 that the defendant should pay 2 per cent. of the gross amount of premiums received by it during 1933 on business done in the state of Nebraska is unconstitutional, unlawful, and void, in that a tax is thereby imposed upon the defendant which tax is greater than that imposed upon similar domestic insurance corporations, and which tax is in lieu of other intangible taxes, and which therefore discriminates against this defendant in favor of

similar domestic insurance corporations, contrary to section 1, art. I, and section 1, art. VIII of the Constitution of Nebraska, and contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and that therefore said section 77-902 is unconstitutional, unlawful and void.

We deemed it necessary to present this brief summary of the amended petition and the general demurrer thereto by defendant.

The plaintiff in this action is an executive department of the state of Nebraska, and section 20-21,141, Comp. St. 1929, provides that "any person" may have any legal question determined under the uniform declaratory judgments act. Does the plaintiff have a right to bring this action?

In *Moeller, McPherrin & Judd v. Smith,* 127 Neb. 424, 255 N. W. 551, it was held that "any taxpayer" who had an actual and justiciable controversy was entitled to have such controversy determined under this act, and the first proposition of law presented by the defendant is whether the legislature intended to include the state under the term "any person."

There are a multitude of cases on both sides of this proposition, and many cases hold that "person" in its legal and ordinary significations does not embrace a state. See the several editions of Words and Phrases under title "Person."

Many decisions hold that the term "person," as used in acts of congress touching internal revenue, does not include a state. But, in *Huffman v. State Roads Commission,* 152 Md. 566, 137 Atl. 358, it is said that the word "person" does not ordinarily include state, yet it may where such intention is manifest by the provision of the legislative act.

Section 20-21,151, Comp. St. 1929, reads as follows: "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be literally (liberally) construed and administered."

Since the uniform declaratory judgments act gives power to this court to declare the rights, status and legal relations

of "any person" arising out of any contract in writing, or in construing the terms of a statute, ordinance, or franchise, in either the affirmative or negative form and effect, and bearing in mind that the act is to be liberally construed, then it seems to this court that, if the state itself or any department thereof has an actual and justiciable controversy with respect to its legal rights growing out of a revenue statute, then under section 20-21,141, Comp. St. 1929, the state is embraced under the expression "any person." See *Lynn v. Kearney County*, 121 Neb. 122, 236 N. W. 192, in which Justice Good reviewed briefly the history of the declaratory judgments act.

We will next consider: Is the question presented justiciable? We realize that test cases are often arranged where only information is sought on a pretended controversy, but courts look with disfavor on such moot cases. *Ex Parte Steele*, 162 Fed. 694; 31 Columbia Law Review, 561; *State v. Dunbar State Bank*, 119 Neb. 571, 230 N. W. 452; *Banning v. Marsh*, 124 Neb. 207, 245 N. W. 775. However, in the case at bar a concrete, contested issue is presented, where there is a definite assertion of certain legal rights and a positive denial thereof, and we find a condition of justiciability established. *Dobson v. Ocean Accident & Guarantee Corporation*, 124 Neb. 652, 247 N. W. 789.

The third, fourth and fifth propositions of law set out in the brief of defendant relate to the procedure under our declaratory judgments act, and whether the defendant may protect all its rights by filing only a general demurrer, as in this case, or should join issues with an answer.

In *Newsum v. Interstate Realty Co.*, 152 Tenn. 302, 278 S. W. 56, it was specifically held: "Proceedings under the declaratory judgments act are governed by applicable established rules of pleading."

In *School District of Omaha v. Gass*, 131 Neb. 312, 267 N. W. 528, the school district of the city of Omaha brought an original action against the members of the Nebraska state liquor control commission and other state officers, and the defendants filed a joint answer, admitting the al-

legations of the petition, and joined in the prayer of plaintiff that the court enter a declaratory judgment establishing the rights and status of the parties, and a judgment was entered for the defendants.

In *Arlington Oil Co. v. Hall*, 130 Neb. 674, 266 N. W. 583, being an original action for a declaratory judgment, the cause came on for hearing upon a motion to dismiss the petition, which was sustained. The court stated that, if a declaratory judgment would not terminate the controversy arising between the parties, it would dismiss the proceeding.

Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, was first heard upon demurrers to plaintiffs' and intervener's petitions, and the demurrers were overruled, and the defendants electing to plead no further, a judgment was thereupon entered in favor of the plaintiffs. The matter came before the court again in *Smithberger v. Banning*, 130 Neb. 354, 265 N. W. 10, upon the motion of defendants to dismiss the petitions of intervention, which motions were sustained.

In the case at bar, during the argument counsel were asked whether there was any agreement as to this court entering a final judgment disposing of this case, and it was agreed by the counsel that that was the understanding, and that a declaratory judgment should be entered which will terminate the controversy.

Section 77-902, Comp. St. 1929, was first enacted as section 59, ch. 73, Laws 1903, and became effective on September 1, 1903. The old company was first licensed to do business in Nebraska on March 11, 1902, and thereafter on the first day of March each year, up to and including March 1, 1933, it made its annual statement and paid into the treasury of the state of Nebraska the 2 per cent. of the gross premiums received by it during the preceding calendar year.

This law was discussed by Chief Justice Sullivan in the case of *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063, in which it was said: "The question to be decided in these

cases is not whether particular provisions of chapter 73 of the laws of 1903 are valid or ideally just, but whether the act, considered as a whole, is a constitutional expression of the legislative will. Objection is specially urged against those sections of the act defining the manner in which insurance companies are to be taxed, and it is said that the law discriminates against the property of foreign insurance companies and in favor of domestic corporations of that character. Relating to the provisions of sections 59 and 60, it is plain that the tax of 2 per cent. upon the gross earnings of the companies mentioned in these sections is a tax imposed, not upon their property, but upon their privilege of doing business in this state. That the state may impose such conditions and limitations upon foreign corporations seeking the privilege of conducting their business in this state as it sees fit, is not a question open to discussion. Such companies have no authority to transact business in this state without the consent of the state, and, when they seek the privilege, they must comply with the conditions imposed. After coming here, their property must be dealt with on terms of equality with the property of the citizen. It is subject to no further burden in the way of taxation than is imposed upon the resident, but, for the privilege of doing business here, they must submit to such conditions as the legislature sees fit to impose. * * * The tax complained of is not in any sense a tax upon the property of these corporations, but a privilege tax and, as such, is wholly unobjectionable."

In *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518, 101 N. W. 3, it was said: "A tax upon the gross amount of premiums received by a foreign fire insurance company during the preceding year * * * is not a tax upon property."

The 2 per cent. gross premium tax on foreign insurance companies transacting business in Nebraska, as provided in said section 77-902, Comp. St. 1929, is an excise tax on the privilege of doing business in the state of Nebraska. If this were not true, such taxes would be unconstitutional as

discriminatory and violative of the due process and equal rights clauses of both the state and federal Constitutions.

Having thus reached the conclusion that the tax sought to be collected by plaintiff is a prospective privilege tax for the year 1934, it never became a valid obligation against the defendant, because the old company, which had failed and been taken over and sold by the superintendent of the insurance department of Missouri, never asked for the right to sell insurance in Nebraska for that year.

We will now consider the question whether defendant, because of nonpayment of the $4,623.59 and interest, can be denied a certificate of authority to do business in Nebraska. This court has recently had a somewhat similar question before it in the case of *Continental Ins. Co. v. Smrha,* 131 Neb. 791, 270 N. W. 122, and it was there said: "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."

The old company owed the money set out, and could not have received a certificate of authority to do business without paying the amount, but it did not file any annual report, and it neither sought nor obtained such authority, but we hold that the newly-incorporated company, the defendant herein, is not obligated to pay this privilege tax. To hold otherwise would give the statute unconstitutional aspects and impose a privilege tax where no privilege was asked or obtained.

The demurrer of the defendant is sustained, and judgment entered that the defendant is not indebted to the plaintiff in the sum of $4,623.59 with interest, or any part thereof, under section 77-902, Comp. St. 1929, and that the plaintiff, because of the nonpayment of said sum, is not

authorized to revoke the certificate of authority of the defendant to do business in the state of Nebraska, or to refuse on that ground alone to issue a new certificate of authority for the license year commencing April 1, 1937, providing defendant company makes all proper reports and pays the proper fees required by law.

DEMURRER SUSTAINED AND JUDGMENT ENTERED.

JACOB SLOSBURG, JR., APPELLEE, V. CHESTER E. HUNTER, APPELLANT.

272 N. W. 571

FILED APRIL 8, 1937. No. 29909.

1. **Pleading.** A general demurrer admits the truth of all facts well pleaded.
2. **Mortgages: MORATORIUM.** In a suit at law on a note secured by mortgage, defendant is not entitled to a moratory stay when the mortgage liens equal or exceed the value of the mortgaged premises.
3. **Appeal.** In the absence of a bill of exceptions or special findings, the only question that this court will consider is the sufficiency of the pleadings to sustain the judgment.

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

Carl F. Benjamin, for appellant.

Eugene N. Blazer, contra.

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

GOSS, C. J.

Defendant appeals because the district court denied his application for a moratory stay of execution in a suit at law on a note given by him and secured by his mortgage on real estate.

Suit on the note for $3,000, dated March 25, 1932, made by defendant in favor of plaintiff, was commenced January 26, 1935. It resulted in a judgment for plaintiff February 13, 1936, for $3,426.40, with interest at 6 per cent. from

that date and costs. On the same day defendant filed his motion for a moratory stay. The motion disclosed for the first time in the record that "the action is based upon a promissory note which is secured by a real estate mortgage upon real estate situated in Douglas county, Nebraska."

The record contains no bill of exceptions. The petition shows that it was a plain suit at law on a promissory note with no indication that the note was secured. The transcript contains no answer of defendant on the merits, but the order containing the judgment on the note shows that both parties appeared by their respective counsel, waived a jury, and submitted the cause upon the pleadings, the evidence adduced and arguments of counsel.

On February 28, 1936, plaintiff pleaded to defendant's motion for stay of execution by filing what is entitled "Objections to Motion," consisting of thirteen paragraphs in which he alleged, among other things, that the note upon which judgment was entered was secured by a mortgage upon two lots in Bemis Park, an addition to the city of Omaha, subject to a mortgage to the Penn Mutual Life Insurance Company; that the latter company had foreclosed its mortgage and had a decree for $4,961.02, with interest at 10 per cent. from March 1, 1935; that plaintiff did not enter any appearance nor take any part in any of the proceedings to foreclose the mortgage of the Penn Mutual Life Insurance Company on the premises; and that the property is of insufficient value to satisfy the decree of the Penn Mutual Life Insurance Company. Plaintiff alleges in the objections that evidence in support of the facts alleged will be presented to the court by affidavits or otherwise at the time of the hearing.

To the above allegations of fact defendant filed a demurrer on March 3, 1936, on the ground that they do not constitute a legal objection to the right of defendant to a stay of proceedings. On March 4, 1936, the cause came on for hearing and the court overruled the demurrer. The order then says: "Thereupon this cause is submitted to the court upon the application of defendant for a moratory

stay. Upon consideration whereof, being fully advised in the premises, the court finds that the facts do not bring this case within the moratorium statute and that the request of defendant for a moratorium and stay of execution should be denied." From this order the appeal was taken.

The order is not very explicit as to exactly what happened, but it is clear that the stay was denied. Either (1) defendant elected to stand upon his demurrer or (2) evidence was taken by the court satisfying the court from the "facts" that the case was not one in which the stay should be allowed. If the former, then defendant, by his demurrer, admitted that the mortgage security was not adequate to pay the Penn Mutual first mortgage and plaintiff's mortgage. A general demurrer admits the truth of all facts well pleaded. *Carter v. Carrell,* 124 Neb. 542, 247 N. W. 348. If the latter, then plaintiff has brought here no bill of exceptions from which we can review the evidence or the hearing to determine whether defendant has any equity in the property. In other words, if defendant stood on his demurrer, he had admitted on the record that, in the language of the moratory statutes of 1933, and as extended in 1935, "good cause has been shown to the contrary;" if evidence was taken which satisfied the trial court that he was not entitled to the stay, defendant has not so perfected his appeal as to allow the judgment to be reviewed on that evidence. In either case, it results in an affirmance of the judgment.

In a suit at law on a note secured by mortgage, the defendant is not entitled to a moratory stay when the mortgage liens equal or exceed the value of the mortgaged premises. *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132; *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792.

In the absence of a bill of exceptions or special findings, the only question that this court will consider is the sufficiency of the pleadings to sustain the judgment. *Plantz v. Peony Park,* 129 Neb. 338, 261 N. W. 826.

The judgment of the district court is

AFFIRMED.

LINDEN N. ELSON, APPELLEE, V. ANDRO NELSON: CURTIS STATE BANK, APPELLANT.
272 N. W. 551

FILED APRIL 8, 1937. No. 29933.

1. **Statute of Frauds.** "Where goods, money, or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing." *Peyson v. Conniff*, 32 Neb. 269, 49 N. W. 340.
2. **Appeal: ISSUES.** A case must be tried in the district court upon the issues tried in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient.

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

F. J. Schroeder, for appellant.

Frank B. Morrison, contra.

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

GOSS, C. J.

Plaintiff recovered a judgment against defendant Curtis State Bank for threshing wheat and said defendant appealed.

The petition alleged that plaintiff entered into an oral contract with defendant bank to thresh certain wheat at seven cents a bushel; the wheat belonged to Andro Nelson and the bank held a chattel mortgage upon all grain grown by him in certain described land; thereafter plaintiff threshed 1,656 bushels of wheat on which the bank held the mortgage; plaintiff asked judgment against the bank for $115.92. Andro Nelson is named as a defendant in the title, but the petition does not ask any judgment against him.

Defendant bank moved to strike the petition on the ground that it was an appeal from the county court and the issues as set forth in the petition were different from those in the county court; that Andro Nelson was a defendant in the county court and only the bank is a defendant here. The motion was overruled.

Then the bank filed a general demurrer to the petition. It was overruled.

For its answer the bank denied that it contracted to pay plaintiff, but alleged that plaintiff had contracted with Andro Nelson to thresh his barley for five cents a bushel and his wheat for seven cents a bushel; that, after threshing part of the grain, plaintiff asked this defendant if it would see that the threshing of the grain would be paid for, and this defendant told plaintiff it would allow Andro Nelson to retain from the proceeds of the grain already threshed and to be threshed enough to pay plaintiff for the threshing; that, after the grain was threshed and sold, this defendant allowed Nelson to retain $454.80 to pay plaintiff's threshing bill and other bills; that this defendant never agreed in writing to pay plaintiff, and that any agreement in that behalf was oral and is void under the statute of frauds; that this action was begun in the county court against Andro Nelson and the bank and was there dismissed as to both defendants, but no appeal was taken as to Andro Nelson; and that the bank, which was a guarantor only according to the bill of particulars in the county court, is therefore discharged; and that the allegations of the petition here are upon an alleged different and distinct cause of action.

The reply was in effect a general denial of new matter stated in the answer.

The cause was tried to a jury, which rendered a verdict for $109.55 against defendant bank. The transcript does not contain the instructions. The bank's motion for judgment notwithstanding the verdict was overruled and judgment was entered on the verdict.

Errors relied upon for reversal are that the court erred in overruling appellant's motion to strike the petition, erred in overruling the demurrer, erred in overruling the motion for judgment notwithstanding the verdict, and erred in overruling the motion for a new trial; that the judgment is not sustained by sufficient evidence, and the verdict and judgment are contrary to law.

Appellant claims that the oral agreement was void because it was an oral agreement to pay the debt of another. Comp. St. 1929, sec. 36-202.

Peyson v. Conniff, 32 Neb. 269, 49 N. W. 340, laid down this rule: "Where goods, money, or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing." That case involved the services of a doctor to one who had been injured in a saloon, the proprietor of which had orally agreed to pay the charges. Many cases from other jurisdictions were cited to support the rule announced and the court there said: "The rule here stated in substance was sustained by this court in *Fitzgerald v. Morrissey*, 14 Neb. 198, and *Clopper v. Poland*, 12 Neb. 69, in each of which it was held that where the leading object of a party, promising to pay the debt of another, is to promote his own interests and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing."

The rule stated in *Peyson v. Conniff, supra*, was made a syllabus point in *Williams v. Auten*, 62 Neb. 832, 87 N. W. 1061, and has never been changed so far as we can discover.

The promise of the bank to pay for the threshing was a direct promise to pay. It was based upon a good consideration, was an original undertaking, did not come under section 36-202, Comp. St. 1929, and was, therefore, not required to be in writing. It was established by sufficient evidence and supports the verdict upon which judgment was rendered.

The errors claimed and sought to be raised by the motion to strike, and by the demurrer to the petition, go to the identity of the cause of action set out in the bill of particulars in the county court and that set out in the petition in the district court. This question is to be determined by a comparison of the two pleadings. *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28, 93 N. W. 983. If the identity of the cause of action is preserved it is sufficient. *Jacob*

North & Co. v. Angelo (on rehearing), 75 Neb. 381, 110 N. W. 570. Without going into details, we have compared the two pleadings and find no prejudicial difference in them. Under the mandate of section 20-853, Comp. St. 1929, we "must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

We have examined the errors claimed and determine that the judgment of the district court was right. It is

AFFIRMED.

A. R. BODKIN V. STATE OF NEBRASKA.

272 N. W. 547

FILED APRIL 8, 1937. No. 29918.

1. **Intoxicating Liquors:** SALES TO MINORS. Government has an interest in the welfare of minors, as public wards, and the state and the city of Lincoln have power to adopt consistent regulations to protect them from the sale of intoxicating liquors.
2. **Statutes:** CONSTRUCTION. It is the duty of the courts to harmonize state and municipal legislation, if permissible in view of all legislative enactments on the same subject.
3. **Municipal Corporations:** ORDINANCES: VALIDITY. In testing the validity of a city ordinance challenged as "inconsistent" with a state statute, that word should be defined to mean contradictory in the sense that the two legislative provisions cannot coexist, not mere lack of uniformity in detail.
4. ———: ———: ———. A city ordinance prohibiting the sale of intoxicating liquor to minors is not void as being "inconsistent" with a state statute prohibiting the sale of intoxicating liquor to minors, knowing them to be such.

ERROR to the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Bruce Fullerton, for plaintiff in error.

William H. Wright, Attorney General, Loren H. Laughlin, George A. Piper and *H. B. Porterfield, contra.*

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

ROSE, J.

In a prosecution by the state in the municipal court of the city of Lincoln, A. R. Bodkin, defendant, was convicted of selling intoxicating liquor to a minor in violation of a city ordinance. Upon appeal to the district court he was found guilty of the same offense and sentenced therefor. The record of his conviction was presented to the supreme court for review.

In an elaborate brief and in an oral argument at the bar the sentence of the district court was challenged as erroneous on the asserted ground that the ordinance under which defendant was convicted is invalid as being inconsistent with provisions of the Constitution and state statutes. The ordinance assailed provides:

"No person shall, within the city, sell or give any alcoholic liquors to, or procure any such liquor for, or permit the sale or gift of any such liquor to, or the procuring of any such liquor for, any minor or any person who is mentally incompetent or any person who is physically or mentally incapacitated due to the consumption of such liquors." Municipal Code, 1936, sec. 19-203.

The state statute on the same subject reads thus:

"No person, who holds a license to sell alcoholic liquors as a retailer, manufacturer or distributor, shall permit the sale or gift to, or procuring for, any such liquors to any minors, to any person who is mentally incompetent, or to any person who is physically or mentally incapacitated due to the consumption of such liquors, knowing them to be such." Comp. St. Supp. 1935, sec. 53-338.

The city of Lincoln is governed by a home rule charter adopted under a constitutional grant which permitted it to "frame a charter for its own government, consistent with and subject to the Constitution and laws of this state." Const. art. XI, sec. 2. The home rule charter itself grants municipal power "To make all such ordinances, by-laws,

rules and regulations not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this article enumerated, maintain the peace, good government, and welfare of the city." Home Rule Charter, art. 2, sec. 50.

The statute makes it unlawful for a licensee to sell alcoholic liquors to minors "knowing them to be such" and the ordinance provides that "No person shall, within the city," sell any alcoholic liquors to minors. Does the difference between sales to minors "knowing them to be such" and "sales to minors" amount to such an inconsistency as to make the ordinance void? Both prohibitions are legislative in character. Neither Constitution nor statute contains a direct prohibition against the enactment of an ordinance forbidding the sale of intoxicating liquor to a minor whether known to be such or not. In Lincoln, a populous educational center, where throngs of students attend school, many of them minors away from parental care in a new environment, the city lawmakers were prompted to adopt a stricter regulation than that provided by statute for the protection of minors generally from the sale of intoxicating liquors. On this subject the public policy of the state and the city is the same. The evils against which the legislation is directed are the same. The legislative purposes do not differ. The protection of minors from dangers of intoxicating liquors and from the traffic therein is the worthy aim of the lawmakers in both jurisdictions. Minors are wards of the state. In their welfare the government is interested. *Geary v. Geary*, 102 Neb. 511, 167 N. W. 778. They are entitled to governmental protection. *State v. Young*, 121 Neb. 619, 237 N. W. 677. Power to legislate in their behalf has been committed by law to the municipality as shown by the home rule charter of Lincoln. The duty of the court to harmonize state and municipal legislation if permissible in view of all enactments on the same subject has always been recognized. The words "consistent" and "inconsistent," appearing in the Constitution or statutes under consideration, are used in a sense applicable to legislation. "Incon-

sistent" in that connection means contradictory in the sense of legislative provisions which cannot coexist, not mere lack of uniformity in detail. *City of Mobile v. Collins*, 24 Ala. App. 41, 130 So. 369. In this interpretation the city ordinance is not inconsistent with the Constitution or statutes. Having reached this unanimous conclusion on the question considered, there is no reversible error apparent in the proceedings and judgment below.

AFFIRMED.

IN RE ESTATE OF JOSHUA P. GIBBONS.
NATHAN P. MCDONALD, APPELLEE, V. BERTRAND C. GIBBONS, TRUSTEE, APPELLANT.
272 N. W. 553

FILED APRIL 8, 1937. No. 29932.

1. **Judgment** for plaintiff in law action against defendants, as trustees of an express trust, should run against defendants in their trust capacity.
2. **Trusts.** Trustees of an express trust owe a duty to preserve and protect the trust property against unjust claims.
3. ———. Where actions for recovery of unjust claims are commenced against trustees in their trust capacity, it is their duty to employ counsel to defend against such actions.
4. ———: ATTORNEY'S FEES. Attorney, employed by one of two trustees of an express trust to defend in actions instituted against such trustees, based on unjust claims, who accepts employment and succeeds in freeing the trustees from liability in such actions, is entitled to reasonable compensation for such legal services from such trustees.

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

Dryden, Dryden & Jensen, for appellant.

Nathan P. McDonald and *M. H. Worlock, contra.*

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

GOOD, J.

From an adverse judgment in the county court, Bertrand

C. Gibbons, as trustee, prosecuted error. The district court dismissed his petition in error, and he has appealed.

From the record we glean the following facts: Joshua P. Gibbons died testate, devising and bequeathing some, or possibly all, of his property, after payment of debts, to Bertrand C. Gibbons and Cecil H. Gibbons, as trustees for the administration of the trust provided for in his will. While the record does not clearly show, it does inferentially appear that the estate of Joshua P. Gibbons has been settled, and the property turned over to the trustees named in his will. It appears that a number of actions were begun in the county court and the justice court against the trustees in their trust capacity. Cecil H. Gibbons, one of the trustees, employed plaintiff in this action to represent them as an attorney in defending against those actions. Bertrand C. Gibbons did not join in the employment of plaintiff. Plaintiff as attorney was successful in freeing the trustees from any liability in the several actions that had been brought against them in the county court and justice court. He was not paid his fees for legal services and brought this action in the county court against both trustees, in their capacity as such trustees, to recover the reasonable value of his services. The petition in the county court was entitled:

"In the Matter of the Estate of Joshua P. Gibbons.
"Nathan P. McDonald, Plaintiff,
v.
"Bertrand C. Gibbons and Cecil H. Gibbons, as trustees of the estate of Joshua P. Gibbons under the last will and testament of Joshua P. Gibbons, Deceased, Defendants."

In his petition plaintiff alleged that he had been employed to perform the legal services; that he had performed them, and, as a result of his labors, defendants had been freed from liability in the several actions; that the reasonable value of his services was so much, and he prayed judgment for that amount. Clearly, the action was one at law to recover a specific amount against the trustees as such. The first part of the caption above recited was mere

surplusage. However, it seems, possibly, to have misled the county court. The journal entry of the judgment recites: "In the Matter of the Estate of Joshua P. Gibbons, Deceased. Order for Hearing on Claim." In its findings, the court recites:

"From the evidence the court finds that the services of said Nathan P. McDonald were rendered for said estate and were beneficial to all concerned, and that said services are of the reasonable value of $303.15, and that the objections thereto are overruled. * * *

"It is adjudged and decreed by the court that said claim of said Nathan P. McDonald be and the same hereby is allowed and ordered paid out of any trust funds in said estate. To which Bertrand C. Gibbons excepts."

The form of the journal entry of the judgment clearly indicates that the county court believed that it was allowing a claim against the estate of Joshua P. Gibbons, deceased, while that estate had been closed and the action was against the trustees in their trust capacity.

In his petition in error filed in the district court, Bertrand C. Gibbons complains that the county court erred in attempting to render a judgment against the estate of Joshua P. Gibbons, deceased, and that the district court, therefore, erred in dismissing his petition in error. Clearly, the action in the county court was one against the trustees in their trust capacity, and, if judgment should have been rendered for plaintiff, it should have been rendered against the trustees as such. We think that, if an attempt were made to enforce the judgment as entered and execution issued thereon, there would be no means of enforcing or collecting it. Certainly, if the estate of Joshua P. Gibbons has been closed and the property is in the hands of the trustees, such judgment could not be enforced against the trustees, because it does not run against them, and there is no property in the estate of Joshua P. Gibbons, deceased, as that estate has been closed. We think the transcript filed in the district court discloses that the county court committed error, and the district court, therefore, erred in dismissing the petition in error.

Appellant also alleges that the district court erred in dismissing his petition because the record shows the employment of plaintiff by only one of two trustees. It may be conceded it is a general rule that, where there are two or more joint trustees of a trust, all should act together, unless the trust instrument otherwise provides. However, to this rule there are some exceptions. Trustees of an express trust owe a duty to preserve and protect the trust property against unjust claims, and where actions for recovery of unjust claims are commenced against such trustees in their trust capacity, it is their duty to employ counsel to defend against such actions. In the instant case, it appears from the record that unjust claims were being asserted against the trustees. One of the trustees alone procured the services of an attorney, who succeeded in protecting the trust property in the hands of the trustees against unjust claims. The trustees accepted and received the benefits of such legal services.

Where an attorney is employed by one of two trustees of an express trust to defend in actions against such trustees which are based on unjust claims and is successful in freeing the trustees from liability in such actions, he is entitled to reasonable compensation for his legal services from such trustees. This same principle was applied in *Follmer v. State*, 94 Neb. 217, 142 N. W. 908. In that case a member of the board of educational lands and funds, which board consisted of five members, employed an attorney to represent the board, and such attorney rendered valuable services, which were received by the board, and it was held that the fact that the attorney was not formally employed by the board was immaterial, and that he was nevertheless entitled to compensation for services which were rendered for and on behalf of the board.

For the error above pointed out, the judgment of the district court is reversed and the cause remanded to the district court, with directions to sustain the petition in error and set the cause down for trial in that court.

REVERSED.

G. E. PETTERS, APPELLANT, V. GORDON H. STORM, APPELLEE.
272 N. W. 409

FILED APRIL 8, 1937. No. 29860.

Mortgages: RELEASE. A mortgagee who releases a mortgage, as to all lands therein described, to a grantee of the mortgagor without the latter's consent, cannot hold such mortgagor personally liable for the debt secured when the actual value of the lands so released exceeds or equals the indebtedness secured by such mortgage.

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

George C. Porter, for appellant.

F. J. Reed, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

EBERLY, J.

This is an appeal from a judgment of the district court for Scotts Bluff county, Nebraska, in an action denying recovery on a promissory note executed by Gordon H. Storm, defendant, for the sum of $600, payable to the order of Petters & Company (a corporation) on the 1st day of November, 1930, and indorsed and transferred to plaintiff, G. E. Petters.

The facts constituting the transaction appear in the record as stipulated by the parties. These may be epitomized as follows:

On July 20, 1922, defendant made and delivered to Petters & Company his promissory note for $600 maturing on November 1, 1930, and on the same date secured the payment of said note by a first mortgage, executed by him to the payee of the note upon certain lands, which was immediately recorded. In the year 1928 Storm sold and conveyed by warranty deed the mortgaged lands to Rawhide Live Stock Company of Goshen county, Wyoming, subject to the mortgage securing the $600 note involved herein, the amount of the note being deducted from the purchase price

by the grantee. This deed was immediately recorded. Petters & Company thereupon sold, transferred and assigned this $600 note to plaintiff herein, who is now, and was at the time of trial, the owner and holder thereof. Plaintiff was at all times an officer in Petters & Company, and had actual knowledge of the facts constituting this transaction. With actual knowledge of the aforesaid conveyance from defendant to the Rawhide Live Stock Company and the surrounding facts and circumstances, plaintiff did, on or about February 7, 1933, enter into an agreement with said Rawhide Live Stock Company, a corporation, and record owner of said land mortgaged by defendant to secure the payment of the sum of $100 on the indebtedness evidenced by the $600 note and the real estate mortgage securing the same, wherein said Rawhide Live Stock Company agreed to pay and did pay the said sum of $100 to Petters & Company for a release of the $600 mortgage as to all lands described therein, being the lands purchased by it from Storm. Thereupon plaintiff caused to be executed and delivered to said Rawhide Live Stock Company a special satisfaction and release of the real estate mortgage securing the note now sued on in this action, which instrument was on February 7, 1933, duly recorded in the proper public records as provided by law. By the terms of this special satisfaction, it was directed, as to said real estate mortgage, that the same "be discharged upon the record thereof, according to the statute in such case provided, by the register of deeds of said county, without however, in any way affecting the obligation of said mortgagor to said mortgagee as evidenced by the certain promissory note dated July 20, 1922, in the principal amount of $600, excepting the amount of $100 to be paid upon surrender of this release, and which is hereby acknowledged."

It was further stipulated that the real estate covered by the mortgage thus released was at that time well and reasonably worth more than the amount of the encumbrance thereon.

The fact appears from the record that the instant case in-

volves a transaction which is made up of two written instruments executed at the same time. The original promissory note proclaims the fact, at its commencement, that it is "First Mortgage Note Secured by Real Estate," and, in the body of the same appears the recital, "This note is secured by first mortgage on real estate in Goshen county, Wyoming." The "First Mortgage Deed," executed contemporaneously, described the lands referred to as situated in Goshen county, Wyoming, the $600 note it is given to secure, and the nine interest coupons thereto attached. It appears that plaintiff at all times knew, or was actually chargeable with knowledge of, these facts.

Under these circumstances, this jurisdiction is committed to the view that, in the determination of the rights of the parties evidenced by the two written instruments above referred to, executed at the same time, the rule applicable is: "When executed together and as part of one transaction, a note and mortgage securing it are to be construed together and as one instrument." *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61. See, also, *Kendall v. Selby*, 66 Neb. 60, 92 N. W. 178. In the instant case, the rights of the parties must be determined in view of the provisions contained in both instruments.

As to the exact point presented by this appeal, the case is one of first impression in this jurisdiction. However, on principle it would seem, if the note and mortgage in suit can be construed together as one instrument, the rule applicable appears to be: "If, after a conveyance of the mortgaged property, the mortgagee releases part or all of the mortgage, without the consent of the mortgagor, the latter, according to the weight of authority, is discharged, wholly or at least to the value of the property released. (There is a difference of opinion, * * * whether the discharge is from all liability or only *pro tanto*.)" Annotation in 41 A. L. R. 306, following *Insley v. Webb*, 122 Wash. 98, 209 Pac. 1093.

The basic reasoning on which this rule rests is well outlined by the supreme court of California in *Woodward v.*

Brown, 119 Cal. 283, 51 Pac. 2, in the following language (appearing in annotation in 41 A. L. R. at page 307): "We cannot perceive upon what principle of equity or by what construction of this section it can be held that the mortgagee may, without the consent of the mortgagor, let go part of his security to a purchaser from the mortgagor, at less than its value, it may be, and then look to the mortgagor to make up the deficiency. It would be a gross injustice to the mortgagor to hold him liable for a deficiency which the mortgagee has, without the mortgagor's authority or consent, created. * * * The danger to the interests and rights of the mortgagor will at once be seen by supposing a not improbable case and one much like the one before us. The mortgagee, for reasons of his own, releases one after another of the mortgaged lots without consideration therefor or for a small consideration, thinking that he has retained enough out of which to realize on sale the amount of the debt. It turns out, through depreciation of values or other cause, that he miscalculated the value of his retained security and there was a deficiency after sale. Now there would have been no deficiency if he had not released a portion of his security. It would be clearly inequitable to hold the mortgagor in such case for any deficiency."

In *First Nat. Bank & Trust Co. v. Strong,* 112 Conn. 412, 152 Atl. 575, the action was one at law upon a promissory note. The facts in the case involved the same controlling principle that is presented in the instant case. The note in suit in the Connecticut case was secured by a real estate mortgage. The mortgaged property had been conveyed by the mortgagor, and certain of it had been released by the mortgagee without the consent of the mortgagor. It does not appear that the grantee had assumed the mortgage debt. In determining the controlling principle, applicable to the facts of our instant case, Banks, J., says in part: "A mortgagor who has conveyed his equity of redemption has a right to have the mortgaged property applied to the payment of the mortgage debt so far as necessary for his

protection against personal liability for the debt secured. 2 Jones, Mortgages (8th ed.) sec. 839. The mortgagee is not, however, obliged to tender an assignment of the mortgage security as a condition of recovery upon the note. *Barnes v. Upham,* 93 Conn. 491, 495, 107 Atl. 300. The mortgagor may justly complain if his personal liability upon the note is allowed to remain, while the means which he has provided for meeting it has been disposed of. But all that he would be entitled to, if the mortgage had not been released, would be the right to have it assigned to him, upon his payment of the debt, so that he may avail himself of such security as the mortgage affords in obtaining reimbursement. He has no right to insist that his liability is wholly discharged because the mortgagee releases the mortgage which is the security for the debt, unless the security was sufficient to have fully paid the debt. He is discharged only to the extent that he has been injured. *Worcester Mechanics Savings Bank v. Thayer,* 136 Mass. 459; *Norton v. Henry,* 67 Vt. 308, 31 Atl. 787; 2 Jones, Mortgages (8th ed.) sec. 839. It follows that the release of the mortgage by the mortgagee is not a bar to his action to recover upon the note from the mortgagor, but that the latter may, in such action, set off against the amount due on the note whatever damage he has suffered by reason of the loss of the security." See, also, *Crisman v. Lanterman,* 149 Cal. 647, 87 Pac. 89; *Meigs v. Tunnicliffe,* 214 Pa. St. 495, 63 Atl. 1019; *Assigned Estate of Hunter,* 257 Pa. St. 32, 101 Atl. 79; *Union Bank of Brooklyn v. Rubinstein,* 78 Misc. Rep. 461, 138 N. Y. Supp. 644 (affirmed in 216 N. Y. 766).

"A mortgagee who releases the mortgage to a grantee of the mortgagor, without the latter's consent, cannot hold such mortgagor personally liable for the debt." 41 C. J. 719. See, also, 41 C. J. 734.

In the instant case, the parties having stipulated that the real estate covered by the mortgage released by plaintiff was then well and reasonably worth more than the amount of the encumbrance, which included the amount due on the

note in suit, no recovery may be sustained against the defendant in any event. The question whether, on principle, such release operated as a discharge of the obligation as an entirety as a matter of law, or only *pro tanto,* need not be determined in view of the record before us, for following either rule in the instant case we arrive at the same conclusion.

It follows, therefore, that the disposition of this case as made by the trial court was in harmony with the principles herein announced, and its judgment is

AFFIRMED.

COZAD DITCH COMPANY ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT ET AL., APPELLEES.

272 N. W. 560

FILED APRIL 8, 1937. No. 30092.

1. Waters: PARTIES. The department of roads and irrigation is neither a necessary nor a proper party to a proceeding on appeal to secure a reversal, modification, or vacation of a decision or order by it made and entered.
2. ———: REMAND: PLEADING: AMENDMENTS. The effect of the amendments made after remand to the department of roads and irrigation, as permitted by the judgment of this court in *Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 268 N. W. 334, was to continue for all purposes the original proceeding in full force and effect, including jurisdiction of the parties and the subject-matter of the litigation, modified of course to conform to the limitations imposed by the amendments so made.
3. ———: ———: INTERVENTION. Intervention in this proceeding, after reversal in this court and remand to the department of roads and irrigation for further proceedings, was not intended to change the nature and character of the action itself, nor to permit the raising of new issues therein.
4. ———. Proceedings in this court to obtain a reversal, modification, or vacation of a final order or decision made and entered by the department of roads and irrigation are limited to an appeal as now prescribed for the review in this court of final

judgments and orders entered in the district courts in civil cases.

5. **Proceedings in error** where improperly instituted in this court will be dismissed on motion.
6. **Appeal.** An appeal from the department of roads and irrigation will be dismissed where the record does not disclose the rendition of a final order or judgment from which such appeal is prosecuted.
7. ———: DISMISSAL. Where, on a second appeal to this court in a proceeding originally instituted in the department of roads and irrigation, it appears that at the first hearing of such cause in this court substantially every question involved or presented in the record submitted on such second appeal was raised, considered, and in effect determined adversely to the present contentions of the appellants, such proceeding will be dismissed.

APPEAL from the Department of Roads and Irrigation. *Appeal dismissed.*

Hoagland, Carr & Hoagland, Cordeal, Colfer & Russell, Cleary, Suhr & Davis, E. J. Patterson, P. S. Heaton, Coufal & Shaw, Ray E. Sabata, Lloyd Pospishil, William H. Lamme, Paul E. Morris and *B. J. Cunningham,* for appellants.

R. O. Canaday and *P. E. Boslaugh, contra.*

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

EBERLY, J.

Certain motions have been filed in this cause and argued before the bar of this court. Preliminary to their disposition, it may be said that this is a second appearance of this cause in this court. Originally it was presented here under the title of *Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 268 N. W. 334, and the matters in dispute were disposed of in an opinion in which the orders of the department of roads and irrigation, approving and granting applications 2354, 2374, et al., were each set aside, annulled and revoked, and the cause remanded to such department with directions, if desired,

to grant leave to amend said applications by limiting the use of the waters taken thereunder to power purposes and to irrigation of lands situated within the Platte river watershed. The record now before us discloses that upon remand the applications 2354 and 2374 were amended, as directed by this court; that on November 27, 1936, amended application 2374 was in due form granted and approved by the department of roads and irrigation, "subject to the following limitations and conditions, viz.: (In application 2374) 1st. The water appropriated shall be used for the purpose of power and irrigation, said water, however, not to be diverted over and beyond the watershed of the Platte river and applied to lands situated without the basin of the Platte river. * * * 5th. The prior rights of the owners of land bordering on this stream or through which this stream flows, to so much of the natural flow of the stream as is necessary for domestic uses, including stock water, must be respected. 6th. The prior rights of all persons who, by compliance with the laws of the state of Nebraska, have acquired a right to the use of the waters of this stream must not be interfered with by this appropriation."

As to amended application 2354, the conditions of the grant were: In paragraph 1 were included the conditions incorporated in the first paragraph of amended application 2374; and the following in paragraphs 6 and 7:

"6th. The rights of all persons who by compliance with the laws of the state of Nebraska governing in the appropriation of water, or who by continuous beneficial use have acquired the right to use of the waters of Platte river or any tributary stream, or any stream to which Platte river is tributary, prior to the date of this filing, shall not be interfered with by this appropriation. 7th. This grant is made subject to the provisions of the Nebraska irrigation laws, which gives preference to appropriators using the water for domestic and agricultural uses, over those using it for manufacturing and power purposes."

It may be noted in passing that an "amendment" implies "an addition or change within the lines of the original

instrument as will affect an improvement or better carry out the purpose for which it was framed." 2 C. J. 1317. See, also, *Livermore v. Waite*, 102 Cal. 113, 118, 36 Pac. 424, 25 L. R. A. 312. And it implies a correction of errors. *McCleary v. Babcock*, 169 Ind. 228, 233, 82 N. E. 453. It also implies an improvement, a correction of faults or errors, or a mistake. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771; *McCleary v. Babcock, supra; Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475; *Lennox v. Vandalia Coal Co.*, 158 Mo. 473, 488, 59 S. W. 242; *In re Pennsylvania Telephone Co.*, 2 Chest. Co. Rep. (Pa.) 129, 131; *Givens v. Wheeler*, 6 Colo. 149, 151; *Woodruff v. Dickie*, 5 Rob. (N. Y.) 619, 622.

It is common practice, in case of reversal on appeal, for the appellate court to remand the cause with directions to the lower court to permit amendments. The effect of the amendment, if made, is to continue for all purposes the original proceeding in full force and effect, including jurisdiction of the parties and subject-matter of the litigation, modified of course to conform to the limitations imposed by the amendment so made. *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, 80 N. W. 276; *McCague Savings Bank v. Croft*, 87 Neb. 770, 128 N. W. 504; *Butler v. Secrist*, 92 Neb. 506, 138 N. W. 749; *Criswell v. Criswell*, 101 Neb. 349, 358, 163 N. W. 302.

The order of reversal of this court, when complied with, was effective to continue the original proceeding, to preserve the priority of the original applications within the scope of the amendment permitted, and was also effective to secure in the tribunal to which the remand was made the retention of uninterrupted jurisdiction over parties to the original proceeding as amended, and of the subject-matter thereof. *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286.

Thereafter, the parties who were such at the time of the hearing and determination of the issues presented to this court on the former appeal commenced proceedings in the

department of roads and irrigation to set aside said orders granting and approving amended applications 2354 and 2374. Certain other parties joined with them, who were not parties in the original case of *Osterman v. Central Nebraska Public Power and Irrigation District.* Whatever designation may be made use of to identify those for the first time joining in this proceeding, they are substantially interveners entitled to all the rights and subject to all the liabilities of that status. The present case is but a continuation of the *Osterman* case. It is, in fact, the same case, with the same subject-matter contained in the original proceeding, but substantially limited in the continuance thereof. Intervening after a final decree, the parties so doing take the case as they find it. They are bound by the law of the case previously formally declared or necessarily determined. Such intervention is not intended to change the nature and character of the action itself, or to stop the machinery of the trial thereof. *Reay v. Butler,* 7 Pac. (Cal.) 669, 671.

The controlling rule, as applied to the situation here presented, appears to be: "He (an intervener) has, or may be given, the benefit of proof already taken, and may be required to accept it as evidence against him. * * * An intervener must abide by the pleadings as he finds them at the time of his entry; he cannot be heard to raise any new issue. Thus an intervener cannot enlarge the scope of a suit by setting up a defense not open to defendant on the ground that, if he had been sued, such defense would have been available to him." 21 C. J. 346, 347.

The present record comes to this court pursuant to section 81-6315, Comp. St. 1929. It contains the orders of the department of roads and irrigation granting and approving amended applications 2354 and 2374, and also the applications by appellants to have such grants and approvals set aside and annulled, and it appears that these applications were heard on January 5, 1937. As to these, the certificate attached to the so-called bill of exceptions includes the following: "I further certify that findings or order of the

state engineer have not yet been made in said cause in the matter of the hearing held on January 5, 1937, herein, for the reason said cause is under advisement and now pending before the department of roads and irrigation; and that the originals of said records, copies of which are attached and certified herein as to each of said amended application number 2354 and amended application number 2374, are on file in the office of the department of roads and irrigation at Lincoln, Nebraska."

In this view of the record, the following disposition of the motions being considered is made:

The motion on behalf of the department of roads and irrigation that it be dismissed from the proceeding is sustained. It is not a party in interest, and no relief may be claimed against it in this proceeding. *Kirchoff v. Board of County Commissioners of McLeod County,* 189 Minn. 226, 248 N. W. 817.

Appellees' motion, "that each of the following petitions in error be stricken from the files of this court; that the summons in error be quashed; and said error proceedings be dismissed for the reason that proceedings in error in matters of this kind have been abolished in this state, and that said petitions in error needlessly encumber the record and complicate the issues, to wit: 1. The petition in error of the Cozad Ditch Company et al.; 2. The petition in error of C. T. Young, Amos Kaufman, and C. E. Faught; 3. The petition in error of Theo Osterman et al.; 4. The petition in error of the Gothenburg Light and Power Company et al.; 5. The petition in error of Butler, Colfax, and Dodge counties," is sustained. This, for the reason that section 81-6315, Comp. St. 1929, provides, with reference to review of proceedings had in the department of roads and irrigation: "The procedure to obtain such reversal, modification or vacation of any such decision or order upon which a hearing has been had before said department shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district court to the supreme court of Nebraska." *Hooper*

Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245, 147 N. W. 674; *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584, 148 N. W. 520.

Appeals to the supreme court from the district court are regulated by sections 20-1912 et seq., Comp. St. 1929.

Error proceedings to the supreme court from the district court, except in criminal cases, are abolished. *Brandt v. State*, 80 Neb. 843, 115 N. W. 327.

Appellee's motions include an application to strike from the transcript filed January 24, 1937, the following instruments, motions, and pleadings, viz.:

"1. Telegram of A. C. Tilley to B. J. Cunningham, dated November 25, 1936.

"2. Telegram from Theo Osterman et al., by B. J. Cunningham, to A. C. Tilley, dated November 27, 1936.

"3. Telegram from state engineer to Cunningham, dated November 26, 1936.

"4. Motion to set aside order allowing applications and for leave to file objections by Riverside Park Association et al. and Theo Osterman et al., filed November 28, 1936.

"5. Affidavit of B. J. Cunningham, filed November 28, 1936.

"6. Objections of Riverside Park Association et al. and Theo Osterman et al. to allowance of said applications, filed November 28, 1936.

"7. Request for hearing on objections to amended applications by Riverside Park Association et al., filed November 28, 1936.

"8. Amended objections to acceptance, allowance, or approval of applications by Theo Osterman et al., filed December 8, 1936.

"9. Amended and supplemental objections of Riverside Park Association et al., filed December 8, 1936.

"10. Proof of service, filed December 10, 1936.

"11. Objections of the Central Nebraska Public Power and Irrigation District and motion to strike, filed December 12, 1936.

"12. Notice to each attorney to file reply, filed December 15, 1936.

"13. Letter from Cunningham to Boslaugh, dated December 16, 1936.

"14. Reply of Riverside Park Association et al., filed December 22, 1936.

"15. Brief of objectors, Riverside Park Association et al., filed December 22, 1936.

"16. Acceptance of service of copy of the pleadings by the Central Nebraska Public Power and Irrigation District, filed December 24, 1936.

"17. Notice of hearing to be held January 5, 1937, filed December 24, 1936.

"18. Objections and answer of the Cozad Ditch Company et al. to amended application 2354, filed December 26, 1936.

"19. Application of Cozad Ditch Company et al. to vacate order, filed December 26, 1936.

"20. Reply of Theo Osterman et al., filed December 26, 1936.

"21. Objections of Gothenburg Light and Power Company, filed December 26, 1936.

"22. Application for rehearing by county of Butler et al., filed December 28, 1936.

"23. Telegram of state engineer fixing date of hearing, filed January 2, 1937.

"24. Letter from Canaday to Coufal and Shaw, dated January 4, 1937.

"25. Objections of the Central Nebraska Public Power and Irrigation District to application of Cozad Ditch Company et al., filed January 4, 1937.

"26. Motion of the Central Nebraska Public Power and Irrigation District to strike objections of Gothenburg Light and Power Company et al., filed January 4, 1937.

"27. Motion of the Central Nebraska Public Power and Irrigation District to strike objections of Butler county et al., filed January 4, 1937.

"28. Motion to vacate order of the department of roads and irrigation made by Gothenburg Light and Power Company et al., filed January 5, 1937.

"29. Reply of county of Butler et al. to motion filed by applicant, filed January 5, 1937.

"30. Motion of Cozad Ditch Company et al. for judgment on pleadings, filed January 6, 1937.

"31. Reply of Cozad Ditch Company et al., filed January 6, 1937.

"32. Amended objections of Gothenburg Light and Power Company et al., filed January 19, 1937."

The matters to which this motion is addressed all pertain to and constitute a part of appellants' application to the department of roads and irrigation to vacate and set aside the orders of November 27, 1936, granting and approving amended applications 2354 and 2374. As to this proceeding, the record before us presents no final order or judgment, as defined by section 20-1902, Comp. St. 1929. So far as this court is advised, the matters have as yet been undetermined by the department of roads and irrigation. Indeed, the fact affirmatively appears in the record before us that the entire matter is now under advisement preliminary to its determination and the entry of a final order. The existence of a final order is essential and a prerequisite to review in this court. *Yager v. Lemp*, 39 Neb. 93, 58 N. W. 285; *Larson v. Sloan*, 77 Neb. 438, 109 N. W. 752.

"An appeal will be dismissed where the record does not disclose the rendition of a final order or judgment." *Vrana v. Vrana*, 85 Neb. 128, 122 N. W. 678. See *Metzger v. Royal Neighbors of America*, 85 Neb. 477, 123 N. W. 1052.

It follows that the matters to which appellee's motion to strike is addressed serve no purpose whatever in the present record. They constitute no part of the proper transcript pertaining to the entry of the original orders. No rights in this proceeding in this court can be predicated upon a matter still pending, undetermined in the original tribunal from which an appeal is prosecuted. This court is sitting in the capacity of an appellate court only. It may only consider what is properly presented on an appeal from a final order. The subject-matter to which the motion now under consideration is addressed must be considered, there-

fore, as surplusage properly subject to a motion to strike; and thus appellee's motion to strike is sustained.

Lastly, appellee's motion also is that this appeal be dismissed for the reason that all of the matters and issues that can be presented and determined by this court on this appeal were presented and determined by this court on the former appeal of this case, being Case No. 29780 (*Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 268 N. W. 334) in this court, and that the orders entered by the department of roads and irrigation, from which this appeal was taken, are in strict accord with the mandate of this court; and for the further reason that the record in this case is inadequate and cannot be made adequate to review the orders of the department of roads and irrigation.

In a determination of the matters thus challenged, it must be remembered that this court does not ordinarily dispose of questions presented for review in instalments; neither does it ordinarily retry questions once determined, either expressly or by necessary implication, on the second appearance of the same cause before it; and, furthermore, we fully appreciate the fact that justice unnecessarily delayed results in justice denied.

So, also, the due application of the principle, viz., "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party" (21 C. J. 1223) is, in this case, appealing to the conscience of this tribunal. See, also, 21 C. J. 1148, 1149.

However, this situation requires the due consideration of the entire record in this cause, both as presented at the original hearing (131 Neb. 356, 268 N. W. 334) and as now filed in this court under the title *Cozad Ditch Company et al. v. Central Nebraska Public Power and Irrigation District and the Department of Roads and Irrigation.* The subject of this consideration, in addition to the formal records

of the department of roads and irrigation, includes the pleadings, the evidence, the briefs filed in the original hearing as well as in the instant presentation of this cause; the motions and briefs for rehearing addressed to the original opinion adopted herein, and the formal statements of attorney for appellants made at the bar of this court at the open public hearing first had in this cause, which was intended to, and did, induce this court to restrict the discussion of determinative questions in the opinion then duly promulgated (131 Neb. 356, 268 N. W. 334) to a determination of riparian rights in and to the waters of the Platte river, and the restriction of the use of the waters thereof for irrigation and power purposes to the Platte river basin, and to adjudge all other issues presented in said cause, at that hearing, for the purpose of the instant case, in conformity with the disposition of the litigation thus made.

These facts as embraced in the entire record lead inevitably to the conclusion that, at the first hearing of this cause, substantially every question now involved and presented in the record now before us, or now proper for consideration, in view of the pleadings and history of the case, was presented, considered, and in effect determined adversely to the present contentions of appellants as now made on the second appeal. It also fairly appears from the entire record that the just rights of the parties to this suit were duly declared at the first hearing in conformity with the presentation then made by them, and that due administration of our irrigation law by the department of roads and irrigation, and as required by the former opinion of this court, will be in harmony with the controlling contentions of the present appellants as made at the initial hearing of this cause in this court.

Therefore, it follows, that as no new questions are properly presented on appeal by the record as now filed in this court, as well as for the reasons already suggested herein, the motion to dismiss this appeal should be, and is, sustained.

It is further directed that this dismissal be entered on the records of this court, and that a mandate conforming thereto be issued forthwith.

APPEAL DISMISSED.

CHARLES SUTHERLAND, APPELLEE, V. MAY E. SUTHERLAND, APPELLANT.
272 N. W. 549

FILED APRIL 8, 1937. No. 29886.

1. **Husband and Wife.** Decree awarding wife support and maintenance *held* not to preclude husband from seeking divorce for cruelty at subsequent term.
2. ———. Where wife was granted decree for support, and husband subsequently filed petition for divorce, testimony relating to events antedating original decree could not be considered.

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

Rosewater, Mecham, Shackelford & Stoehr and *Jay P. Gibbs*, for appellant.

Johnsen, Gross & Crawford, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

PAINE, J.

This is an appeal by the defendant from a decree granting a divorce to her husband and dismissing her cross-petition for separate maintenance.

Among the errors set out for reversal, it is charged that the decree is not supported by sufficient evidence, that plaintiff was guilty of gross misconduct toward defendant, that it was error to grant husband an absolute divorce without granting the wife any alimony, and that the divorce was granted contrary to the provisions of section 42-335, Comp. St. 1929.

The evidence is very voluminous, being found in a bill of exceptions of 400 pages, and only a few points will be

briefly set out in this opinion. Much of the evidence is very conflicting and can scarcely be reconciled.

The plaintiff, who was born in 1880, married the defendant, who was a widow with three children, on March 18, 1908, at Council Bluffs, and to this union there were seven children born, and six are still living. After the marriage the plaintiff worked for a few years as foreman of the pickle department in a packing-house in South Omaha, and then got a job on the city fire department, where he worked for some 23 years, being retired as a senior captain, with a life pension of a little over $100 a month. During their married life they had accumulated two houses and lots and also some cash.

The wife began an action for separate maintenance and support, which was granted her in a decree rendered October 4, 1933, in which action she was given a monthly allowance and one house and lot, and the plaintiff was given the other. The evidence discloses that she at once paid off the mortgage on the property she secured with cash, which cash the plaintiff claims was money taken from the safety deposit box containing their joint savings, but which the defendant denies. The plaintiff was unable to pay off the mortgage on the house and lot awarded to him, and when it was sold and the mortgage and other past-due bills paid he had but $305 left from the sale.

The parties stipulated that, in accordance with the decree in the separate maintenance action of the wife, the husband had paid the following items: To attorney, $67.45; clerk of the district court, $32.55; and alimony payments to the wife in the sum of $1,232.50.

The plaintiff owed bills, at the time of trial of the case at bar, of approximately $1,000, over $600 being due to doctors, nurses, and hospitals, and the testimony shows that plaintiff is in need of hospital treatment because of chronic arthritis, by which plaintiff is permanently disabled. The evidence discloses that in 1911 plaintiff was caught between an overhead bridge and the fire truck, which necessitated long confinement in bed and the wear-

ing of a back brace for a long time. In 1929 he received a compound fracture of his left leg, which laid him up for nearly a year. At the present time he walks with difficulty with a cane, and, according to one of the doctors, he needs treatment for a long time in bed, with his back immobilized in a plaster of Paris cast; that such treatment would not bring about a cure, but would help his chronic arthritis of the upper lumbar and lower thoracic vertebræ, which is growing progressively worse.

Pages of testimony are found in this long bill of exceptions of incidents which occurred years prior to the former hearing. Each party apparently indulged in the same liberty, without the slightest restriction. After the matter had been fully submitted, we are satisfied that the trial judge, who had also presided at the first trial, rendered a decree of absolute divorce based only upon the happenings subsequent to the former decree.

The defendant argues that the testimony of the plaintiff was uncorroborated. With this we do not agree. There was abundant testimony of cruelty practiced upon the plaintiff, sufficiently corroborated by testimony of others, with proper inferences therefrom.

In the decree entered by Judge Rhoades, he stated that the defendant is not entitled to any further alimony payments or property rights. However, the plaintiff was required by the decree in the instant case to pay to the clerk of the court $15 a month for the support of the minor daughter, Lillian, until a certain date, and was required to pay defendant's attorney $100, and all costs.

It appears from the transcript that no motion for a new trial was filed in this case by the attorney then in the employ of the defendant. It has been announced from time to time that a motion for new trial must be filed and overruled in the district court to authorize a review of rulings on evidence in an equity case. *Farmers Loan & Trust Co. v. Joseph,* 86 Neb. 256, 125 N. W. 533; *Stuhr v. City of Grand Island,* 120 Neb. 491, 233 N. W. 886.

Many similar cases of second decrees have been before

this court, such as *Stocker v. Stocker,* 112 Neb. 201, 199 N. W. 23, and *Mann v. Mann,* 124 Neb. 639, 247 N. W. 602. The appellant in his brief refers to the "syllabus" in the *Mann* case. However, no syllabus appears in our official report of this case. The paragraphs placed at the head of the case, where it is republished in 247 N. W. 602, read as follows:

"Decree awarding wife support and maintenance *held* not to preclude husband from seeking divorce for cruelty at subsequent term."

"Where wife was granted decree for support, and husband subsequently filed petition for divorce, testimony relating to events antedating original decree could not be considered."

The first decree, awarding the wife separate maintenance, did not prove satisfactory. Quite often much embarrassment is caused the parties by these partial dissolutions of the marital relations. *McKnight v. McKnight,* 5 Neb. (Unof.) 260, 98 N. W. 62. The husband, finding the situation intolerable, as is shown by the evidence, brought the action for divorce.

The appellant complains that the defendant, by this decree of absolute divorce, will be cut off from the widow's pension should she survive the plaintiff, and that this great injustice cries out for correction. We have carefully considered this phase of the case, but it is not controlling. The sole question, we believe, is whether the plaintiff has established his right to a divorce by a preponderance of all of the evidence.

The trial court, during the course of two hotly-contested actions between these same parties, doubtless acquired by that experience an ability to judge wisely in reference to the stories told by the principals, the members of their family, and the many other witnesses called to testify. This court tries this case *de novo,* and yet we have said that, when the testimony of the witnesses upon the vital question involved is conflicting, this court will consider the fact that an experienced trial judge observed these wit-

nesses and their manner of testifying, and accepted one version of the facts rather than the other. *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178; *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N. W. 797. We believe that the trial court had some very definite advantages over the members of this court, by observing with care each of the witnesses, their manner of testifying, and their apparent fairness or bias, and his decree clearly indicates that he reached the conclusion that, under all the circumstances, the plaintiff was entitled to a divorce, and that the defendant was not entitled to alimony.

After a careful examination of the evidence, we find no error in the decree of the trial court, and the same is

AFFIRMED.

ROY J. FURSTENBERG, APPLICANT, APPELLANT: CITY OF OMAHA, PROPONENT, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, OBJECTOR, APPELLEE.
272 N. W. 756

FILED APRIL 8, 1937. No. 29841.

1. **Courts.** Powers conferred upon an appellate court should be construed as intended to include only powers consistent with the discharge of its inherent judicial functions.
2. **State Railway Commission.** The grant or denial of a certificate of convenience and necessity by the railway commission requires the exercise of administrative and legislative functions and not of judicial powers.
3. ———: COURTS. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
4. ———: APPEAL. On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
5. ———: PUBLIC SERVICE COMMISSIONS. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security

of investment in public service corporations, but, first and at all times, to serve the interests of the public. In considering an application for a certificate of convenience and necessity for the operation of motor bus transportation, the public, and not individuals, is to be most considered.

6. **Estoppel.** A public utility operating under a nonexclusive franchise is not estopped, in a hearing before the railway commission upon application by another for a certificate of convenience and necessity to operate in the same field, to appear and object to the grant thereof.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Tunison & Joyner, for applicant, appellant.

Seymour L. Smith, Harold C. Linahan and *W. W. Wenstrand,* for proponent, appellant.

William H. Wright, Attorney General, and *Edwin Vail,* for Nebraska State Railway Commission, appellee.

Kennedy, Holland, De Lacy & Svoboda and *R. B. Hasselquist,* for Omaha & Council Bluffs Street Railway Company, appellee.

Heard before DAY, PAINE and CARTER, JJ., and TEWELL, CHAPPELL and YEAGER, District Judges.

CHAPPELL, District Judge.

Appellants Roy J. Furstenberg, as applicant, and the city of Omaha, proponent, by precedent approval, applied to the Nebraska state railway commission for a certificate of public convenience and necessity thereby seeking authority for appellant Furstenberg to engage in the common carrier business of transporting passengers for hire by motor busses in Omaha over one definite route upon a definite schedule at a certain price. The application was denied. Motion for new trial was overruled, and both applicant and proponent, hereinafter called appellants, come to this court on appeal.

All parties concede, and the record shows, that the railway commission had jurisdiction to hear the application. Appellants contend that the railway commission erred in

its refusal to hold, over objections of both appellants, that the objector, Omaha & Council Bluffs Street Railway Company, hereinafter called appellee, was barred and estopped from appearing and objecting to the granting of the certificate, and that the denial of the certificate to appellant Furstenberg was erroneous, arbitrary and unreasonable.

With reference to estoppel, earnest contention is made that on November 6, 1928, appellee, having received and unconditionally accepted a nonexclusive franchise from the city of Omaha by vote of its electorate, is estopped to appear and make objection in this proceeding. We have made studious effort to find the proposition contended for by appellants in the cases cited by them and apply it to this proceeding, but have failed. The doctrine of estoppel has application in adversary judicative controversies at law or in equity where one party is prevented from making a claim by reason of his previous conduct to the damage of his opponent. Estoppel must be reciprocal and mutual and is founded upon the idea that the acts of the party estopped must result in injury to the other party and, generally, that it would be a fraud if the right asserted be maintained. See 21 C. J. 1107 and 1139. Estoppel does not itself give a cause of action, its purpose being to preserve rights already acquired and not to create new ones. *State v. Missouri Utilities Co.*, 331 Mo. 337, 53 S. W. (2d) 394. We do not discover its application ordinarily in unilateral legislative or administrative proceedings.

We said in *Publix Cars, Inc., v. Yellow Cab & Baggage Co.*, 130 Neb. 401, 265 N. W. 234: "The grant or denial of a certificate of convenience and necessity by the railway commission requires the exercise of administrative and legislative functions and not of judicial powers." In *Gallaher v. City of Lincoln*, 63 Neb. 339, 88 N. W. 505, it was held that the city, acting in a ministerial and not in a judicial capacity, could not avail itself of the defense of estoppel in an action to enforce a contract contrary to an express statute. The rule generally is that admissions, in order to constitute estoppel, must relate to matters of fact

and not of law. 21 C. J. 1147. The doctrine of estoppel will not ordinarily apply to a private individual when the public interest is concerned, and one private individual cannot be given an advantage over another by claiming an estoppel against the public. 21 C. J. 1189.

We must not permit a confusion between the jurisdiction of the city and the railway commission. There is a clear distinction between powers of a city to grant or withhold franchises, licenses or permits to use its streets, police power, and the exclusive constitutional power of the railway commission to impose regulation and control over the city's common carriers. *In re Yellow Cab & Baggage Co.*, 126 Neb. 138, 253 N. W. 80. Appellants recognize these two different forces of jurisdiction by admitting and contending that such permit already obtained is insufficient to authorize common carrier service in that a certificate of convenience and necessity from the railway commission is also required. These two precedent authorizations arise from two different jurisdictional authorities, and that both are necessary is not questioned.

Appellee's franchise recognizes these separate powers. Section 2, subsec. 32 thereof, with reference to regulation, provides that such authority should be exercised by the city if the railway commission should relinquish it, or should it be held by the supreme court not to possess it. We have said that the railway commission has jurisdiction over Omaha common carriers even though contrary provisions are contained in its city charter. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission,* 103 Neb. 695, 173 N. W. 690. We reaffirmed this position in 1934 after the grant of appellee's franchise. *Omaha & C. B. Street R. Co. v. City of Omaha,* 125 Neb. 825, 252 N. W. 407. The authority of the railway commission to require common carriers in Omaha to obtain from it certificates of convenience and necessity was later established. *In re Yellow Cab & Baggage Co., supra; Publix Cars, Inc., v. Yellow Cab & Baggage Co., supra.*

This court has expressly held that the jurisdiction of the

railway commission cannot be avoided by the affirmative contractual provisions of a franchise. Such contracts are made subject to the right of the railway commission's jurisdictional regulation. *Marquis v. Polk County Telephone Co.*, 100 Neb. 140, 158 N. W. 927; *McCook Irrigation & Water Power Co. v. Burtless*, 98 Neb. 141, 152 N. W. 334. Public service corporations in each instance sought and obtained relief before the railway commission from low rates specifically imposed by their own franchises or contractual obligations without estoppel. In other cases they appear as objectors and have been granted or denied relief despite their own contractual obligations. The analogy is that not any understanding, implication, or express agreement by franchise between a municipality and a public service company, seeking to disrobe the paramount power of the railway commission, can have any legal force in this state. To assume that such a municipality, as a condition of favorably exercising its veto power with reference to the entry into its jurisdiction of a common carrier, could, by franchise, divest a constitutionally created regulatory body, such as the railway commission, of its jurisdiction is without logic. Appellee is not estopped by its franchise from invoking affirmative or negative action in this proceeding because to that extent the jurisdiction of the railway commission would be divested and its power to serve the people destroyed. See *Milwaukee Electric Ry. & Light Co. v. Railroad Commission*, 238 U. S. 174; *Railroad Commission v. Los Angeles Ry. Corporation*, 280 U. S. 145; *City of Englewood v. Denver & South Platte Ry. Co.*, 248 U. S. 294; *Southwest Mo. R. Co. v. Public Service Commission*, 281 Mo. 52, 219 S. W. 380; *State v. Missouri Utilities Co., supra; City of Cape Girardeau v. St. Louis-San Francisco Ry. Co.*, 305 Mo. 590, 267 S. W. 601; *City of St. Louis v. Public Service Commission*, 276 Mo. 509, 207 S. W. 799; *City of Milwaukee v. Railroad Commission*, 206 Wis. 339, 240 N. W. 165; 3 Ponds, Public Utilities (4th ed.) sec. 826. The converse of these propositions we have been unable to find, and appellants have not found them for us.

It is suggested that section 18, art. III of the Constitution, inhibiting exclusive franchises, would be violated by an act of the Nebraska state railway commission in denying a certificate of convenience and necessity to a second common carrier in the city of Omaha; in other words, that such denial would make the nonexclusive franchise of appellee exclusive in its effect. True logic cannot so array the fact. The railway commission is thereby simply exercising the discretion reposed in it by section 20, art. IV of the Constitution, wherein it was given plenary jurisdiction over the rates, service and regulation of common carriers. The jurisdiction to grant franchises in the city of Omaha was constitutionally reposed in the city under section 2, art. XII of the Constitution, and nothing precludes the city from granting further street railway or bus franchises at its pleasure. This being true, appellee's franchise is not and never can be an exclusive franchise. We find that no conflict is assumed or recognized to obtain in the general inhibition to original grants of exclusive franchises and what appellants visualize as a practical status of exclusive franchises brought about by the regulatory bodies preferring to evolve adequate service out of the activities of one public service company duly regulated rather than out of two or more competing public service companies. This is true because the railway commission, whenever it finds that the single public service is not giving, and will not give, adequate service, can grant certificates of convenience and necessity to one or more additional competing companies.

Resolution No. 137 of the Nebraska railway commission, the legislative instrument under and by which this appellant makes application for certificate of convenience and necessity, provides: "While the old adage 'Competition is the life of trade' may still be acceptable as applied in private industry, still today it is the general concensus of opinion of both the courts and regulatory bodies that unbridled competition between such public utilities is not only harmful to the industries themselves but also in the

end generally inures to the detriment of the general public as well." Appellants and the railway commission thereby brought this objector, appellee, a prospective competitor public utility, into this proceeding. *Re Borough of Brookville, P. U. R.* 1929 D, 483; *Egyptian Transportation System v. Louisville & N. R. Co.*, 321 Ill. 580, 152 N. E. 510; *Chicago Rys. Co. v. Commerce Commission*, 336 Ill. 51, 167 N. E. 840; *State v. Department of Public Works*, 119 Wash. 381, 206 Pac. 21.

In *City of Campbell v. Arkansas-Missouri Power Co.*, 55 Fed. (2d) 560, after citing many cases, the court said: "A franchise is property, and, as such, is under the protection of the law, and without express words it is exclusive as against all persons acting without legal sanction. True, plaintiff's franchise was not exclusive in the sense that the city might not grant similar right to another, yet it was exclusive against any one who assumed to exercise the privilege granted the plaintiff, in the absence of authority or in defiance of law." We hold that the appellee had a legal right, enjoying an admittedly nonexclusive franchise, to legally object before the railway commission to any one else invading its field unlawfully. Appellants' contentions of estoppel are not available.

Section 75-505, Comp. St. 1929, provides for an appeal to this court from a decision of the railway commission with reference to any order or regulation made or adopted by it upon which there has been a hearing. This court under its previous holdings has jurisdiction on appeal to review its orders and regulations. However, appellants confuse the administrative, legislative, and judicial field of action. In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution and not as an amendment to the executive, legislative, or judicial articles thereof. *In re Lincoln Traction Co.*, 103 Neb. 229, 171 N. W. 192. In 1907 the legislature adopted an act defining its powers and duties and provided generally the authority that the railway commission may exercise over common carriers. Both by

the Constitution and statute the railway commission is given full power to regulate and control them. The railway commission is thereby clothed with administrative, legislative, and judicial powers. No specific legislation has limited or affected this power, and the people have given the railway commission all the control over common carriers that they themselves could exercise. *In re Lincoln Traction Co., supra.* We have said that such powers thus possessed by the railway commission are to be liberally construed. *In re Yellow Cab & Baggage Co., supra.*

The grant or denial of a certificate of convenience and necessity is the exercise of an administrative or legislative power as distinguished from judicial power. On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, this court will not interfere with its findings of fact for the reason that they involve administrative and legislative rather than judicial questions. *In re Yellow Cab & Baggage Co., supra; Publix Cars, Inc., v. Yellow Cab & Baggage Co., supra.* See, also, *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N. W. 674; *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584, 148 N. W. 520; *Rawlings v. Chicago, B. & Q. R. Co.*, 109 Neb. 167, 190 N. W. 569; *Southern Nebraska Power Co. v. Taylor*, 109 Neb. 683, 192 N. W. 317; *Farmers & Merchants Telephone Co. v. Orleans Community Club*, 116 Neb. 633, 218 N. W. 583; *Omaha & C. B. Street R. Co. v. City of Omaha, supra; Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission, supra.*

The facilities of administrative law with the combination of administrative, legislative, and judicial powers such as the railway commission have been developed by the people of this state and in the country generally for the purpose

of providing direct, swiftly-moving, effective, nonpolitical protection of the public. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public. Nothing is more injurious to the public from every standpoint than a law which is not capable of working out tangible results. Therefore, in its administrative and legislative sphere, if the railway commission acts within the law and not arbitrarily, the courts should not, under the guise of judicial action, interfere and thereby unlawfully usurp administrative and legislative powers constitutionally reposed elsewhere. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. The policy or wisdom of its action in this field ordinarily cannot be reviewed by the courts except where unlawfully exercised. This court has no power to regulate public utilities. That power is constitutionally vested in the legislature and the railway commission. "The Constitution is still recognized as the supreme law of the state and as a limitation of power of all departments and all officials." *Laverty v. Cochran, ante,* p. 118, 271 N. W. 354. See Const. art. II, sec. 1. This court has no business in the field of making legislation, and it is not an administrative body. Powers conferred upon an appellate court should be construed as intended to include only powers consistent with the discharge of its inherent judicial functions. The intended effective control of public utilities by the railway commission is dependent upon this attitude of the court in that field. 3 Pond, Public Utilities (4th ed.) secs. 913, 915, 919, 920, 932, 937, 938, 939, and 940; 42 C. J. 691, 692; 80 Uni. of Pa. Law Rev. 312; 31 Mich. Law Rev. 582; 36 Yale Law Jr. 190; *Aetna Ins. Co. v. Commonwealth,* 160 Va. 698, 169 S. E. 859; *Wabash, C. & W. R. Co. v. Commerce Commission,* 309 Ill. 412, 141 N. E. 212; *In re Samoset Co.,* 125 Me. 141, 131 Atl. 692; *In re*

Application of Consolidated Freight Co., 265 Mich. 340, 251 N. W. 431; *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 931; *Niagara Falls Power Co. v. Water Power & Control Commission*, 267 N. Y. 265, 196 N. E. 51; *Procter & Gamble Co. v. United States*, 225 U. S. 282; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *Vander Werf v. Board of Railroad Commissioners*, 58 S. Dak. 586, 237 N. W. 909; *State v. Public Service Commission*, 330 Mo. 1, 49 S. W. (2d) 614; *Fornarotto v. Board of Public Utility Commissioners*, 105 N. J. Law, 28, 143 Atl. 450; *Sohngen v. Public Utilities Commission*, 115 Ohio St. 449, 154 N. E. 734; *York Motor Express Co. v. Public Service Commission*, 111 Pa. Super. Ct. 169, 169 Atl. 396; *Buckeye Stages v. Public Utilities Commission*, 117 Ohio St. 540, 159 N. E. 561; *Matter of Public Service Interstate Transportation Co. v. Public Service Commission*, 258 N. Y. 455, 180 N. E. 170; *Shupee v. Railroad Commission*, 123 Tex. 521, 73 S. W. (2d) 505; *Day v. Public Service Commission*, 107 Pa. Super. Ct. 461, 164 Atl. 65; *Union Cooperative Telephone Co. v. Public Service Commission*, 206 Wis. 160, 239 N. W. 409; *Modeste v. Public Utilities Commission*, 97 Conn. 453, 117 Atl. 494; *Lake Shore Electric Ry. Co. v. Public Utilities Commission*, 119 Ohio St. 61, 162 N. E. 279; *In re Stolting*, 131 Wash. 392, 230 Pac. 405; *Moffat Tunnel Improvement District v. Denver & S. L. Ry. Co.*, 45 Fed. (2d) 715; *O'Keefe v. Chicago Rys. Co.*, 354 Ill. 645, 188 N. E. 815; *State v. Public Service Commission*, 63 S. W. (2d) (Mo.) 26; *Texas Motor Coaches v. Railroad Commission*, 59 S. W. (2d) (Tex. Civ. App.) 923; *State v. Public Service Commission*, 324 Mo. 270, 23 S. W. (2d) 115; *Decker v. City of Wichita*, 109 Kan. 796, 202 Pac. 89; *White Transit Co. v. Public Service Commission*, 108 Pa. Super. Ct. 490, 165 Atl. 523; *Gongaware v. Public Service Commission*, 83 Pa. Super. Ct. 269.

The railway commission conducted an extended hearing on this application. We have read the record with great care. Many witnesses were called and a great volume of

evidence was adduced, most of it for appellee, and many other objectors, including Omaha business men, contiguous residents and users of appellee's transportation system; persons interested in a then-proposed franchise election in Omaha to establish separate motor bus transportation, and traffic experts from Omaha, Des Moines, Kansas City and elsewhere. Only appellant Furstenberg and one city commissioner, not a patron of appellee, testified for him. The permit granted by the city to Furstenberg in the first instance was by a divided vote of its council 4 to 3.

The evidence, which we deem it not necessary to quote at length, supports the order of the railway commission; therefore, it is reasonable and not arbitrarily made. Appellant Furstenberg, a man of little experience in this field which he abandoned when unprofitable, made application for a certificate of convenience and necessity to use motor bus transportation over one definite route through the best-paying, congested district of the city almost parallel with the routes of appellee, crossing its system many times, and at a rate slightly lower, except for individual single fares, than now set by the railway commission for appellee. He is not bound thereby to give continuous adequate service upon any route. In other words, the railway commission is asked to put its approval upon an experiment at the expense of that which is permanent. Appellee has a long-established, city-wide transportation system with great investment. It is heavily in debt, just emerging from an unprecedented depression of everything except individual automobile ownership and transportation. It operates under a franchise requiring continuous adequate service to every part of the city whether profitable or not. Its entire system has recently been rerouted by experts with the approval and assistance of the city. Extensive improvements were then immediately made. One-third of appellee's present mileage is now served by motor bus transportation. There is no evidence of inadequate service. There is some evidence that part of appellee's present equipment is not up-to-date; that such equipment is not modern or the latest model, which

changes frequently. Traffic experts testified that there are now three methods of municipal transportation—the electric rail car, the rubber-tired trackless trolley, and the motor coach. The expected development of the Diesel engine, electricity by high-frequency current or other mechanical perfection, may suddenly destroy the modernity of all of them.

Under these circumstances no common carrier in a city the size of Omaha could maintain a semblance of economic stability if it attempted to maintain the latest transportation equipment in its entirety. The effect of granting a certificate of convenience and necessity in this proceeding would be to install competition hazardous to appellee's investment and the public with no assurance of other better continuous adequate city-wide transportation for the people of the city of Omaha in the future. Appellee offers to furnish and makes claim that it is able to meet any reasonable order of the railway commission with reference to new motor bus or other transportation requirements. Since it has been called to our attention by brief of counsel and argument to this court, we take judicial notice that, shortly after this proceeding was concluded by the railway commission, the people of the city of Omaha voted on the question of whether they should grant a separate franchise to other parties for the purpose of establishing exclusive motor bus transportation in Omaha, and overwhelmingly defeated it.

Justice Brandeis, in speaking of the necessity for regulation of public utilities or business affected with the public interest and certificates of convenience and necessity therefor, expressed the modern view in a dissenting opinion in *New State Ice Co. v. Liebmann,* 285 U. S. 262, when he said: "The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patron-

age among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied." As to common carriers, this is the very foundation and the only reason ever given for the requirement of certificates of convenience and necessity. In considering an application for a certificate of convenience and necessity for the operation of motor bus transportation, the public, and not individuals, is to be most considered. Every jurisdiction requiring certificates of convenience and necessity supports this theory, and we adopted it in *In re Yellow Cab & Baggage Co., supra,* and *Publix Cars, Inc., v. Yellow Cab & Baggage Co., supra.* See, also, 3 Pond, Public Utilities (4th ed.) secs. 775, 913; 36 Yale Law Jr. 163; *Chicago Rys. Co. v. Commerce Commission, supra; State v. Public Service Commission,* 327 Mo. 249, 37 S. W. (2d) 576; *Cincinnati Traction Co. v. Public Utilities Commission,* 112 Ohio. St. 699, 148 N. E. 921; *People's Transit Co. v. Henshaw,* 20 Fed. (2d) 87; *Consolidated Coach Corporation v. Kentucky River Coach Co.,* 249 Ky. 65, 60 S. W. (2d) 127; *Hoffman v. Public Service Commission,* 99 Pa. Super. Ct. 417; *Fornarotto v. Board of Public Utility Commissioners, supra; Vander Werf v. Board of Railroad Commissioners, supra; Red Star Transportation Co. v. Red Dot Coach Lines,* 220 Ky. 424, 295 S. W. 419; *West Suburban Transportation Co. v. Chicago & W. T. R. Co.,* 309 Ill. 87, 140 N. E. 56; *Abbott v. Public Utilities Commission,* 48 R. I. 196, 136 Atl. 490; *Monongahela West Penn Public Service Co. v. State Road Commission,* 104 W. Va. 183, 139 S. E. 744.

The railway commission, having this theory in mind and remembering its duty to protect the public, reasonably decided that, if adequate service was being rendered by an existing common carrier passenger agency which is willing

and able to comply with any reasonable order with reference to new motor bus or other transportation requirements, a certificate of convenience and necessity should not be issued for applicant's competitive service. See *Publix Cars, Inc., v. Yellow Cab & Baggage Co., supra;* 42 C. J. 687, 688; *Illinois Commerce Commission v. Wabash R. Co.,* 335 Ill. 484, 167 N. E. 64; *Chicago, B. & Q. R. Co. v. Commerce Commission,* 345 Ill. 576, 178 N. E. 157; *East End Traction Co. v. Public Utilities Commission,* 115 Ohio St. 119, 152 N. E. 20; *McLain v. Public Utilities Commission,* 110 Ohio St. 1, 143 N. E. 381; *North Coast Transportation Co. v. Department of Public Works,* 157 Wash. 79, 288 Pac. 245; *Sohngen v. Public Utilities Commission, supra; White Transit Co. v. Public Service Commission, supra; Cardinal Bus Lines v. Consolidated Coach Corporation,* 254 Ky. 586, 72 S. W. (2d) 7; *Cannonball Transit Co. v. Sparks Bros. Bus Co.,* 255 Ky. 121, 72 S. W. (2d) 1021; *Chicago, R. I. & P. R. Co. v. State,* 123 Okla. 190, 252 Pac. 849; *Trescot Transfer Co. v. Sawyer,* 138 S. Car. 337, 136 S. E. 481; *Pottsville Union Traction Co. v. Public Service Commission,* 67 Pa. Super. Ct. 304; *Andrews v. Public Service Commission,* 88 Pa. Super. Ct. 306; *Chicago Rys. Co. v. Commerce Commission, supra; Egyptian Transportation System v. Louisville & N. R. Co., supra; Monongahela West Penn Public Service Co. v. State Road Commission, supra; Vander Werf v. Board of Railroad Commissioners, supra; Fornarotto v. Board of Public Utility Commissioners, supra; State v. Department of Public Works,* 141 Wash. 168, 250 Pac. 1088; *Stark Electric R. Co. v. Public Utilities Commission,* 118 Ohio St. 405, 161 N. E. 208; *State v. Public Service Commission,* 329 Mo. 1139, 49 S. W. (2d) 619; Ann. 67 A. L. R. 957.

This opinion is not conclusive except as to legal questions presented and does not foreclose the question of whether or not the people of the city of Omaha shall have new or added motor bus transportation or other modern transportation facilities. The railway commission, upon proper application made to it, the evidence and law per-

mitting, may grant a certificate of convenience and necessity to others and thereby establish such facilities, or may require appellee herein to furnish the same.

The record disclosing competent and relevant evidence in support of the findings of the railway commission upon the questions of fact presented, and no violation of any rule of law or constitutional right appearing, this court will not substitute its judgment for that of the railway commission, and its order is

AFFIRMED.

DEPARTMENT OF BANKING, RECEIVER, V. ALBERT STENGER: FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLANT: KATHERINE CHARNLEY, APPELLEE.
272 N. W. 403

FILED APRIL 8, 1937. No. 29883.

1. Mortgages: FORECLOSURE. In a foreclosure of a real estate mortgage, a court having jurisdiction over the subject-matter, under its broad equity powers, may determine the rights of all persons claiming any interest therein, when properly before it.
2. ———: ———: INTERVENTION. A court of equity in a foreclosure proceeding has discretion to allow third persons to intervene in order to litigate title to the decree, under a contract of assignment arising since the rendition thereof.
3. Record examined, and *held* not to present sufficient meeting of minds to constitute a binding contract.

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

Hall, Cline & Williams, for appellant.

Wagner, Wagner & Albert and *Waldron, Newkirk & Mathews, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

CHASE, District Judge.

This is a suit in equity praying for specific performance of an alleged contract to assign a mortgage decree. The

parties interested in the appeal are the First Trust Company of Lincoln, appellant, and Katherine Charnley, appellee.

The appellee, claiming to be assignee of a decree in foreclosure entered by the district court for Platte county, presents her petition in that court for leave to intervene and establish her title to such decree. The appellant, by special appearance, challenged the jurisdiction of the court, which was overruled, and appellee was permitted to appear by way of intervention in the foreclosure proceeding to establish title to and specifically perform her contract of assignment. The case was tried on the merits, resulting in a finding in favor of intervener on her petition, from which the First Trust Company, as successor-trustee, appeals to this court.

It is contended that the court erred in overruling the special appearance and permitting intervener to appear in the foreclosure proceeding to litigate her right to specific performance of the alleged contract of assignment.

Appellant argues that an application for intervention to be allowable must be filed before decree. In view of the prior holdings of this court, such position is wholly untenable. The courts recognize two methods by which intervention may be accomplished. One is statutory and is allowed as a matter of right, in which case the petition must be filed before decree. The other is a matter of equitable discretion growing out of the powers inherent in a court of equity. This existed prior to the enactment of the statute, and still exists independent thereof. In the latter case a court has jurisdiction to entertain the application at any time during the pendency of the proceedings if, in its discretion, it is essential to administer complete relief between all parties before it. *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N. W. 507; *State v. Farmers State Bank*, 103 Neb. 194, 170 N. W. 901; *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718; *Engdahl v. Laverty*, 110 Neb. 672, 194 N. W. 862.

The appellant, on the 7th day of November, 1934, ob-

tained a decree of foreclosure in the district court for Platte county, Nebraska, against real estate owned by one Albert Stenger and wife, by which there was found to be due this appellant the sum of $16,015, with interest at 10 per cent. per annum, and further finding that said mortgage was a first lien upon the premises. On August 20, 1935, Katherine Charnley, this appellee, presented a petition in intervention in that court, alleging that since the rendition of the decree one O. F. Schlaebitz, assistant trust officer and manager of the appellant, entered into an agreement to assign said decree to her. The negotiations therefor on her behalf were carried on by her attorney, C. L. Waldron, of Omaha, Nebraska; that in the negotiations for such assignment the said Schlaebitz represented the appellant and all persons owning certificates of participation in the decree; the consideration therefor being $12,500.

Suits to foreclose mortgages must be brought in the county where the real estate or some part thereof is situated. This doctrine is so well established that it is not necessary to quote either the statute or the decisions relating thereto. Section 20-403, Comp. St. 1929, provides that actions to compel specific performance of a contract for the sale of real estate *may* be brought in the county where the defendants or any of them reside.

In a foreclosure proceeding where the statute requires the suit to be brought in the county where the land is situated, the court may acquire jurisdiction over the parties to determine their interests in the subject of the controversy whether it involves title to the real estate or ownership of the mortgage lien. The word "may" as used in the specific performance statute does not mean "must," and suits for such relief may be brought in any county where the parties are properly before the court. *Pollard v. Larson,* 115 Neb. 136, 211 N. W. 998; *Miller v. Ruzicka,* 109 Neb. 152, 190 N. W. 216.

The appellant, by statute, was required to select its forum in Platte county in order to subject the real estate to the satisfaction of the mortgage lien. This was the only

court in which the appellant, or any one who may have succeeded to its rights, could have received the proceeds of the sale of the real estate in satisfaction of the mortgage lien. Legal proceedings in any other forum to obtain such relief would result in useless litigation. The argument of the appellant is that the court in the county where the owner of the decree sought to be assigned resides, or may be summoned, is the proper forum in which to litigate the matters presented by the petition for intervention. The futility of such an argument is obvious, since a court in any other county except the one where the foreclosure proceeding is pending would not be invested with power to extend complete relief to the parties. Only the court where the foreclosure proceeding is pending would have such jurisdiction over the *res* as to order sale of the property, from which funds could be obtained to satisfy the decree. In view of the foregoing, the trial court was correct in overruling this special appearance.

Appellant further contends that the evidence does not establish a sufficient meeting of minds to constitute a contract of assignment.

The appellee owned tax liens and a second mortgage on the real estate involved, and is also a sister of the owner of the equity of redemption. Appellant is successor-trustee to the Lincoln Trust Company, which was the original mortgagee. It appears that certificates of participation in the original mortgage debt were sold by the mortgagee to various investors who, for the purpose of this record, will be referred to as bondholders. Mr. Schlaebitz is the managing trust officer of the successor-trustee.

The facts relied upon to constitute such a contract consist mostly of correspondence. It appears that on March 20, 1935, the appellee through her attorney wrote a letter to appellant stating that she would put up $10,000 cash for an assignment of the bondholders' interest in the mortgage decree. On March 22 following the appellant replied stating that the proposition would be submitted to the bondholders for their consideration, acceptance or rejection, informing

appellee that the final answer rested with them. On March 30 following appellant again wrote appellee that there had been a meeting of the bondholders and all were present except two; that at this meeting the appellee's offer was rejected, and stating further that the bondholders were willing to accept not less than $12,500 for the assignment of the decree, fixing the time limit for payment as of May 1, 1935. In a postscript the appellee was informed that any counter-proposal must be subject to the bondholders' approval. On April 26 following appellee wrote to appellant stating she would raise the former offer to $11,400, and if this was acceptable appellee would immediately make a payment of $500 as evidence of good faith, stating further that this was the best and final offer. On May 29, in reply to appellee's last letter, appellant wrote that the counter-proposal was rejected, stating that the bondholders "are still insisting on being paid the sum of $12,500 in full payment." Apparently not receiving a prompt reply to the last letter, appellant wrote appellee again inquiring whether she would meet the bondholders' requirement and pay the sum of $12,500. At this point the evidence is slightly in conflict. It appears that appellee's attorney, Mr. Waldron, had a conversation with Mr. Schlaebitz, representing the appellant, in which Waldron testifies that on June 13 he inquired whether appellant would reduce its demand to $12,000. Mr. Schlaebitz testifies concerning this meeting that Mr. Waldron stated he thought his client would make an offer of $12,000 provided these bondholders, who up to this time had rejected the offer of $12,500, would indicate they would be inclined to accept $12,000. The substance of this conversation being that Waldron would raise his offer to $12,000 if it could be ascertained beforehand whether or not it would be accepted. Following this conversation, on June 29, appellant wrote another letter to appellee stating that one of the bondholders, Mr. W. W. Wilson, of Nebraska City, had inspected the land in the meantime and was unwilling to accept the offer of $12,000 for a compromise settlement, further notifying appellee that, "since he is un-

willing to agree," appellant is of opinion that no contract assignment can be concluded. On July 3 following appellee wrote appellant that she had concluded to accept the original offer of $12,500 for a settlement of the mortgage decree, and inclosed her draft for $500 as evidence of good faith, which draft was cashed by the successor-trustee and temporarily passed to the credit of appellant. Upon receipt of the draft appellant wrote to one B. E. King, a bondholder, who had never assented to any of the negotiations, stating what had been done and asking if he would accept the offer. Mr. King, at the bottom of the letter, replied, "I do not agree to accept the offer on the terms above indicated." On July 11, having received a letter from bondholder King rejecting the offer, appellant mailed its check to appellee covering the deposit payment of $500, stating that bondholders representing a substantial amount of the bonds had refused to accept the offer, one particularly stating that the time fixed for meeting the demand was May 1, 1935.

Our interpretation of the correspondence and the testimony on this point is that the original letter of appellee to pay $10,000 merely opened negotiations for the purchase of the decree. The reply thereto stating that the bondholders would not consider anything less than $12,500 constitutes the first offer. When appellee made the counter-proposal to pay $11,400, she thereby rejected the offer, and unless subsequently renewed, the original offer, as a matter of law, would be considered withdrawn.

Every contract is the result of an offer and acceptance thereof. The law requires the acceptance to be identical upon every point with the offer or there is not sufficient meeting of minds to amount to a binding obligation. *Detroit Copper & Brass Rolling Mills v. Wise*, 297 Fed. 460; *United States v. Carlin Construction Co.*, 224 Fed. 859; *Roberts v. Cox*, 91 Neb. 553, 136 N. W. 831; *Melick v. Kelley*, 53 Neb. 509, 73 N. W. 945.

Where one to whom an offer is made makes a counter-proposition of different terms and new conditions, such counter-proposition amounts to a rejection of the offer.

Doyle v. Hamilton Fish Corporation, 234 Fed. 47; *Pollak v. Roberts,* 45 N. Dak. 150, 176 N. W. 957.

A counter-proposition to an offer amounts to a rejection of the offer and a substitution therefor of the counter-proposition. In such case the original offer loses its vitality and is no longer binding upon the party making it. The party submitting the counter-proposition cannot, of his own option, revive and accept the original offer which he has rejected. *Lewis v. Johnson,* 123 Minn. 409, 143 N. W. 1127. It will be observed that there can be no contract unless the minds of the parties have met and mutually agreed. Since appellant stated its position in answer to the appellee's first negotiations to be willing to accept not less than $12,500, the appellant occupies the position of the offerer and appellee that of offeree. The appellee making the counter-proposal of $11,400 amounts to a rejection of the offer, which destroys all its vitality unless it can be said it is subsequently renewed. Even though it may be argued that appellant's attitude in the letter of May 29, 1935, wherein appellee was informed that the bondholders were still insisting on being paid the sum of $12,500 amounts to a re-offer, the oral testimony fairly establishes that after making the counter-proposal of $11,400 appellee made another counter-proposal of $12,000 which, had this been a renewal of the original offer, would likewise amount to a rejection thereof.

From the most liberal construction which can be placed upon the facts presented by the record, we are constrained to hold that, when appellee wrote her final letter, claiming to accept appellant's original offer, the appellant's offer had ceased to have any legal existence, and, as a result, there was nothing left to accept upon which the minds could meet to constitute a binding contract.

The courts hold that a revivor of a rejected offer is as essential a part of a contract as the original offer in the first instance. *Lewis v. Johnson, supra.*

The trial court erred in finding appellee to be the owner of the decree in foreclosure. The part of the decree over-

ruling the special appearance is affirmed; that finding appellee to be the owner of the decree of foreclosure is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

EDITH HUDSON, APPELLEE, V. EDWARD A. SCHMID ET AL., APPELLANTS.
272 N. W. 406

FILED APRIL 8, 1937. No. 29857.

1. Libel and Slander. In a case where an innuendo is necessary to make the meaning of alleged slanderous statements clear and understandable, such statements are not slanderous *per se*.
2. ———. A statement claimed to be slanderous for the reason that it is claimed that a charge of crime is made is not slanderous *per se* unless the language in and of itself is naturally and presumably capable of being understood by hearers as a charge of crime.
3. ———. Words to be slanderous *per se* must not only convey the expression of a wrong which is actionable, but also the nature of the particular wrong.
4. ———. When published words are ambiguous or are meaningless unless explained, or are *prima facie* innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words, and to allege and prove special damages.

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

Flansburg, Lee & Sheldahl, for appellants.

Lloyd E. Chapman, contra.

Heard before GOSS, C. J., DAY, PAINE and CARTER, JJ., and TEWELL and YEAGER, District Judges.

YEAGER, District Judge.

In this case, Edith Hudson, plaintiff and appellee, instituted action against Edward A. Schmid and the Iowa-Nebraska Light & Power Company, a corporation, defendants and appellants, to recover damages for slander. Plaintiff

based her right of recovery on certain statements which she alleged were, on or about the 24th day of April, 1935, made to her and in the presence of others by the appellant Edward A. Schmid, who at the time was engaged in the business of the Iowa-Nebraska Light & Power Company, a corporation, the other appellant.

The statement of the case to the extent necessary to a determination of this appeal is as follows: A petition was filed wherein plaintiff substantially set forth that at the time in question she was living at 811 Otoe street, Lincoln, Nebraska, with her parents; that on the date mentioned the defendant Edward A. Schmid came to the residence, and while there and while acting within the scope of his employment as an employee of the Iowa-Nebraska Light & Power Company, a corporation, made certain maliciously false and defamatory statements to the plaintiff and in the presence of Matilda Hudson, Davie Hudson and Jesse E. Shuff. That portion of the alleged statements with its innuendo pertinent to this inquiry is as follows: "We know you (referring to this plaintiff) have had a jumper on there and we are going to have you arrested (meaning that this plaintiff had been stealing electric current from the defendants and that she would be arrested)." The portions of the foregoing quotation in parentheses are set forth in the petition and instructions as innuendo. The defendants filed answers in which they denied the making of the alleged statements and further denied that the alleged slanderous words were in fact false and defamatory or that they were falsely made. On the issues being joined, a trial was had to a jury, which resulted in a verdict and judgment in favor of plaintiff and against the defendants for the sum of $500. From this judgment the defendants have appealed.

As grounds for reversal of the judgment of the district court, the appellants have set forth four assignments of error. We, however, find it necessary to discuss only the third assignment. This assignment deals with the question of whether or not the trial court was in error in the

giving of instruction No. 5. In the examination of this instruction it becomes necessary to examine also instruction No. 1. In instruction No. 1 the court limited the jury to a consideration only of the words: "We know you have had a jumper on there and we are going to have you arrested." This limitation is again found in instruction No. 5. No fault is found, nor could properly be found, with the limitation.

The complaint is directed at the following language used in instruction No. 5, wherein the court told the jury that the words hereinbefore quoted were libelous *per se*: "The words claimed to have been used, as set out in paragraph one hereof, are slanderous *per se*." It is the contention of appellants that the words which the court submitted were not slanderous *per se* and that as a necessary consequence, under her pleadings, the appellee, not having alleged any special damage, was not entitled to recover.

Appellants contend that this case comes within the application of the rule that, where an innuendo is necessary to make the meaning of alleged slanderous statements clear and understandable, such statements are not slanderous *per se*. *Kee v. Armstrong, Byrd & Co.*, 151 Pac. (Okla.) 572; *Callfas v. World Publishing Co.*, 93 Neb. 108, 139 N. W. 830; *Hays v. Mitchell*, 7 Blackf. (Ind.) *117; *Carter v. Andrews*, 16 Pick. (Mass.) 1. For the purpose of determining this question, it is necessary to examine the language which the court informed the jury was slanderous *per se*. The particular word upon which this examination must center is "jumper." Is the word in the sense used either alone or accompanied by a threat of arrest capable of being naturally and presumably understood as a charge of crime? If it is not so naturally and presumably capable of being understood by the hearers as a charge of crime, then the language so defined by the court was not slanderous *per se*. 36 C. J. 1151; *Kee v. Armstrong, Byrd & Co., supra; Central of Georgia Ry. Co. v. Sheftall*, 118 Ga. 865, 45 S. E. 687; *Shaw Cleaners & Dyers v. Des Moines Dress Club*, 215 Ia. 1130, 245 N. W. 231; *Owens v. Clark*, 154 Okla. 108, 6

Pac. (2d) 755; *Hays v. Mitchell, supra; Carter v. Andrews, supra.*

It is urged that the utterances of the language complained of amounted to a charge that appellee had been guilty of stealing or had been guilty of larceny of electric current. An examination of texts on the subject and reported cases does not disclose any case where the particular term has been employed. However, there are a number of cases wherein certain words are discussed with reference to whether or not, in the use to which they were put, they imported libel or slander *per se*. *Hays v. Mitchell, supra,* was an action for slander. In that case, the particular language which was the basis of the action was as follows: "You hooked my geese." The trial court instructed that the language was actionable *per se*. On review the court said: "We think this instruction was erroneous. The common and ordinary meaning of the word 'hook' is not steal; nor does its connection with the rest of the sentence naturally give it that signification or any other criminal meaning. Words not actionable in themselves may express a criminal charge by reason of their allusion to some extrinsic fact, or in consequence of being used and understood in a particular sense different from their natural meaning, and thus become actionable. And when such is the case, it is as necessary to prove the extrinsic fact, or the particular and offensive sense in which the words were used, as it is to establish the words themselves. The charge of the court was in violation of this principle."

In *Carter v. Andrews, supra,* also an action for slander, the basis for the action was the words, "We offer these books under a disadvantage, for the library has been plundered by Deacon James G. Carter of this town." In passing on the question of whether or not the language was slanderous *per se* the court said:

"The most common meanings of this term, to plunder, is to take property from persons or places, by open force, and this may be in a course of lawful war, or by unlawful hostility, as in the case of pirates or banditti. But in an-

other and very common meaning, though perhaps in some degree figurative, according to the general tendency of men to exaggerate and apply stronger language than the case will warrant, it is used to express the idea of taking property from a person or place, without just right, but not expressing the nature or quality of the wrong done. Like many such terms, as pillaging, rifling, pilfering, embezzling, swindling, peculation, and many other like ambiguous terms, which have not acquired, either in law or philology, a precise or definite meaning, they express the idea of wrongful acquisition, but not the nature of the wrong done."

It becomes apparent, in the light of precedent and authority, that the statement alleged to have been made to appellee herein did not, in and of itself, have the force and effect of an accusation of crime and more particularly an accusation of larceny.

It is contended that the threat of arrest accompanying the charge of possession of a "jumper" amounts to a slander *per se*. With this contention we cannot agree. Assumsuming that the language complained of expresses the idea of wrongful acquisition, it does not express or even suggest the nature of the wrong done. Words to be slanderous *per se* must not only convey the expression of a wrong which is actionable, but also the nature of the particular wrong. *Carter v. Andrews, supra.* The language singled out by the court in instruction No. 5 does not meet this test.

Unless the language complained of is slanderous *per se,* and we have concluded that it is not, appellee is not entitled to recover on the basis of the record, since in the petition no special damage is alleged. In the case of *Callfas v. World Publishing Co., supra,* the rule is laid down that, if published words are ambiguous or are meaningless unless explained, or are *prima facie* innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages.

The language quoted in instruction No. 5 not being slanderous *per se*, and the plaintiff and appellee not having alleged in her petition any special damage, it therefore becomes necessary to reverse the judgment and remand the cause to the district court for further proceedings in conformity with the decision herein.

REVERSED.

ALGERNON L. ANDERSON, APPELLEE, V. FORREST BYRD, DOING BUSINESS AS BYRD NURSERY COMPANY, ET AL., APPELLANTS.
272 N. W. 572

FILED APRIL 16, 1937. No. 29961.

1. Trial. Where the evidence on a material issue is conflicting, it is the duty of the court to submit the issues of fact to the jury.
2. ———: INSTRUCTIONS. "It is the duty of the trial judge to instruct the jury correctly upon the law as applied to the issues presented by the pleadings, if supported by the evidence, whether requested or not." *Hall v. Rice*, 117 Neb. 813, 223 N. W. 4.
3. Negligence: INSTRUCTIONS: PROXIMATE CAUSE. It is not necessary that the words "proximate cause" be used if the instructions contain a word or phrase or language conveying the same meaning.

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

De Lamatre & De Lamatre and *Dora Nelson*, for appellants.

A. W. Storms and *Frank A. Anderson, contra.*

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

GOSS, C. J.

Forrest Byrd, doing business as Byrd Nursery Company, and Howard Deckard, his employee, appeal from a judgment against them.

The action arose out of a collision November 26, 1935, about 10:30 in the morning, about half a mile east of Holdrege on paved highway No. 6, between plaintiff's Dodge coach and the truck of defendant Byrd. Defendant Byrd had a contract with the state highway department for the planting of trees on either side of the highway. His truck, driven by defendant Deckard, was traveling west carrying several other employees who had been doing work in connection with trees planted along the highway. Plaintiff was driving his coach east with three parties, going out to see a wreck on the railroad running south of and near the highway. They had about reached the point of the wreck when the collision occurred.

The petition alleged negligence in operating the truck of defendant Byrd at a dangerous rate of speed on the left side of the highway and left of its center line; without keeping a proper lookout; and so that it could not be stopped in time to avoid a collision.

The amended answer alleged that the accident was proximately caused by a dense and impenetrable cloud of smoke which settled over the road so that for several seconds prior to the collision it was impossible for either driver to see where he was going and that as a result the accident was unavoidable under the circumstances; that any injury sustained by plaintiff was due to the contributory negligence of plaintiff; that plaintiff negligently operated his car on the left side of the highway, left of the center line thereof, in such a manner as to collide with the left front and left side of the truck; that plaintiff operated his car without keeping a proper lookout, drove into the cloud of smoke at a high rate of speed and was negligent in not continuing to drive to the right of the center of the road, or, in the alternative, in not immediately bringing his car to a stop. Defendant Byrd counterclaimed for damages to his truck.

The trial resulted in a verdict and judgment for plaintiff for $7,450.

Fourteen errors are relied upon for reversal. They re-

late to excessiveness of the verdict, insufficiency of the evidence, and ten of them are concerned with alleged errors in instructions.

The only issues of negligence alleged by plaintiff that were submitted to the jury by the instructions of the court are: (1) That "defendant was driving said truck at a rate of speed which at the time and place and under the circumstances there existing was dangerous; (2) that the truck was being driven on the wrong or left-hand side of the highway; and (3) that it was being driven without a proper lookout being maintained by the driver thereof." This is quoted from the second instruction given by the court, but the parenthetical figures are ours.

It would take undue space to detail the testimony of the various witnesses. Suffice it to say that there was ample evidence (though disputed) from which the jury might conclude that, when the collision occurred, the truck of defendant Byrd was being driven with its left wheels considerably south of the black line marking the center of the pavement; that while the speed of the truck was perhaps not over 25 miles an hour, yet, considering the circumstances of the drizzle of rain, the wet pavement and the smoke coming from the engine or engines, the jury might infer that the speed was a dangerous rate of speed under the circumstances; and the facts might properly lead to the conclusion by the jury that Deckard, who was driving the truck, was not maintaining a proper lookout for a car coming from the west. He himself testified that he had been driving the truck in second gear but had shifted to high just before he entered the "cloud of smoke." He estimated that he went 75 to 100 feet in this smoke, saw plaintiff's car at a distance of 30 feet and turned his steering wheel to the right. At least one other witness furnished testimony tending to establish that the truck was enveloped for a period in the smoke.

The witnesses in plaintiff's car furnished testimony from which the jury might find that they saw the truck approaching, that it was not very much obscured by smoke, that

as it neared them it turned and came diagonally across the black center line of the pavement and struck their car on the south side of the pavement. This situation in the evidence constrained the trial judge to submit the cause to the jury. There was conflict in the evidence, but it was particularly a jury case. For that reason the trial court properly overruled the motions of defendants for a directed verdict both at the end of plaintiff's evidence and at the end of all the evidence.

It is not a case in which it could be said that the collision or accident was unavoidable. Either one or both parties caused it by negligence. It was a question for the jury to decide under proper instructions.

The most serious objection made by defendants raises the question relating to proximate cause. Defendants had pleaded that the proximate cause of the collision was the smoke. There was evidence on the subject, though conflicting. Nowhere in the instructions to guide the deliberations of the jury was the term "proximate cause" used. Nor can we find that this theory of defendants, that the existence of smoke from the railroad engine or engines nearby was the proximate cause of the collision, was otherwise stated in the language used by the court in its instructions. It is not necessary that the words "proximate cause" be used if the instructions contain a word or phrase or language conveying the same meaning.

It is true that defendants requested no instruction by the court on the subject of proximate cause, but "It is the duty of the trial judge to instruct the jury correctly upon the law as applied to the issues presented by the pleadings, if supported by the evidence, whether requested or not." *Hall v. Rice*, 117 Neb. 813, 223 N. W. 4. See *Brooks v. Thayer County*, 126 Neb. 610, 254 N. W. 413.

In view of the conclusion we have reached, it is not necessary to discuss the other errors assigned. The judgment of the district court is

REVERSED.

NORRIS P. CRAFTS, APPELLANT, V. IRVING E. SAWTELLE, APPELLEE.

272 N. W. 567

FILED APRIL 16, 1937. No. 29784.

1. **Appeal.** Where appellant did not preserve the evidence by a bill of exceptions, the appeal nevertheless may present the insufficiency of the pleadings to support the judgment in favor of appellee.
2. **Vendor and Purchaser: CONTRACT: BREACH: MEASURE OF DAMAGES.** "In an action by the vendor to recover from the vendee damages for a failure on his part to perform the contract, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach." *Wasson v. Palmer*, 17 Neb. 330, 22 N. W. 773.

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

Anson H. Bigelow, for appellant.

J. Gerald MacVeigh and *Fischer, Fischer, Fischer & Fischer, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $820.33 for breach of a contract obligating defendant to purchase from plaintiff the north half of lot 9, block 21, West Benson, an addition in Douglas county, and to pay therefor $1,800 in monthly instalments of $10 each.

Plaintiff pleaded the contract of sale for $1,800 and alleged that defendant took possession, made 10 monthly payments, vacated the premises, breached the contract and refused to comply further with its terms; that plaintiff declared a breach of the contract; that the market value of the real estate did not exceed $1,250 at the time of the breach, and that his damages after credits for payments were $820.33, including interest, waste and nonpayment of taxes.

The answer of defendant contained a general denial and pleas that he was induced to enter into the contract by

fraudulent representations upon which he relied; that the value then was not more than $1,000; that through the fraud he promised to pay $1,800. The reply to the answer contained a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of defendant. From a judgment of dismissal plaintiff appealed.

Plaintiff is in the supreme court without a bill of exceptions preserving the evidence and therefore the sufficiency of the pleadings to support the verdict in favor of defendant is the question presented on the face of the clerk's transcript of the proceedings below.

The district court did not submit to the jury the issue of fraud and this left to them the single issue of damages, since defendant alleged in his answer that he signed the contract agreeing to pay $1,800 for the real estate; that he entered into possession; that he moved out and gave up the place after paying $100. The answer does not allege that the market value when defendant surrendered possession was equal to the purchase price less payments. With fraud eliminated, as it was by instructions of the trial court, the measure of damages was the difference between the agreed price and the market value of the property when the contract was breached, less payments which plaintiff allowed on his claim.

The general rule was stated in an early case as follows:

"In an action by the vendor to recover from the vendee damages for a failure on his part to perform the contract, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach." *Wasson v. Palmer*, 17 Neb. 330, 22 N. W. 773. See, also, *Ridgeway v. Eastern Colorado Development Co.*, 105 Neb. 288, 180 N. W. 587.

On the record presented there is no theory of the case on which the pleadings, in connection with the instructions given, will support a verdict in favor of defendant. For this reason the judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED.

EDWARD B. ROGERS, APPELLANT, V. AUGUST L. REBBE ET AL., APPELLEES.
272 N. W. 565

FILED APRIL 16, 1937. No. 29895.

Fraudulent Conveyances: EQUITY. Equity does not relieve rival litigants from the consequences of their own fraud in becoming parties to or participants in a fraudulent conveyance which unlawfully delays creditors in the collection of grantor's debts, but, on grounds of public policy and protection of the judiciary, leaves them in the position in which they placed themselves.

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

Joseph E. Daly, for appellant.

Abbott, Dunlap & Corbett, contra.

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

ROSE, J.

This is a suit in equity for a decree adjudging a warranty deed to land to be a mortgage, requiring grantees to account for rents and profits and restoring title and possession to grantor, the plaintiff. The district court dismissed the suit and plaintiff appealed.

The land, a 160-acre farm in Dodge county, was described in the deed as the west half of the northeast quarter and the north half of the southeast quarter of section 2, township 18, north of range 7, east of the 6th P. M., valued by plaintiff at $24,000. The deed was dated and recorded October 5, 1926. Edward B. Rogers, plaintiff, was grantor, and August L. Rebbe and Louis J. Rebbe, defendants, were grantees. The wife of each grantee and Fred Derkin, tenant, were also defendants.

In the petition it was alleged in substance that plaintiff desired a loan not exceeding $10,000 to aid him in settling with creditors for an unpaid judgment and other claims against him; that he applied to grantees for a loan, which they agreed to make; that the deed was intended as, and is,

a mortgage securing the loan; that grantees, pursuant to arrangements, lent him $4,600; took and still retain possession of the land; collected and kept rents and profits exceeding the loan, interest and taxes; refused to account to plaintiff on demand; failed to restore possession or to reconvey the title. Plaintiff offered to pay grantees the unpaid debt, if any, owing by him to them upon an accounting and prayed for restoration of his title and other equitable relief to which he is entitled under facts pleaded in detail.

For the purposes of the appeal the answer of grantees may be summarized as follows: Plaintiff acquired his title by inheritance from his deceased wife, who was a sister of grantees, and he declared to them his purpose to restore the title by deed to the Rebbes. Plaintiff transferred this land to grantees and his other property to third persons with the intention of cheating and defrauding his creditors and of delaying them in the collection of their claims, grantees being without knowledge of the fraudulent intent. A 9,000-dollar judgment was entered against plaintiff and he owed other unpaid debts. December 1, 1926, a judgment creditor of his sued grantees to cancel their deed as a conveyance to cheat and defraud creditors. December 6, 1926, grantees gave plaintiff $4,600 to enable him to compromise the judgment and his other debts—this for the protection of their own title. Grantees did not lend plaintiff any money and there was no agreement or understanding that the deed should operate as a mortgage or stand as security for a debt. They accepted the deed, took possession believing the land, which was formerly owned by their deceased sister, was transferred to them for the purpose of restoring the title to the Rebbes according to the declared intention of grantor. They afterward made permanent and valuable improvements with that understanding. This is a mere summary of facts pleaded in defense. Further details are not necessary to a decision.

Is plaintiff entitled to equitable relief? The evidence definitely proves that plaintiff executed and delivered the

deed in controversy for the unlawful purpose of delaying his creditors in the collection of their claims, if not with the positive intent to cheat or defraud them. He did not receive for the deed, when executed, delivered and accepted, any money or other property as consideration. The evidence will not admit of any finding to the contrary. Grantees pleaded that they did not lend grantor any money and that they gave him $4,600 to protect the title which the deed conveyed. The evidence proves that, with knowledge of the fraud on the part of grantor, grantees retained the fruits of the fraudulent transaction which they pleaded in defense; failed to reconvey the title or to account for rents and profits or to permit the land to be subjected to the payment of the judgment against grantor. They were participants in the fraud which delayed the collection of his debts. The plea that grantor intended to defraud his creditors does not aid grantees. Equity does not relieve rival litigants from the consequences of their own fraud in becoming parties to or participants in a fraudulent conveyance which unlawfully delays creditors in the collection of grantor's debts, but, on grounds of public policy and protection of the judiciary, leaves them in the position in which they placed themselves. Plaintiff and defendants alike may be denied relief in a situation of this kind on the court's own motion as soon as such fraud is positively disclosed at the trial. A dismissal of the suit in such a case is not ordered for the purpose of sustaining the defense but for turning out of court all participants in the fraud. These rules of equity are of such universal application as to make reference to precedents unnecessary.

AFFIRMED.

EBER M. STEEVES ET AL., APPELLANTS, V. STANLEY J. NISPEL ET AL.: JOHN HALLQUIST, APPELLEE.

273 N. W. 50

FILED APRIL 16, 1937. No. 29803.

1. **Mortgages:** NOTICE. Actual knowledge of the existence of a real estate mortgage is as binding as constructive notice thereof supplied by the duly recorded instrument.
2. ———: EXTENSION. "A new agreement, upon a sufficient consideration, extending the time of the payment of a note and mortgage to a day certain, has the effect, in equity, of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition." *Eby v. Ryan*, 22 Neb. 470, 35 N. W. 225.
3. ———: LIMITATIONS. In determining the period of limitation in an action to foreclose a real estate mortgage given for the security of a promissory note, section 20-202, Comp. St. 1929, should be construed in connection with section 20-216, Comp. St. 1929.
4. ———: ———. Ordinarily, under section 20-216, Comp. St. 1929, the owner of the equity of redemption has authority to bind the property by payment or contract in writing, and a payment by him on the mortgage debt, or a promise to pay the same in writing, before the statute has run is binding on the property, and tolls the statute as against subsequent mortgagees with notice.
5. **Statutes:** REPEAL. "Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature." *Schafer v. Schafer*, 71 Neb. 708, 99 N. W. 482.
6. **Limitation of Actions.** Sections 20-202 and 20-216, Comp. St. 1929, together with other cognate provisions of our recording act, construed as in *pari materia*, and *held* that the provision of section 20-216, Comp. St. 1929, viz., that, "in any cause founded on contract, when * * * (as to) an existing liability, debt, or claim, * * * any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such * * * promise," remains in full force and effect.
7. ———. The plaintiffs' cause of action based on the note and mortgage in suit, and the written extensions thereof, was not barred by the statute pleaded, but remained in full force and effect.

APPEAL from the district court for Deuel county: ISAAC J. NISLEY, JUDGE. *Reversed, with directions.*

Heaton & Heaton, R. L. Smith and *George H. Risser,* for appellants.

Rolfson & Hendricks and *B. E. Hendricks, contra.*

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

EBERLY, J.

This is an action in equity instituted by Eber M. Steeves and Clinton D. Dickson against Stanley J. Nispel, Carl I. Hallquist and Josie M. Hallquist, his wife, and John Hallquist, et al., defendants, to foreclose a certain real estate mortgage securing the repayment of $6,000 and interest, dated July 1, 1917, executed by Stanley J. Nispel, single, which, by its terms, originally matured July 1, 1922. This action was commenced on March 14, 1935. The petition was in the usual form, but contained additional averments to the effect that the maturity of the original writing obligatory had been extended by the terms of three, successive, unrecorded, extension agreements in writing, in due form, each duly executed by the then owner of the mortgaged premises, respectively, on May 26, 1922, for the period of two years from the date of original maturity; on August 30, 1924, for the period of five years from the date to which said maturity date had been extended by the agreement of May 26, 1922; and on or about July 1, 1929, for the period of five years from that date. Each of these extension agreements in writing, together with the unpaid interest coupons attached thereto, were set out in the petition verbatim, together with the condition of the original mortgage. A breach of the terms of these writings was alleged in proper form, the pleading closing by the prayer for usual relief incident to foreclosure actions. All defendants save and except John Hallquist defaulted. The last-named party, who is the father of Carl I. Hallquist, in his pleading denied generally the allegations contained in the petition; alleged

affirmatively that plaintiff's action was not commenced within the time limited by section 20-202, Comp. St. 1929, and as to the answering defendant was barred thereby; and by cross-petition alleged the ownership of a mortgage covering the premises in suit securing the payment of $9,830, evidenced by a promissory note in writing bearing interest at 5 per cent. per annum, which note and mortgage securing the same had been on August 27, 1932, for a valuable consideration, duly executed and delivered to said John Hallquist by Carl I. Hallquist and wife, and on said date duly recorded as provided by law. This defendant further alleged that his mortgage lien was senior and superior to the lien of plaintiffs' mortgage, and prayed for a foreclosure of his mortgage, and that the lien thereof be adjudged senior and superior to the lien of plaintiffs' mortgage.

Issues were joined on these allegations, and, upon trial to the court, judgment was entered for the defendant as by him prayed. From the order of the trial court overruling their motion for a new trial, plaintiffs appeal.

No serious conflict is disclosed by the evidence as to the main issues involved. To summarize the proof, it may be said that on and prior to July 1, 1917, defendant Stanley J. Nispel, a single man, was the owner of the north half of section thirty-four, township thirteen, range forty-three west of the 6th P. M., in Deuel county, Nebraska. On the day mentioned he made and delivered to Samuel H. Steeves, for a valuable consideration, his promissory note for the sum of $6,000 with interest at 6 per cent. from date, payable to Samuel H. Steeves on July 1, 1922; and that contemporaneously therewith Nispel, to secure the payment of said note, executed and delivered to the payee thereof his real estate mortgage, mortgaging the premises above described, which was duly recorded in the office of the register of deeds of Deuel county as by law provided. This mortgage, and indebtedness secured thereby, was thereafter duly assigned to plaintiffs, who are now the owners thereof. Thereafter Stanley J. Nispel conveyed the prem-

ises above described to one James Gammell, who, in turn, on June 26, 1918, conveyed this real estate to one Carl Buehler. Said Buehler and his wife, Leona Buehler, in consideration of the extension of time of payment of the original $6,000 note and mortgage, executed and delivered to the then owner of the mortgage indebtedness their extension agreement, in writing, and thereby extended the maturity date of the mortgage indebtedness from July 1, 1922, to July 1, 1924. Thereafter said Carl Buehler and wife, Leona Buehler, entered into their second extension agreement, in writing, with the then owner of the mortgage indebtedness, evidenced by the note and mortgage of July 1, 1917, by the terms of which the maturity of said indebtedness was again extended from July 1, 1924, to July 1, 1929. The premises herein described were thereafter duly conveyed by Carl Buehler and wife to Carl I. Hallquist, who since said conveyance has been, and is now, the owner in fee simple thereof. On or about July 1, 1929, Carl I. Hallquist and his wife made, executed and delivered to plaintiffs herein an extension agreement in writing, with interest coupons attached, wherein Carl I. Hallquist and his wife, in consideration of the extension of the time for payment of the note of $6,000 for a term of five years from July 1, 1929, agreed to pay interest on said sum from July 1, 1929, as evidenced by interest coupons attached to this extension agreement. This extension agreement, omitting the interest coupons attached thereto and forming a part thereof, is in the following form:

"Extension Agreement and Coupons.

"Chappell, Nebraska, July 1st, 1929.

"The undersigned hereby covenant that Carl I. Hallquist, the legal owner of the premises conveyed to Dickson and Steeves, mortgagees, by a mortgage deed dated July 2d, 1917, and recorded in book 15 at page 404 of the mortgage records of Deuel county, Nebraska, made by Stanley J. Nispel, which mortgage deed was given to secure the payment of a note or bond for the sum of $6,000 (of which amount none has been paid), payable July 2d, 1922, to the

order of Samuel H. Steeves, upon which note or bond there remains unpaid the sum of $6,000, of principal money, and in consideration of the extension of the time for the payment thereof for the term of five years, hereby agree to pay interest upon said principal sum from the day whereon the same, by the terms of said note or bond becomes due, at the rate of 7 per cent. per annum, payable annually, for and during said term of extension according to the tenor and effect of the extension coupons hereto attached; both principal and interest to be paid, when due, at Panama, Nebraska, and in case of default in payment of any of said extension coupons, or in case of nonpayment of taxes or breach of any of the covenants contained in said mortgage deed, it shall be optional with grantee or assigns to declare said principal sum immediately due and payable.

"I further agree to pay all taxes levied upon this mortgage or the note which this mortgage is given to secure, before the same becomes delinquent. The grantor is given the privilege of paying $100 or any multiple thereof, on any interest paying date.

"Witness ————————.

"Carl I. Hallquist
"Josie M. Hallquist."

The two previous extension agreements were executed upon the same form of blank, each in the presence of a witness who affixed his signature thereto, evidencing that fact; and these two previous extension agreements embody identical terms. The third extension agreement, above quoted, contained the same terms, save and except that the words, "the grantor is given the privilege of paying $100 or any multiple thereof, on any interest paying date," are added. To each of these extension agreements, interest coupons covering the period of the extension provided for were executed by the then owners of the mortgaged land and formed a part thereof. None of these extension agreements was acknowledged before an officer possessing the requisite authority to take acknowledgments, and interest accruing by the terms of these extension agreements and

evidenced by coupon notes attached thereto was paid up to and including the interest falling due on July 1, 1931. None of the extension agreements was recorded prior to August 27, 1932, the date of defendant John Hallquist's mortgage. The original mortgage given on July 1, 1917, or a sworn copy thereof, was not refiled in the office of the recorder of deeds of Deuel county, Nebraska.

The evidence also discloses that defendant Carl I. Hallquist purchased this land for $14,000 in 1929 (March settlement). Defendant John Hallquist, father of Carl I. Hallquist, was at that time informed of the existence of the unpaid mortgage of $6,000 then on the land, and that this purchase price of $14,000 was met by a deduction of the $6,000 mortgage and the payment of $8,000 in cash. The father, John Hallquist, loaned his son, Carl I. Hallquist, $4,000 which was used to make up the $8,000 cash paid on the purchase price. The evidence is direct and positive that the Dickson and Steeves mortgage of $6,000, now in suit, was what was referred to in the mortgage of $4,000, which secured this loan of that amount, given by Carl I. Hallquist and wife to his father, John Hallquist, under date of March 4, 1929, upon the same lands, by the employment of the following words in such mortgage, viz.: "This mortgage is given subject to a mortgage for $6,000 in favor of Samuel H. Steeves."

Therefore, it appears without question that on March 4, 1929, defendant John Hallquist had actual knowledge of the unpaid mortgage of $6,000 in suit, and that his son had received the benefit of a deduction thereof from the agreed purchase price of the lands the son had purchased.

In this connection, the following testimony by Carl I. Hallquist is also for consideration: "Q. It has been stipulated that on July 1, 1929, you gave to plaintiffs here, Steeves and Dickson, an extension agreement, extending the time of payments on this mortgage, and that also you have paid interest up to July 1st of 1931. Did you ever discuss that matter with your father, John Hallquist? A. Oh, I have an idea that I told him about it, but I don't know

whether I discussed it or not. Mr. Hendricks (John Hallquist's attorney): If you remember, say you remember, and if you don't, say, you don't remember. A. No; I don't remember that it was discussed and taken up in a discussion."

Carl I. Hallquist testified that he had borrowed $5,000 on his "home place;" that it was on a second mortgage; that he had also borrowed $4,000 from his father on the premises here in suit which was likewise a second mortgage. Both mortgages were due when the mortgage to his father for $9,830 was executed in 1932.

Carl I. Hallquist's explanation of the 1932 mortgage given to his father is that on August 27, 1932, he and his wife executed to his father a new note of $9,830, and a mortgage securing the same covering the half section in suit. In arriving at this sum, the $4,000 and the interest accrued thereon, secured by the mortgage of 1929 owned by his father, were added to the $5,000 note and accrued interest thereon, which had its origin in 1915 and was secured by a second mortgage to his father on his "home place." The new mortgage of August 27, 1932, covered the lands here in suit, and was made after he had inspected the records in Deuel county, Nebraska, and ascertained that the $6,000 mortgage of plaintiffs "was outlawed."

He also testified: "Q. The mortgage that you gave him on August 27th of 1932? A. Yes, sir. Q. Had you previously discussed with your father about giving him a mortgage on this real estate? A. No. Q. You hadn't discussed it with him? A. No. * * * Q. Did you ever talk with any one about waiting until after July 1st of 1932 to give your father another mortgage? A. No, sir. Q. You hadn't? What were the facts in your mind, or the knowledge that you had that caused you to believe that another mortgage on this half section would be better security? A. Well, because the $6,000 was outlawed. Q. Was outlawed? A. Yes, sir. * * * Q. Did you say anything to him (John Hallquist) about the Steeves mortgage, the mortgage that is under foreclosure here? A. I told him what I found on the records.

Q. You told him what you found on the records? A. Yes, sir."

John Hallquist did not appear as a witness or testify in this case. It is clear from the foregoing that he was not only put on notice as to the existence of plaintiffs' $6,000 mortgage, but must be deemed to have had actual knowledge that it was unpaid, that it had been extended and interest paid thereon at least to July 1, 1929, and that it was undischarged of record when the mortgage of 1932 was delivered to him.

Mortgage extension agreements are instrumentalities of commerce, and their legal incidents are established with unanimity in many jurisdictions.

In 41 C. J. 808, the following appears:

"An agreement by a mortgagee to extend the time for payment of the debt secured by a mortgage, whether indorsed on the instrument or otherwise evidenced, will continue the lien of the mortgage and all his rights and remedies thereunder for the new period. Such agreement may be made without the formality of a sealed instrument; it may be made out by a mere parol promise, unless otherwise provided by statute; but in any case it must be clearly shown and not left to mere inference or conjecture, and it must be supported by a sufficient consideration. But these facts being established, the agreement will prevent the mortgagee from taking proceedings to enforce the mortgage before the end of the extended period. The mortgage is not discharged, although the extension of time is accompanied by or coupled with an increase of the rate of interest. The mere extension of the time for the payment of a mortgage debt does not waive the other terms of the mortgage, such as an agreement by the mortgagor to pay the taxes."

In *Eby v. Ryan*, 22 Neb. 470, 35 N. W. 225, which, among other things, involved the rights of third parties to an extension agreement (including the grantee of the mortgaged premises), Reese, J., in delivering the opinion of this court, says in part:

"It is not contended, nor could it be, that there was not sufficient consideration to sustain the agreement to extend the time of the maturity of the note and mortgage. The time of payment being extended, the right to foreclose is suspended until the expiration of the extended term, unless default be thereafter made. The extension of the time of payment has the effect in equity of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition. *Insurance Co. v. Bonnell,* 35 Ohio St. 365. It follows that, if defendant in error had the right to foreclose the mortgage, it existed by virtue of some default occurring subsequent to the agreement for extension."

Therefore, it is obvious that the three mortgage extension agreements involved in the present proceeding were valid instruments, binding upon the parties and those to whom notice or knowledge was imputed. In fact, the actual, effective, subsisting mortgage in suit, in equity, was formed of two instruments, viz., the original mortgage of 1917 and the extension as to which no cause of action ever arose, or under the facts could have arisen, until 1931.

The provisions of chapter 76, art. 2, Comp. St. 1929, which include our recording act, appear to be involved in the present case. Under such provisions all mortgages are required to be recorded and shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith. Comp. St. 1929, sec. 76-218.

A subsequent mortgagee is a "subsequent purchaser" within the meaning of the last-named section. *Dorr v. Meyer,* 51 Neb. 94, 70 N. W. 543. But we have also announced the rule that actual knowledge of the existence of a real estate mortgage is as binding as constructive notice thereof supplied by the duly recorded instrument. *Bradford v. Anderson,* 60 Neb. 368, 83 N. W. 173; *Gabel Lumber Co. v. West,* 95 Neb. 394, 145 N. W. 849; *Mulligan v. Snavely,* 117 Neb. 765, 223 N. W. 8. In the instant case the exten-

sion agreements involved were not recorded, and were not eligible to record. Comp. St. 1929, sec. 76-219. However, one with actual notice is not affected by failure to record. *National Mutual Bldg. & Loan Ass'n v. Blair,* 98 Va. 490, 36 S. E. 513.

This court has held that the recording acts, and not the law merchant, determine the rights of an assignee of mortgage notes, as to and in land mortgaged to secure the payment thereof. *First Nat. Bank of Falls City v. Edgar,* 65 Neb. 340, 91 N. W. 404.

On the state of facts before us, appellee contends that after ten years from the date of the maturity of the mortgage, unless within said period the mortgage is refiled for record, the right of action for foreclosure is not only barred, but the lien thereof ceases absolutely, as to subsequent encumbrancers for value; that notice of the earlier mortgage is immaterial; and that the real estate mortgage of 1917 having never been refiled, as to appellee, the lien thereof is junior to his mortgage of 1932. In support of such contentions appellee relies on the provisions of section 20-202, Comp. St. 1929, and in particular that portion thereof first incorporated therein by chapter 64, Laws 1925, which first came into force and effect on April 1, 1925. Thus, we have presented for construction a remedial statute.

"In construing a remedial statute three things must be considered, viz.: The old law, the mischief, and the remedy." *Clother v. Maher,* 15 Neb. 1, 16 N. W. 902. See, also, *Harmon v. City of Omaha,* 17 Neb. 548, 23 N. W. 503.

But, "In order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one." *Campbell v. Youngson,* 80 Neb. 322, 114 N. W. 415.

So too, all statutes in *pari materia* must be taken together and construed as if they were one law, and, if possible, effect be given to every provision. *Hendrix v. Rieman,* 6 Neb. 516; *State v. Babcock,* 21 Neb. 599, 33 N. W. 247;

Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822; *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689, 82 N. W. 26; *Logan County v. Carnahan*, 66 Neb. 685, 95 N. W. 812; *State v. Royse*, 71 Neb. 1, 98 N. W. 459; *State v. Omaha Elevator Co.*, 75 Neb. 637, 106 N. W. 979.

Previous to April 1, 1925, the limitation prescribed for civil actions of this nature was: "An action for the recovery of the title or possession of lands, tenements or heriditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued." Comp. St. 1922, sec. 8507. In this connection, section 20-216, Comp. St. 1929, which has been retained unchanged since 1866, provides: "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise." These two sections were before this court in *Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337, and the following principles were there announced:

"In determining the period of limitation in an action to foreclose a real estate mortgage given for the security of a promissory note, section 6 of the Code of Civil Procedure (now section 20-202, Comp. St. 1929) should be construed in connection with section 22 of such Code (now section 20-216, Comp. St. 1929)."

And, "Where, after the maturity of a note secured by a real estate mortgage, interest payments are made annually on such note, a right of action accrues on the mortgage at any time within ten years after the date of the last payment on said note."

See, also, *Gillilan v. Fletcher*, 80 Neb. 237, 114 N. W. 161; *McLaughlin v. Senne*, 78 Neb. 631, 111 N. W. 377.

In *McLaughlin v. Senne, supra*, the additional principle was also approved, viz.: "Ordinarily the owner of the equity of redemption has authority to bind the property by such

payment, and a payment by him on the mortgage debt before the statute has run is binding on the property, and tolls the statute as against a subsequent mortgagee with notice of the prior mortgage."

On principle, it is obvious that the clause, "an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing," as employed in section 20-216, Comp. St. 1929, is equally potent to toll the statute, and in any such event "an action may be brought * * * within the period prescribed for the same, after such payment, acknowledgment, or promise." Such, indeed, was the old law as it existed prior to April 1, 1925.

In the consideration of section 20-202, Comp. St. 1929, as now amended, it will be noted that the title of the 1925 enactment is "An act to amend" certain definite sections of the Compiled Statutes of 1922. The body of this act may constitutionally accomplish no other purpose. The unquestioned rule in this jurisdiction is: "Where the title to a bill is to amend a particular section, no amendatory legislation not germane to the subject-matter of the original section proposed to be changed is permissible." *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401. See, also, *Preston v. Stover*, 70 Neb. 632, 97 N. W. 812; *Day v. Metropolitan Utilities District*, 115 Neb. 711, 214 N. W. 647.

In the original plan of our Code of Civil Procedure, section 6 of title II (now section 20-202, Comp. St. 1929) was devoted to a declaration of the statute of limitations on recovery of real estate; and the enforcement of mortgages was included. Section 22 of such title II (now section 20-216, Comp. St. 1929) was originally enacted exactly as it now appears. Obviously, the scope of such sections 6 and 22 would be correctly determined by a proper construction of both with reference to the text of each and the context of the original enactment in which both are included. It would seem that what was clearly allocated to section 22 as originally enacted would not be deemed germane to section 6 of our original Civil Code, and *vice versa*.

But this court will not determine an act unconstitutional unless necessary for the proper disposition of the case in which it arises. *Howarth v. Becker,* 131 Neb. 233, 267 N. W. 444. However, this court is committed to the doctrine, viz.:

"Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature." *Schafer v. Schafer,* 71 Neb. 708, 99 N. W. 482. See, also, *State v. Harris,* 100 Neb. 745, 161 N. W. 253.

Reading the terms of the amendment of 1925 in the light of the restrictions imposed by the title of the legislative act which enacted it, and with proper regard for provisions of our statutes in *pari materia,* it is obvious that the only words thereof which might be deemed irreconcilable with, and repugnant to, any part of section 20-216, Comp. St. 1929, are the following: "Said period of ten years shall not be extended by nonresidence, legal disability, *partial payment, or acknowledgment of debt.*" (Italics ours.)

But we are here concerned with a written extension agreement, the terms of which constitute a promise to pay the indebtedness secured and evidenced by the note and mortgage in suit. The language of the 1925 amendment obviously does not include it, nor are the terms employed by this legislation repugnant to that portion of section 20-216, Comp. St. 1929, which, in effect, provides: "In any cause founded on contract, when * * * (as to) an existing liability, debt, or claim, * * * any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such * * * promise." It follows that sections 20-202 and 20-216, Comp. St. 1929, and other cognate enactments, properly construed, sustain the cause of action of plaintiffs in the instant case, as against the contentions of defendant John Hallquist; that the lien of plaintiffs' mortgage is senior to the lien of the mortgage of that defendant; that the due enforcement of plaintiffs' note and mortgage in

suit as to all defendants is not barred by the statute of limitations. Thus, the trial court erred in adjudging the lien of plaintiffs' mortgage to be junior to the lien of the mortgage of defendant John Hallquist.

The judgment of the district court is, therefore, reversed and the cause remanded, with directions to enter a decree of foreclosure and sale in favor of plaintiffs, determining their lien to be senior and superior to the rights and claims of all the defendants.

REVERSED.

ROSE S. MABRY ET AL., APPELLEES, V. MINNIE MUDD ET AL., APPELLANTS: SIDNEY W. SMITH, APPELLEE.
272 N. W. 574

FILED APRIL 16, 1937. No. 29892.

1. Partition: ATTORNEY'S FEES. Where partition proceedings are amicable and for the benefit of all the parties in interest, the court may allow a reasonable attorney's fee to be paid by the parties in proportion to their interest in the property involved.
2. Appeal. When the trial court fails to make a just and equitable allowance of attorney's fees, and such failure amounts to an abuse of judicial discretion, this court will, in a proper proceeding, correct it.

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

Gaines, McLaughlin & Gaines, for appellants.

Sidney W. Smith, Jay Gibbs and *Hollingsworth & Francis, contra.*

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

CARTER, J.

This is a partition suit commenced by plaintiffs to secure the partition of certain property in Douglas county. Upon confirmation of the referee's sale, the trial court allowed plaintiffs' attorney an attorney's fee in the amount of

$5,810. From the order allowing this fee, certain of the defendants herein designated as appellants have appealed to this court.

The record discloses that on September 20, 1935, Sidney W. Smith, as attorney for the plaintiffs, commenced this suit in the district court for Douglas county praying for the partition of the property set forth in the petition and that, in the event that said property could not be equitably partitioned, it be sold and the proceeds distributed to the persons entitled thereto according to law. The record further discloses that said property was sold by the referee on February 7, 1936, for the sum of $58,100. On February 13, 1936, plaintiffs moved for a confirmation of the sale and for an order fixing the fees of the attorney and the referee. On February 17, 1936, the court confirmed the sale and fixed the fees of the referee at $750 and those of the attorney at $5,810. On April 7, 1936, the referee filed his final report, and on April 17, 1936, the appellants herein filed a motion objecting to the allowance of the attorney's fee in the amount of $5,810 and asked the court to set aside the allowance. The trial court overruled this motion on April 29, 1936, and approved the final report of the referee. On the same date a notice of appeal from the allowance of the attorney's fee was filed in the district court in said suit. No bill of exceptions was filed in the appeal. The only question presented is whether the allowance of the attorney's fee in the sum of $5,810 is sustained by the record before us.

The record discloses that the partition suit was one for the benefit of all the parties in interest and of an amicable nature. In such a case, the court may allow a reasonable attorney's fee to be paid by the parties in proportion to their interests in the property involved. *Johnson v. Emerick*, 74 Neb. 303, 104 N. W. 169.

Appellee contends that, as there is no bill of exceptions, there is nothing for this court to consider. The record discloses that the proceeding was the usual kind commenced in such cases. There was no unusual question of fact to be

determined nor any peculiar or intricate proposition of law to be solved. The trial judge was undoubtedly familiar with the professional work required and could not have been materially assisted in arriving at a proper fee by the taking of evidence. In such a case, the trial court has before it the facts necessary upon which to determine the reasonableness of the fee to be fixed. If special or unusual services were required of the attorney, we can see where the adducing of evidence might be required to sustain the finding of the court, but such does not appear to be the case in the suit at bar.

The question resolves itself into this: Did the trial court abuse its discretion in allowing an attorney's fee of $5,810 in a partition suit involving no unusual or unique questions of fact or law where the property involved sold for $58,100?

It is impossible for us to lay down a rule as to the allowance of attorneys' fees that would apply in all cases. The amount must necessarily be left to the sound judicial discretion of the trial court. On the subject of judicial discretion, Lord Mansfield says: "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular." *Rex v. Wilkes*, 4 Burr. (Eng.) 2527. See, also, *Pettegrew v. Pettegrew*, 128 Neb. 783, 260 N. W. 287. When the trial court fails to make a just and equitable allowance or apportionment of attorney's fees, it is for this court in a proper proceeding to say whether such failure amounts to an abuse of discretion, and when such an abuse exists to correct it.

The following cases are similar to the one at bar except as to the sale price of the property sought to be partitioned. In *Forsee v. McGuire*, 109 Mo. App. 701, 83 S. W. 548, the property sold for $80,000 and an attorney's fee of $1,500 was allowed. In *Connor Realty Co. v. St. Louis Union Trust Co.*, 176 Mo. App. 260, 161 S. W. 865, the property sold for $24,000 and an attorney's fee of $720 was allowed. In *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, the prop-

erty sold for approximately $100,000 and the court allowed an attorney's fee of $5,000. In *Murray v. Hays,* 51 Utah, 211, 169 Pac. 264, the property sold for $350,000 and $10,000 was allowed the attorneys by the court. In *McMullin v. Doughty,* 68 N. J. Eq. 776, 55 Atl. 115, the attorneys obtained an actual partition of 13,000 acres of land. In the course of the opinion in that case the court said: "As the cause proceeded it was disclosed by both parties that the extent of the lands was so great, and the documentary evidences of title in such a confused condition, that accuracy of description was almost impossible. The difficulties of the procedure became so great as to threaten the efficiency of the partition." After a completion of the work, the court fixed the attorney's fee at $400. In *Dent v. Foy,* 210 Ala. 160, 97 So. 627, the property sold for $65,000 and an attorney's fee of $2,000 was allowed. In *Rackemann v. Tilton,* 236 Ill. 49, 86 N. E. 168, the property sold for $200,000 and an attorney's fee of $1,500 was approved by the court. While this court is not bound to follow any one or all of the above cited cases in determining a reasonable fee for the attorney in the case at bar, yet we are of the opinion that the authorities cited conclusively show that the amount allowed in the instant case is excessive and that the trial court abused that sound judicial discretion reposed in it that ought to be guided by the law and its analogies when applied to a given set of facts.

After a consideration of the services rendered, the nature of the litigation, the amount involved, the results obtained, and the care and diligence exhibited, we have concluded that a maximum fee for such services should not exceed the sum of $1,500. The allowance of the trial court is therefore reduced to $1,500 and the decree of the trial court, as thus modified, is affirmed.

AFFIRMED AS MODIFIED.

LESTER STRAWHACKER ET AL., APPELLANTS, V. GENEVIEVE STRAWHACKER, APPELLEE.
272 N. W. 772

FILED APRIL 16, 1937. No. 29951.

1. **Deeds:** VESTING OF INTERESTS. Where a grantor conveys real estate "to A. for and during his natural life and at his death, to his present wife B. and her children," B. having one child C. at the time of the execution and delivery of the deed, the life estate immediately vests in A., and the remainder interest immediately vests in B. and C., subject to being opened to let in children subsequently born to B. during the continuance of the life estate.
2. ———: ———. Under such a conveyance, an interest in the remainder vests in a child born into the class during the continuance of the life estate from the moment of his birth.
3. ———: ———. At the termination of the life estate, the number of the class becomes fixed and the absolute interest of each can be determined.
4. ———: ———. Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs.

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

E. A. Wunder, for appellants.

W. J. Moss, C. L. Clark and *Melvin Moss, contra.*

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

CARTER, J.

Plaintiffs brought this suit to have a deed to 80 acres of Jefferson county land construed and for a decree that they are the owners of an undivided one-half interest therein. From an adverse decree, plaintiffs appeal.

The record discloses that on December 1, 1883, John Jury and Mary E. Jury, his wife, conveyed the above-mentioned lands "to Andrew M. Strawhacker for and during his

natural life and at his death, to his present wife Genevieve and her children. Now of the town of Minonk, county of Woodford and state of Illinois." On the date of the execution and delivery of the deed, Genevieve Strawhacker had one child, Orville Strawhacker, then about one year of age. Subsequent to the execution and delivery of the deed, seven additional children were born to Andrew M. Strawhacker and his wife, Genevieve Strawhacker. Orville Strawhacker died December 28, 1918, leaving surviving his widow and one son, the plaintiffs in this action. Another child, Storis I. Strawhacker, died April 15, 1891, at the age of six years. Andrew M. Strawhacker, the grantee of the life estate, died on October 15, 1922. The question for determination is the rights of the parties in the land in question, as fixed by the provisions of the deed above quoted.

Plaintiffs contend that the language employed by the grantor of the deed indicates an intent that the remainder interest should vest only in those persons in being at the time the deed was executed and delivered. The evidence shows that Genevieve Strawhacker had only one child at that time. The use of the word "children" in the clause "to his present wife Genevieve and her children" seems to us to indicate an intent to include after-born children, otherwise the grantor would have named the then living child as a grantee of the remainder interest. Unless this be true, there would have been no reason for the use of the plural in designating the grantees of the estate in remainder. The contention is also advanced that the use of the words "now of the town of Minonk" indicates that the grantor of the lands in question indicated an intent that only those "now" in being should receive an interest in the realty. It will be observed that a period precedes the use of the word "now" and that the word "now" is capitalized, indicating the beginning of a new sentence. We conclude that the use of the words "now of the town of Minonk" refers solely to the then residence of Andrew M. Strawhacker, Genevieve Strawhacker and Orville Strawhacker and contains no inference whatever to the extent of the class in-

tended as grantees in the deed by the use of the words, "to his present wife Genevieve and her children."

We are convinced that, at the time of the execution and delivery of the deed, Andrew M. Strawhacker became vested with a life estate and that the remainder interest vested in his wife, Genevieve, and her only son then in being, Orville Strawhacker, subject to the condition that the class will open up and let in other children born during the continuance of the life estate. The rule is aptly stated by a text-writer as follows: "A bequest or devise to a class of the remainder over after a life estate vests the title to the estate in remainder in those of the class *in esse* at the death of the testator; the right of enjoyment of possession, however, is deferred until the expiration of the preceding estate. The estate in remainder, when once vested as upon the death of the testator, does not lapse by reason of the death of a beneficiary prior to the expiration of the life estate unless the will so provides, as by a limitation over in the event of the death of a remainderman before that of the life tenant. But the class will open up and let in those born during the continuance of the life estate, who belong to the class designated in the will. This general rule is held to apply particularly to gifts to children as a class, and in all such cases the estate in remainder vests in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate, from the moment of their birth." 2 Alexander, Commentaries on Wills, sec. 890.

The rule is also well stated in 2 Underhill, Law of Wills, sec. 558, as follows: "Where the distribution to or among children is to come after a prior life estate, a different rule is applicable than where it is immediate; for if the distribution or the possession of the property devised in remainder to children is not to be made or enjoyed until a period has elapsed subsequent to the death of the testator, a gift to children as a class will embrace not only all children who are living at the testator's death, and compose the class at that time, but also all who are born before the period of

distribution arrives. The rule as thus stated is applicable to a remainder to the children of some person other than the testator himself. Thus, suppose the testator shall give property to A. for his life, and after his death to the children of A. in remainder; all the children of A. who are living at the death of the testator, and all of A.'s children who are born during his life, will constitute the class at the period of distribution. And the same rule would apply where the gift is of a remainder to the children of B. at the death of A., or the children of the testator after a prior life estate to be enjoyed by his widow. If the gift of the remainder is a present gift, that is to say, if it vests a present interest, the possession only being postponed, all the children take who are *in esse* at the death of the testator, and they will take vested interests, subject to open and let in after-born children who come into being during the existence of the prior life estate; and both classes will compose the class at the time appointed for distribution. And if any child in whom the remainder has become vested dies during the life tenancy, his or her issues, if any survive until the time of distribution, will take *per stirpes* the share of the parent."

In Restatement, Property, sec. 157, the following pertinent statements appear:

"A remainder can be (a) indefeasibly vested; or (b) vested subject to open; or (c) vested subject to complete defeasance; or (d) subject to a condition precedent. * * *

"Illustration to Clause (b): 2. A, owning Blackacre in fee simple absolute, transfers Blackacre 'to B for life, remainder to the children of B.' B has a child C. C has a remainder vested subject to open and let in other children born to B."

"When an otherwise effective conveyance of either land or a thing other than land creates one or more prior interests, the maximum duration of which is measured by lives, and then limits a remainder estate in fee simple absolute, or a corresponding remainder interest in a thing other than land, which is construed to be in favor of the

'children' of a designated living person who has one or more living children, these children have a 'remainder vested subject to open.' It is immaterial whether this designated person is the transferor, a transferee in favor of whom one of the prior life interests has been created or a person having no other relation to the affected thing." Restatement, Property, sec. 157, comment n.

We necessarily conclude that the life estate in the case at bar immediately vested in Andrew M. Strawhacker and that the remainder interest immediately vested in Genevieve Strawhacker and her then only son, Orville Strawhacker, at the time the deed was executed and delivered, and as each subsequent child was born to Genevieve Strawhacker during the continuance of the life estate he became a member of the class and his interest in the land immediately vested. *Yates v. Yates,* 104 Neb. 678, 178 N. W. 262; *Wilkins v. Rowan,* 107 Neb. 180, 185 N. W. 437; *De Witt v. Searles,* 123 Neb. 129, 242 N. W. 370; *Drury v. Hickinbotham,* 129 Neb. 499, 262 N. W. 37.

It will be noted that the clause in the deed does not provide for a defeasance of the vested interest of any child, either by the death of the child or otherwise. In such case the vested interest of a child does not lapse at his death but descends to his heirs. In the instant case, each of the eight children and Genevieve Strawhacker became vested with an undivided interest in the land as they entered the class. At the termination of the life estate by the death of Andrew M. Strawhacker, the grantee of the life estate, the number within the class became fixed and the absolute interest of each at that time would necessarily be an undivided one-ninth interest in the premises.

The contention of plaintiffs that a one-half interest in the premises vested in Orville Strawhacker absolutely when the deed was executed and delivered and that, as his heirs, they are now entitled to a one-half interest therein is without merit. The vested interest of Orville Strawhacker was subject to being opened to let in children born during the continuance of the life estate, and, as each subsequent child

was born into the class, the interest of each was thereby proportionately decreased.

We therefore hold that each of the six surviving children is entitled to an undivided one-ninth interest in and to said lands by virtue of his being a member of the designated class. Genevieve Strawhacker is also entitled to an undivided one-ninth interest in her own right, as she was designated by name as a member of the class. Likewise, the estates of Orville Strawhacker and Storis I. Strawhacker are each entitled to an undivided one-ninth interest in and to said lands.

The trial court properly denied the claim of plaintiffs that they were entitled to one-half of the property involved in this action. The trial court erred, however, in not permitting the estates of Orville Strawhacker and Storis I. Strawhacker, deceased members of the class, to share in the estate.

The judgment of the trial court is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion.

REVERSED.

WILLIAM WRIGHT V. BLANCHE WRIGHT.
272 N. W. 568

FILED APRIL 16, 1937. No. 29955.

1. **Contempt**: REVIEW. Where an action for contempt of court is brought to this court upon a petition in error, we will not examine the alleged errors, where it does not appear that a motion for a new trial was presented to the trial court.
2. ———: ———. In such a case, this court will only examine the record to determine if the pleadings are sufficient to confer jurisdiction on the trial court to make the order complained of.
3. ———: PLEADING. While in an action for a civil contempt of court the strict rules applicable to criminal cases do not apply, the affidavit must contain allegations which, if admitted or proved, constitute the offense complained of.
4. ———: ———. Alleging the order of court and the defendant's failure to comply therewith, without an allegation that

the defendant had sufficient ability to comply with the order and that his failure to do so was without just cause and wilful, is not sufficient to confer jurisdiction upon the court to punish him for contempt.

ERROR to the district court for Otoe county: DANIEL W. LIVINGSTON, JUDGE. *Reversed and dismissed.*

O. G. Leidigh and *Andrew P. Moran,* for plaintiff in error.

Lloyd E. Peterson, contra.

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

CLEMENTS, District Judge.

This action was brought in the district court for Otoe county to punish the plaintiff in error, hereinafter called the defendant, for an alleged contempt of court based upon his failure to pay into court for the support of his minor children the sum of $10 a month for each child or a total of $20 a month. This order was made in an action brought in the district court for Otoe county wherein defendant in error, hereinafter called the plaintiff, was granted a divorce from defendant.

The action was instituted by the filing of a motion and affidavit, as follows:

"Comes now Blanche Courtney, formerly Blanche Wright, the defendant in the above-entitled cause, and respectfully shows to the court that heretofore on February 23, 1928, she recovered a judgment in the district court for Otoe county, Nebraska, against the plaintiff for payment of the sum of $20 per month, support money for William Wright and Nina Wright, the minor children of the above-named plaintiff and defendant, and costs taxed in the sum of $5; that no part of said judgment has been paid except the sum of $20 which was paid by the defendant on the 1st day of July, 1929; that on the 24th day of June, 1936, defendant caused an execution to be issued out of the district court for

Otoe county, Nebraska, and the same was delivered to Carl Ryder, sheriff of Otoe county, Nebraska, for service and return according to law, which said execution was by said sheriff on June 24, 1936, returned wholly unsatisfied for want of sufficient property belonging to the plaintiff whereof to levy and collect said judgment.

"Defendant therefore moves the court that an order be entered herein fixing the time within which the plaintiff may show cause why he is not in contempt of court for failure to pay said judgment as provided by said decree entered herein.

"In support of this motion, there is attached hereto and marked exhibit 'A' the affidavit of the defendant.

"Lloyd E. Peterson,
"Attorney for Defendant."

"Exhibit 'A'

"State of Nebraska, }
"County of Otoe. } ss.

"Blanche Courtney, formerly Blanche Wright, being first duly sworn, on oath says that she is the defendant in the above-entitled cause; that heretofore on February 23, 1928, she recovered a judgment in this action against the above-named plaintiff, William Wright, for payment of the sum of $20 per month, support money for William Wright and Nina Wright, the minor children of the above-named plaintiff and defendant, and costs taxed in the sum of $5.

"That as shown by the records and files herein, the defendant, on June 24, 1936, caused an execution to be issued out of the district court for Otoe county, Nebraska, and the same was delivered to Carl Ryder, sheriff of Otoe county, Nebraska, for service and return according to law, and that on said date of June 24, 1936, said execution was returned wholly unsatisfied for want of sufficient property of said William Wright whereof to levy and collect said judgment.

"That no part of said judgment has been paid except the sum of $20 which was paid by the plaintiff on July 1, 1929.

"Blanche Courtney, formerly Blanche Wright.

"Subscribed and sworn to before me this 26th day of June, 1936.

"(Seal) My com. exp. Nov. 28, 1940. Marjorie Booth,
"Notary Public."

No other complaint was filed and no answer was interposed. Upon the motion and affidavit an order to show cause was entered. Upon the return day of the order, a trial was had resulting in a finding by the court that no cause had been shown why the plaintiff in error was not in contempt of court, finding that he was in contempt of court and ordering him confined in the county jail of Otoe county until further order of the court or until he is otherwise legally discharged and that he pay the costs of the proceeding.

To this finding the defendant excepted and brings the case here by petition in error. In this petition in error numerous assignments of error are made. It does not appear that these alleged errors were ever called to the attention of the trial court by a motion for a new trial.

It is well settled in this jurisdiction: "In order to secure a review in this court of alleged errors occurring at the trial, such errors must be pointed out in a motion for a new trial, addressed to the district court, and a ruling obtained thereon." *Dillon v. State,* 39 Neb. 92, 57 N. W. 986. See *Madsen v. State,* 44 Neb. 631, 62 N. W. 1081; *Zimmerman v. State,* 46 Neb. 13, 64 N. W. 375. As no motion for a new trial was filed in the instant case, this court will not examine the alleged errors.

The failure of the plaintiff in error to file a motion for a new trial in the trial court and obtain a ruling thereon does not however prevent this court from an examination of the record to determine whether the motion and affidavit filed are sufficient to confer jurisdiction on the court to make the order complained of. In a number of early cases this court has held: "Proceedings in contempt are in their nature criminal, and strict rules of construction applicable to criminal proceedings are to govern therein." *Boyd v. State,* 19 Neb. 128, 26 N. W. 925; *Johnson v. Bouton,* 35 Neb. 898,

53 N. W. 995; *O'Chander v. State,* 46 Neb. 10, 64 N. W. 373. "The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime." *Herdman v. State,* 54 Neb. 626, 74 N. W. 1097. In two recent cases, namely, *Maryott v. State,* 124 Neb. 274, 246 N. W. 343, and *State v. Barlow, ante,* p. 166, 271 N. W. 282, we have differentiated between "criminal" and "civil" contempts and held: "The rules of procedure in proceedings for criminal contempt are inapplicable to proceedings for civil contempt." The contempt which is attempted to be charged in this proceeding is a "civil" contempt. "Where, in a divorce action, a husband has been ordered to pay alimony for the support of his wife and children, and, being of sufficient ability to pay the same, wilfully and contumaciously refuses to pay, having no just or reasonable grounds for his failure or refusal, such conduct constitutes a civil contempt." *Maryott v. State, supra.*

While the strict rules applicable to criminal cases do not apply in this proceeding, the affidavit upon which the action is based should have stated facts which, if proved, would constitute a "civil" contempt. This it does not do. The only allegations material to the case are that an order was made and that the defendant failed to comply with the order. A party is not in contempt of court for a failure to comply with an order to pay alimony unless it is shown that he had sufficient ability to pay and that his refusal was wilful and contumacious and without just and reasonable ground.

The case of *Hawthorne v. State,* 45 Neb. 871, 64 N. W. 359, is clearly in point and decisive of this action. It is there held: "In a proceeding to punish for an alleged contempt, not committed in the presence of the court, the affidavit upon which the proceeding is based is jurisdictional, and it must affirmatively disclose sufficient facts to show that the case is one over which the court has jurisdiction. * * * Unless the disobedience of an order of court is wilful there is no contempt." In this case the defendant, in a civil

action, failed to comply with an order of court directing the payment by him of a certain sum of money to apply on a judgment recovered therein against him. Contempt proceedings were instituted against him. This was in an action in aid of execution. The alleged contempt was clearly a "civil" contempt. Much might be quoted from the opinion in this case. We call attention particularly to the following: "The affidavit does not aver that it is in the power of the plaintiff in error to comply with the order of the court, nor does it allege that proof by affidavit or otherwise was made to the county judge that Mr. Hawthorne 'has property which he unjustly refuses to apply toward the satisfaction of the judgment rendered against him.' It therefore follows that the affidavit in this case is fatally defective, and the order of the county judge, to which the plaintiff in error refuses to yield obedience, is void, because such judge had no jurisdiction to make the same."

The affidavit in the instant case being fatally defective, the order and judgment of the court are void and must be set aside and the cause dismissed. This will be done without prejudice to another action.

REVERSED AND DISMISSED.

PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. EVA P. SWEENEY ET AL., APPELLANTS.

273 N. W. 46

FILED APRIL 23, 1937. No. 29963.

1. **Judgment**: VACATION. "The motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term." Comp. St. 1929, sec. 20-2003.
2. ———: ———. The general rule is that a failure to appoint a guardian *ad litem* is at most only erroneous and the appropriate remedy is by direct appeal and not by an original action to vacate the judgment.
3. **Landlord and Tenant**. A tenant cannot dispute his landlord's title.
4. **Pleading**. "A reply must be made to all the material allegations

of new matter contained in an answer, or they will be taken as true." *Williams v. Evans*, 6 Neb. 216.

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

Walter G. Badham, for appellants.

Sidney W. Smith, contra.

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

GOSS, C. J.

There is no bill of exceptions. We derive all data from the transcript. This action was begun May 29, 1931, by filing a petition against Eva P. Sweeney and Elizabeth P. Goodrich and by service of summons on each of them to foreclose a mortgage on two lots and improvements in Dundee Place in Douglas county. Decree was entered August 4, 1931. The transcript does not show whether a stay was taken, but the next entry after the decree is a motion to confirm sale filed July 27, 1932. The sale was confirmed November 12, 1932, and a conveyance directed to be made by the sheriff to plaintiff as the purchaser. July 5, 1935, plaintiff applied for an order for a writ of assistance to oust defendant Goodrich, who was alleged to be in possession, and on December 2, 1935, the court ordered the writ and directed the sheriff to oust defendant Goodrich and put plaintiff in possession.

On March 16, 1936, defendant Goodrich filed a pleading, called a substituted motion, asking for an order canceling the sheriff's deed and recalling the writ of assistance on the grounds that no notice of the confirmation of sale was had upon Moses P. O'Brien, attorney of record for defendants, and the only notice thereof was served upon defendants by leaving copies at the usual place of residence of defendants on July 29, 1932; that on July 27, 1932, Eva P. Sweeney, the owner of an undivided half of the real estate in foreclosure, was declared mentally incompetent and insane by the insanity board of Douglas county and was

legally incompetent to receive any notice at the time the notice was alleged to have been served.

To this pleading plaintiff filed an answer pleading that it was unable to serve notice of confirmation upon Moses P. O'Brien, attorney of record for defendants, because he maintained no office and had no known place of abode, and so served a copy of the notice upon defendant Goodrich at her usual place of residence and left a copy with her for defendant Sweeney, both of whom had their residences in the same house; that William Colfax, as the agent and representative of defendants, appeared in court at the time set for the hearing and secured continuances for defendants until November 12, 1932, when the sale was confirmed; that both defendants knew that the sale was confirmed and the sheriff's deed executed and never up to March 16, 1936, questioned the validity of the order of confirmation and sheriff's deed; that Eva P. Sweeney died December 29, 1932, and Elizabeth P. Goodrich is her sole and only heir; that defendant Goodrich requested to reside in the premises after the confirmation of the sale and execution of sheriff's deed, agreed to pay $30 a month therefor and did pay that rental for December, 1932, and following months until May, 1933, and in April, 1933, she and plaintiff made a written lease for one year at $30 a month, which provided that either party might cancel it upon 30 days' notice; that defendant Goodrich made application to the Home Owners Loan Corporation for a loan that she might repurchase said property and requested plaintiff to accept bonds issued by the corporation; that in her application she stated that plaintiff was the owner through foreclosure proceedings; that plaintiff had paid taxes amounting to $647.91 on the premises since it received its sheriff's deed and would not have paid them had it not believed it was the owner of the property; that by her actions defendant Goodrich led plaintiff to believe the foreclosure proceedings were regular and that she had full knowledge and notice of the proceedings and is now estopped to claim ownership or that the proceedings were irregular or invalid; that defendant has been

guilty of laches in the premises; that the term of court at which the sale was confirmed and that at which the order of confirmation was entered have adjourned and the court is without jurisdiction to vacate either order. No reply was filed.

April 11, 1936, Elizabeth P. Goodrich, as administratrix of the estate of Eva P. Sweeney, deceased, was substituted as a defendant and thereupon she filed a petition to vacate the judgment and decree and plaintiff filed an answer thereto, both of which are substantially the same as the pleadings heretofore abstracted.

On April 30, 1936, upon hearing and arguments, the court overruled the motions and petitions of defendants and ordered the sheriff to execute the writ of assistance. Supersedeas bond was fixed. Defendants gave the bond and appealed.

The first point of defendants is that the court erred in confirming the sale because the notice was not served on their attorney of record but was served by leaving copies at the usual place of residence of defendants; that is, that the sale was confirmed before the matter, by proper notice, stood for hearing. It must be conceded that this question was raised several years after the final order confirming the sale was made. The record shows the adjournment of the term of court had long passed. "The motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term." Comp. St. 1929, sec. 20-2003.

It is claimed by appellants that a guardian *ad litem* should have been appointed for Eva P. Sweeney. The answer to that is that the failure to appoint a guardian *ad litem* is at most only erroneous and the appropriate remedy is by direct appeal and not by an original action to vacate the judgment. *McAllister v. Lancaster County Bank*, 15 Neb. 295, 18 N. W. 57; *Kuhn v. Kilmer*, 16 Neb. 699, 21 N. W. 443; *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602; *Schleuning v. Tatro*, 122 Neb. 3, 238 N. W. 741.

A tenant cannot dispute his landlord's title. *Gies v.*

Storz Brewing Co., 75 Neb. 698, 106 N. W. 775; *Schroeder v. Bartlett*, 129 Neb. 645, 262 N. W. 447.

"A reply must be made to all the material allegations of new matter contained in an answer, or they will be taken as true." *Williams v. Evans*, 6 Neb. 216.

The judgment of the district court is

AFFIRMED.

STATE LIFE INSURANCE COMPANY, APPELLEE, V. JAMES I. LEE, APPELLANT.
272 N. W. 767

FILED APRIL 23, 1937. No. 29979.

Mortgages: FORECLOSURE: MORATORIUM. "Defendant in a foreclosure action is not entitled to the benefit of the moratory statute where the mortgage lien equals or exceeds the actual value of the mortgaged premises, and where the premises are sold under decree for the full amount of the mortgage lien, interest and costs." *Erickson v. Hansen*, 129 Neb. 806, 263 N. W. 132.

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

Carrico & Carrico, for appellant.

Ginsburg & Ginsburg and *Carl E. Peterson, contra.*

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

GOSS, C. J.

Defendant appeals from an order denying a further moratorium stay and confirming sheriff's sale in a mortgage foreclosure.

The land involved consists of 640 acres less what is taken out of it by a highway traversing the farm. Approximately half of it is tillable and half pasture land.

Plaintiff's decree, entered November 28, 1932, was for $9,748.58, bearing 10 per cent. interest from that date. Federal Trust Company had foreclosed (on interest coupons

paid by it) subject to plaintiff's mortgage and had a second lien bearing the same rate of interest. Plaintiff bid in the property at sheriff's sale on October 31, 1933, for $10,718. At the time of confirmation, March 23, 1936, plaintiff, with the approval of the court, increased its bid to $13,072.60, which covered its entire lien, interest and costs, but not the second lien of Federal Trust Company, which amounted to approximately $1,250. Even then the court gave defendant 30 days to get an increased bid of $300, and on May 25, 1936, found that he had failed to get such a bid, and the order then became absolute.

Without taking space to analyze the evidence, it shows that the liens amount to a total of approximately $16,000 and no competent testimony as to the actual value of the land places it that high.

"Defendant in a foreclosure action is not entitled to the benefit of the moratory statute where the mortgage lien equals or exceeds the actual value of the mortgaged premises, and where the premises are sold under decree for the full amount of the mortgage lien, interest and costs." *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132.

The judgment is

AFFIRMED.

SCHOBERT-ZIMMERMAN DRAINAGE DISTRICT, APPELLEE, V. JOHN L. SOLL ET AL., APPELLANTS.
272 N. W. 775

FILED APRIL 23, 1937. No. 29930.

1. **Appeal.** On appeal in a suit in equity, the trial court's findings on issues of fact import verity in absence of a bill of exceptions.
2. **Taxation: FORECLOSURE OF LIEN: PURCHASER.** Under the drainage laws of Nebraska, a drainage district may buy at a tax sale lands encumbered by unpaid delinquent assessments levied thereon for special drainage benefits. Comp. St. 1929, secs. 77-2010, 77-2041.
3. ———: ———: **SALE.** A decree foreclosing a tax sale certificate to enforce payment of assessments for special drainage

benefits accruing to two tracts of land may order the sale of one tract first, if both are owned by the same defendant, and direct payment of any surplus proceeds of sale on the assessment lien on the other tract. Comp. St. 1929, sec. 77-2045.

4. Drains: ASSESSMENTS FOR BENEFITS. Where a drainage district, in strict compliance with law, levies valid assessments for special drainage benefits accruing to land, the levies are not open to the plea that they are void because an older drainage district previously levied and collected assessments on the same land for special drainage benefits.

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

Charles W. Haller, for appellants.

Nickerson & Nickerson, contra.

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

ROSE, J.

This is a suit in equity to foreclose a tax sale certificate evidencing liens in favor of Schobert-Zimmerman Drainage District, plaintiff, against two contiguous tracts of land owned by John L. Soll, defendant, in Sarpy county. The liens were created by assessments for special benefits of $6.50 for drainage improvements accruing to a 20-acre tract and by assessments for special benefits of $617.50 for drainage improvements accruing to a 40-acre tract. The tracts were sold for unpaid delinquent assessments for drainage benefits by the county treasurer of Sarpy county at private tax sale to plaintiff, one certificate of sale including both liens.

The answer of defendant Soll contained a general denial and pleas that his lands were not benefited by plaintiff and that they were assessed in another drainage district and the assessments therein paid.

Upon a trial of the cause, the district court found the issues in favor of plaintiff and decreed a foreclosure of its tax sale certificate. Defendant appealed.

The appeal does not present any issue of fact for de-

termination. The evidence was not preserved by a bill of exceptions. There is therefore nothing in the record to refute any issuable fact determined by the district court. According to the transcript of the proceedings, the following facts, in substance, were established by the findings below: Plaintiff is a regularly organized drainage district in which the two contiguous tracts of land owned by Soll are situated. The 20-acre tract was benefited by drainage improvements to the extent of $6.50 and the 40-acre tract to the extent of $617.50. Assessments for the benefits were made by the proper officers pursuant to the requirements of law. The proceedings throughout, including notices, were regular and in compliance with legislation on the subject. The assessments were certified to the county clerk of Sarpy county and placed on the tax list in the office of the county treasurer and each assessment became a first lien.

Power of the drainage district to buy the land at tax sale and to foreclose the tax sale certificate was granted by statute. Comp. St. 1929, secs. 77-2010, 77-2041.

The principal argument of defendant is directed to the proposition that the decree discloses error on its face by ordering the sale of the 20-acre tract which is charged with the small lien of $6.50 to pay the assessment of $617.50 against the 40-acre tract. The proposition itself is at variance with the decree. Each assessment was levied against the tract to the extent it was benefited. The tracts were contiguous and owned by the same defendant. The land to be first offered at judicial sale is the 40-acre tract. The 20-acre tract is to be sold only in the event that the proceeds of the first sale do not equal or exceed both liens, interest and costs. These directions may be beneficial to defendant by making the sale of the smaller tract unnecessary and are in harmony with the statute which provides:

"Where the same defendant is the owner of two or more lots or parcels of land, the court may in its decree order that any surplus proceeds of sale of one lot or parcel of land shall be applied to the payment of taxes and costs against any other lot or parcel of land owned by the same

defendant, where no rights of third persons will be affected thereby, and that only so much of the land so owned by one defendant shall be sold as may be necessary to satisfy all taxes and costs charged against all the lands owned by the same defendant." Comp. St. 1929, sec. 77-2045.

The decree of foreclosure, therefore, is not void or erroneous for the asserted reason that it directs the sale of one tract to pay an assessment lien on another tract.

It is further insisted the district court erroneously deprived defendant of the pleaded defense that this same land was improved by drainage work of an older drainage district which levied and collected assessments therefor. This defense is without merit, since plaintiff, an existing drainage district, benefited defendant's land by drainage improvements to the extent of the assessments levied against it as authorized by law. The findings of fact below eliminate this defense and are not open to review on appeal in absence of a bill of exceptions.

A general demurrer to the petition is also without merit.

Error in the proceedings and judgment of the district court has not been pointed out or found.

AFFIRMED.

FILOMENA HLADKY, APPELLEE, V. VACLAV ECKSTEIN ET AL., APPELLANTS.
272 N. W. 910

FILED APRIL 23, 1937. No. 29877.

Evidence in the record examined, and *held* ample to support the judgment challenged on this appeal.

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

Charles H. Slama and *Beach Hinman,* for appellants.

Fred C. Foster, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

EBERLY, J.

This is a consolidation of two actions, in the nature of creditors' bills, instituted by Filomena Hladky, plaintiff, against Vaclav Eckstein, Otile Eckstein, Mike Eckstein, and Emil Eckstein, defendants. Vaclav Eckstein and Otile Eckstein were and are husband and wife. Mike Eckstein and Emil Eckstein are sons of Vaclav Eckstein.

The petitions are in the usual form. The transfers attacked are two, viz.: (1) A deed of conveyance executed and acknowledged by Vaclav Eckstein and wife, Otile Eckstein, on September 1, 1932, conveying to Mike Eckstein and Emil Eckstein, "in consideration of the sum of five thousand dollars, in hand paid," the west half of the northeast quarter and the east half of the northwest quarter of section 18, and the east half of the southwest quarter of section 7, all in township 16, range 6 east of the 6th P. M., in Saunders county, Nebraska, subject to encumbrance against the property estimated at $21,000. This deed was properly filed for record on September 2, 1932. (2) A bill of sale on September 1, 1932, executed by Vaclav Eckstein for a consideration recited in the instrument of conveyance as "the sum of five thousand dollars * * * in hand paid," purporting to bargain and sell to his sons, Mike Eckstein and Emil Eckstein, "all of the crops now growing and already gathered" on the premises above described, "also 12 head mixed cattle, 16 head mixed horses, 33 head large hogs, 40 head fall pigs," and farming implements particularly described therein.

After a hearing on the merits, the district court adjudged that 160 acres of the land described constituted the homestead of Vaclav Eckstein and family, was of less value than $2,000, and was therefore exempt and not subject to fraudulent alienation; but that as to the east half of the southwest quarter of section 7, township 16, range 6, Saunders county, Nebraska, the conveyance thereof by Vaclav Eckstein and Otile Eckstein to Mike Eckstein and

Emil Eckstein recorded on September 2, 1932, was fraudulent and void as to plaintiff, and the same was subjected to plaintiff's judgment lien. The court further found that the bill of sale did not enter into the litigation, and entered no order concerning the personal property described therein. From the order of the trial court overruling their motion for a new trial, the defendants appeal.

As to the *bona fides* of these transfers, the principal evidence in the record as to the nature of the conveyances referred to is the testimony of Mike Eckstein and Emil Eckstein. Neither Vaclav Eckstein nor Otile Eckstein testified.

From the record as an entirety, it fairly appears that Vaclav Eckstein was insolvent at the time of the execution of these instruments; that the consideration ($5,000) set forth in each instrument of conveyance was false and untrue; that substantially all of Vaclav Eckstein's property was conveyed to his sons thereby; and, by reason thereof, his then creditors were necessarily prejudiced, hindered and delayed.

Under the uncontested facts in this case the application of the following principles is invoked:

A deed by a debtor to an immediate member of his family is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, 243 N. W. 118; *Ayers v. Wolcott,* 66 Neb. 712, 92 N. W. 1036; *Glass v. Zutavern,* 43 Neb. 334, 61 N. W. 579; *Steinkraus v. Korth,* 44 Neb. 777, 62 N. W. 1110; *Jansen v. Lewis,* 52 Neb. 556, 72 N. W. 861; *Schott v. Machamer,* 54 Neb. 514, 74 N. W. 854.

"Where the circumstances under which a transfer of property by a debtor is made are suspicious, the failure of the parties to testify or to produce available explanatory or rebutting evidence is a badge of fraud. The presumption is that if they could have truthfully testified to facts show-

ing the *bona fides* of the conveyance they would have done so. It is wholly immaterial that their failure or refusal to do so is based on the advice of counsel." 27 C. J. 494.

This burden the defendants wholly failed to sustain in the record before us. From the evidence in the record, in view of the burden of proof, it is clear that the entire transaction of September 1, 1932, including the execution of the warranty deed in suit, was a sham created by the joint action of the defendants for the express purpose of hindering, delaying and defrauding the plaintiff in the collection of her judgments. While the evidence of defendants, by studied and palpable omissions, succeeded in disclosing the particulars of the transactions, in addition it also fairly appears that Vaclav Eckstein, then insolvent, disposed of a material portion of the property described in the bill of sale, secretly retaining, after its execution, a valuable interest therein for his own use and benefit and for the use and benefit of his family, with the acquiescence, express or implied, of Mike Eckstein and Emil Eckstein, the grantees thereof.

On the subject of benefits retained and enjoyed by Vaclav Eckstein, the son Mike Eckstein further testified, as follows: "Q. Now, Mr. Eckstein, have you always lived with your father? A. Yes. Q. And you're still living with him? A. Yes, sir. * * * Q. Your father has always lived on this land that is in controversy? A. Yes, sir. Q. Prior to September, 1932, who lived with your father? A. Me. Q. And who else? A. Emil. Q. Who else? A. The rest of the kids. * * * Q. How many living with him now? A. Nine. * * * Q. And the situation there on the farm today is just like it was when you were 21, isn't it? A. Yes, sir. Q. There hasn't been any change at all, has there? A. Yes. Q. You're all living in the same house? A. Yes, sir. Q. And the children eating at the same table, the same as you did before? A. Yes, sir. Q. And your father has taken all that he needs for the support of his family? A. Yes, sir. Q. He has taken care of his family just the same? A. Yes, sir. Q. There hasn't been any change in that respect? A. No."

Emil Eckstein's testimony on this subject is: "Q. Now, your father is still living on this place? A. Yes. Q. And his family is still with him? A. Yes, sir. Q. All those that are under age? A. Yes. Q. Now, you folks live there just the same as before you got this farm—before you and your brother got the farm, don't you—you all live there together, just the same? A. Yes, sir; we do. Q. There's been no change in the management of that place, has there, since that? A. No change."

What was actually done, particularly if continued for a considerable period of time with the acquiescence of all parties in interest, must be deemed to have been contemplated by the actual agreement as originally entered into by them. True, as a practical matter, while the existence of what amounts to a mutual contract between these parties on this subject-matter is thus clearly indicated, the palpable concealments by and in behalf of the sons have rendered as a matter of proof the exact nature of its obligations ambiguous. However, on the Ecksteins was imposed the duty of full disclosure. Besides, "A practical construction placed upon an ambiguous contract by the parties will generally be adopted by the courts." *Wilhoit v. Stevenson,* 96 Neb. 751, 148 N. W. 963. See, also, *Muller v. Pratt,* 108 Neb. 473, 187 N. W. 902; *School District v. Davis,* 76 Neb. 612, 107 N. W. 842.

In view of the evidence recited, and the further facts disclosed by the record, including manifest concealment by the defendants in their testimony, we deem as applicable the rule stated in *Graham v. Estate of Townsend,* 62 Neb. 364, 87 N. W. 169, viz.: "But where a fraudulent transfer of property, or choses in action, is made in trust for the use and benefit of the person making the same, it is void both as to existing and subsequent creditors."

So, also, "According to the weight of authority, a conveyance by one who is insolvent or in embarrassed circumstances, or by one who conveys all his property, in which the grantor secures to himself or to himself and family the right of future support by the grantee, is either *prima facie*

or conclusively fraudulent and void as to existing creditors; and the property so sold or conveyed may be subjected to their claims either in law or in equity." 27 C. J. 602.

In view of the entire record in this case, we find the allegations of plaintiff's petition amply sustained by the evidence adduced at the trial. Therefore, it follows that the judgment of the district court was, in all respects, correct and it is

AFFIRMED.

EDWIN L. SERVEN, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
272 N. W. 922

FILED APRIL 23, 1937. No. 29965.

1. Insurance: "TOTAL DISABILITY:" SUFFICIENCY OF EVIDENCE. An examination of the evidence reveals that it is sufficient to support a verdict based upon the continuous and total disability of the insured.
2. ———: ———. An unsuccessful attempt of an insured to return to his usual work, even though some of the duties are performed in agony and pain, does not conclusively negative a continuous total disability.
3. ———: POLICY: CONSTRUCTION: "TOTAL DISABILITY." "A literal interpretation of the term 'total disability,' in an accident insurance policy implying by its terms utter mental and physical helplessness as a condition of liability, will not be adopted, where it would result in an unreasonable and unjust forfeiture of the accident insurance." *McCleneghan v. London Guarantee & Accident Co., ante*, p. 131, 271 N. W. 276.
4. **Estoppel.** A party who gives one reason for his conduct and decision as to a matter involved in controversy cannot after litigation has begun defend upon another and a different ground.

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

Beghtol, Foe & Rankin, for appellant.

Chambers & Holland and *Bernard S. Gradwohl, contra.*

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

DAY, J.

This is an action on two policies of insurance for a disability caused by an accident. The first cause of action is based on the disability provision of the life insurance policy and the second cause of action on the accident policy. The insurance company appeals from a judgment in favor of the insured.

The argument is directed to the judgment on the provisions of the accident policy. That policy provides for certain payments if the injury "shall, within two weeks from the date of the accident, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to the occupation in which he is engaged at the time of the accident."

It is asserted that an impartial analysis of the evidence reveals that for a period of ten months the insured performed a substantial portion of his occupational duties. He was injured as a result of an accident on the first day of April, 1932. He fractured the sixth dorsal vertebra. He has spent months in the hospital, and his condition is progressively worse. The defense is predicated upon the allegation that the insured returned to his place of business on October 1, 1932, and for a period of about ten months thereafter worked in his store.

It appears that Serven spent considerable time in his place of business. He felt an urgent necessity to try to look after the business, if possible, because it was not doing well in his absence. The testimony on the question of his ability to work during this period is in conflict.

There is evidence that during this time he was in constant pain and agony and was compelled to lie down a considerable portion of the time; that he was unable to perform any work; that on several occasions he fell to the floor; and that he finally collapsed completely and was taken to the Veterans Hospital, where he remained for 18 consecutive months. On the other hand, there is the testimony of various witnesses as to the time plaintiff spent at the store and the nature of the work he performed. An ex-

amination of the evidence reveals that it is sufficient to support a verdict based upon the continuous and total disability of the insured.

An unsuccessful attempt of an insured to return to his usual work, even though some of the duties are performed in agony and pain, does not conclusively negative a continuous total disability. *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903; *Woods v. Central States Life Ins. Co., ante,* p. 261, 271 N. W. 850; *McCleneghan v. London Guarantee & Accident Co., ante,* p. 131, 271 N. W. 276. The last case cited is particularly applicable here. There the insured was injured in an accident. He made a valiant effort to continue his work but was finally compelled to submit to an operation to remove the disability. It was there held: "A literal interpretation of the term 'total disability,' in an accident insurance policy implying by its terms utter mental and physical helplessness as a condition of liability, will not be adopted, where it would result in an unreasonable and unjust forfeiture of the accident insurance."

There are other assignments argued before this court, but the appellant has by its action limited its defense to the policy to the extent of the disability. That issue has been properly submitted to the jury, and the verdict thereon is final.

On May 27, 1935, the defendant wrote to the plaintiff's attorney as follows:

"We seem to possess very opposite opinions as to the merits of Mr. Serven's claim. I have no doubt in the sincerity of your belief that he has been and will be disabled. On the other hand we are very sincere in our belief that he is not necessarily disabled, and that if he is disabled, it is not solely on account of his injury of 1932.

"*We fully recognize the existence of the policy contract,* and it is our desire to meet our obligation, whatever it may be, according to the terms of that contract. *We differ only as to the facts pertaining to the extent of injury and the extent of disability,* and if we can come to some agreement on

those points we would deem it a pleasure to make payment under the contract with any further amounts that might be found to be due." (Italics ours.)

It has long been the rule in this jurisdiction that a party who gives one reason for his conduct and decision as to a matter involved in controversy cannot after litigation has begun defend upon another and a different ground. This court approved this rule in a recent case. *McDowell v. Metropolitan Life Ins. Co.*, 129 Neb. 764, 263 N. W. 145. See, also, *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen*, 103 Neb. 791, 174 N. W. 422; *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N. W. 285; *Powers v. Bohuslav*, 84 Neb. 179, 120 N. W. 942; *Pittenger v. Salisbury & Almquist*, 125 Neb. 672, 251 N. W. 287; *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.

While the defendant is not now to be permitted to interpose the defense of lack of notice under the contract, it has not lost a substantial defense. The insurance company had prompt and timely notice of the accident, the injury, and the disability of the insured. The insured was examined by physicians for the company at least six different times. The paragraph providing for monthly payments and examinations was optional with the insured. It was for him to elect to receive monthly payments and comply with conditions precedent to receiving them. A failure to elect to receive the payments monthly did not forfeit all his rights under the policy.

The case was tried on the theory that the notice was required and that the agent of the company would and did waive the notices. This was harmless error. The instructions submitted by the court to the jury on the authority were upon an issue not properly before the court, so that, even if they were erroneous, they were not prejudicial to any substantial right of the appellant. The record does not require a reversal.

AFFIRMED.

LLOYD DOAN, A MINOR, BY WAYMAN H. DOAN, HIS FATHER AND NEXT FRIEND, APPELLEE, V. HAROLD HOPPE ET AL., APPELLANTS.

272 N. W. 763

FILED APRIL 23, 1937. No. 29935.

Automobiles: INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE. When a pedestrian, crossing a business street between intersections, at 11:30 at night, suddenly runs in front of an automobile and is struck by same, he is, as a matter of law, guilty of negligence contributing to his own injuries in a degree more than slight.

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

Burkett, Wilson & Van Kirk, for appellants.

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

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

PAINE, J.

This is an action for injuries to a pedestrian who was hit by an automobile, and the jury returned a verdict of $2,000. Defendant appealed.

The defendant assigns as error the action of the trial court in overruling the motion of the defendant to return a verdict in his favor at the close of the evidence, said motion being based on the ground that there was insufficient evidence to sustain a verdict for the plaintiff, and that the evidence failed to establish an issue of negligence as a matter of law, for that the plaintiff was guilty of negligence contributing to his own injuries in a degree that was more than slight, and that the evidence established as a matter of law that the defendant was not guilty of gross negligence.

The accident occurred after 11:30 p. m., August 2, 1935, on O street in the city of Lincoln, between Seventeenth and Eighteenth streets. The plaintiff is Lloyd Doan, was 20 years of age at the time of the accident, but was of full

age at the time of the trial, and his father, Wayman H. Doan, is also named as plaintiff. The car was being driven by the defendant Harold Hoppe, aged about 21, the son of William F. Hoppe, the other defendant, who owned the automobile, which was a family car, being driven with the knowledge and consent of the father. The plaintiff was engaged in common labor, and had been assisting in trucking a load of household furniture during the evening, and was sitting on a davenport in the rear of a truck, which was parked at an angle on the south side of O street west of the middle of the block. His employer, Merle Allen, had crossed the street from the truck to a small hamburger stand, located on the north side of O street, and was standing there visiting with a friend, Frank Bonsor. Allen had called to the plaintiff to come across the street to get a little lunch, but was standing with his back to the street, and did not turn around until he heard the brakes go on. The plaintiff, when called, had started directly across in the middle of the block, and when he reached the middle of the street he said he looked both ways and saw the car coming from the east, and thought it was going about 40 miles an hour, but thought he could get across ahead of it safely.

The evidence shows that O street in the city of Lincoln runs east and west; that it is 70 feet wide from curb to curb, and entirely paved; that the hamburger stand is 14.1 feet across the front; that a used-car business immediately to the west of it is 36 feet 3 inches wide, with a driveway through the curb, which driveway is 11.8 feet wide; that in this block there were three electroliers on each side of the street.

The defendant testified that he was alone in the car, driving west on O street; that his car was equipped with four-wheel brakes, which were in good condition; that he was driving about 25 miles an hour, was looking ahead, and watching the street; that he did not see the plaintiff until he was about ten feet ahead of him and coming into the left side of the car; that plaintiff was running; that defend-

ant put on his brakes, tried to get out of plaintiff's way by turning the car toward the north, and that the car was going in a northwesterly direction on the north side of O street when it struck the plaintiff; that the defendant kept his brakes on all the time, applying the brakes so hard that the wheels may have skidded, and brought the car immediately to a stop in the driveway in front of the used-car place; that he got out of the car, helped put plaintiff in the car and took him to a hospital, and then went and got the plaintiff's father and mother and took them to the hospital, then took them home again that night, and visited the plaintiff at the hospital the next day. The plaintiff was struck about in front of the east side of the hamburger shop, and the car came to rest in the driveway in front of the used-car place of business next west of the hamburger shop. The plaintiff rolled 30 or 40 feet down the street after he was hit. There is considerable dispute as to how far the car ran after striking the plaintiff, but it is not difficult to arrive at the approximate distance that the car ran after the brakes were put on.

The captain of the traffic division of the Lincoln police department, and head of the brake-testing department, testified that he had taken a course of study at the Traffic Officers' Training School at Northwestern University, and had made and observed many tests to determine the distance within which an automobile equipped with four-wheel brakes could stop while traveling on such pavement at the various rates of speed, and gave it as his opinion that the shortest distance within which the average automobile so equipped could be stopped was as follows: Within 80 feet if traveling 40 miles an hour; within 61 feet if traveling 35 miles an hour; within 45 feet if traveling 30 miles an hour; within 31 feet if traveling 25 miles an hour; that these distances are based upon the assumption that the brakes are applied during the entire distance to the fullest extent and that the wheels of the automobile do not skid, for if the wheels of an automobile skid, then the distances would be greater, for the car will stop more quickly

if the brakes do not lock the wheels and cause them to slide. He testified that the speed limit allowed on the date and place of the accident was 25 miles an hour.

The plaintiff testified orally in the case at bar, and said he had only gone to school a very short time, and was only experienced in labor on farms and elsewhere. Also, additional evidence of plaintiff was taken by deposition at the Lincoln General Hospital, and was read to the jury.

One of the disputed points in the evidence is as to the speed of the defendant's car at the time of the accident. His testimony is that he was driving 25 miles an hour. Frank Bonsor judged the automobile to be running 35 to 40 miles an hour. Merle Allen, with his back to the street, did not turn around until he heard the brakes screeching, but judges the automobile was running from 30 to 40 miles an hour. Its speed may be judged somewhat by the distance it ran after striking the plaintiff. According to the defendant, the automobile did not travel over 31 feet after the brakes were applied. On the other hand, the plaintiff's evidence is that it traveled more than twice that far, the witnesses of the plaintiff claiming that the automobile ran up into the driveway and then backed down to where it finally stopped.

In *Peterson v. Millnitz*, 119 Neb. 365, 229 N. W. 12, which was decided in 1930, a middle-aged man who was walking diagonally across an intersection of public streets, where motor vehicles might be expected to approach from four directions at the same time, was struck by a Ford car, which was being driven at the rate of 10 to 12 miles an hour, and the driver had honked within 50 feet of this intersection, and it appeared that plaintiff jumped backward into the path of this car and was struck. This court held that the plaintiff in such a case cannot recover unless his negligence is shown to be slight in comparison with that of the defendant. This case was reversed because a prejudicial instruction was given.

Next we will discuss the case of *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489, where a

young lady was injured by being knocked down by a street car, which she had stepped in front of when it was still in motion and within seven feet of her. It was held that her act in stepping directly in the path of such street car was the proximate cause of the accident. This court said: "If the evidence clearly shows that the plaintiff is guilty of more than slight negligence, which will defeat a recovery, it is proper to sustain a motion for an instructed verdict for the defendant." The trial court having given such an instructed verdict, it was affirmed in this court. In this case our comparative negligence statute, section 20-1151, Comp. St. 1929, was discussed, and it was stated that, where from the facts different minds might draw different conclusions, the question should be submitted to the jury, but, on the other hand, where the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant.

The defendant in the case at bar insists that he should have been given an instructed verdict, the same as was given in *Troup v. Porter*, 126 Neb. 93, 252 N. W. 611. What were the facts? Alexander C. Troup, district judge, of Omaha, was killed by being struck by a car at 8:20 a. m. as he was crossing the street. The automobile was going about 25 miles an hour, and it appeared that decedent was running to catch a street car and came out from between two parked cars and ran directly in front of the car which struck him. This court said: "It seems the evidence fairly establishes as a matter of law that the (negligence of the) decedent herein in stepping from between two parked automobiles directly in front of the defendant's car without looking is more than slight negligence in comparison with the negligence of the defendant and that the trial court was justified in discharging the jury and entering a judgment in favor of the defendant." The principle of law controlling in this case was announced as follows: "Where contributory negligence of plaintiffs' decedent was more

than slight when compared with the negligence of defendant, there can be no recovery."

We have examined the cases cited by plaintiff, including *Coburn v. Loetscher,* 123 Neb. 407, 243 N. W. 127, *Campbell v. Slater,* 127 Neb. 231, 254 N. W. 897, and *Anderson v. Lee,* 130 Neb. 258, 264 N. W. 666, but, the facts being so entirely different in those cases, we do not think they interfere with our holding in this case.

Complaint is made by plaintiff because defendant did not sound his horn, citing *Christoffersen v. Weir,* 110 Neb. 390, 193 N. W. 922, but in the case at bar the plaintiff, crossing the street near midnight, and against the ordinance forbidding crossing in the middle of the block, was running into the car the first time defendant saw him, and if the headlights would not warn plaintiff certainly a honk would not. All the defendant could do was to apply his brakes hard, which he did instantly.

In the case at bar the defendants discuss at length the effect of the violation of the law by the pedestrian. Section 1201, Traffic Ordinance No. 3357 of the city of Lincoln, pleaded in defendant's answer and offered in evidence, prohibits a pedestrian from crossing the street at any place other than a regular cross-walk, in the following language: "Section 1201. Pedestrians Jay-Walking. No pedestrian shall cross any street at a place other than a cross-walk, nor cross any street intersection diagonally."

There is also a statute, section 39-1148, Comp. St. Supp. 1935, a portion of which section reads as follows: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked cross-walk. * * * Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, cross-walk or intersection shall yield the right of way to vehicles upon the highway." Therefore, in this jurisdiction pedestrians are forbidden by the ordinance of the city of Lincoln from crossing a street between intersections, and the statute requires them

to yield the right of way if they cross between such intersections.

The evidence in the case at bar does not show that there was any other car in the middle of the block at the time of the accident, and nothing to confuse the pedestrian. The plaintiff saw the defendant's car coming west on O street from the time it crossed Eighteenth street, for the headlights were burning, as required. The plaintiff, instead of stopping in the middle of the street, started to run to beat the automobile, while the testimony of the defendant is that he did not observe the plaintiff until he saw him running in from the south side within ten feet of the car.

In our opinion, the evidence would not sustain a finding that the defendant was guilty of gross negligence, but the evidence did establish beyond the point that reasonable minds differ, and as a matter of law, that plaintiff was guilty of negligence contributing to his own injuries, in a degree more than slight.

The judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissenting.

My view of the facts and the law is at variance with the opinion of the majority. Plaintiff was rightfully in the street before he attempted to cross it. The jury were at liberty to find from the circumstances that plaintiff would have crossed in safety except for the dangerous and unlawful speed of the car that struck and maimed him, as evidenced by the distance he was thrown and rolled along the street like a tumble-weed. It was reasonable for plaintiff to believe the approaching car was so far away as to permit him to cross on foot in safety and his negligence in attempting to do so was evidentially slight in comparison with the proper inference of gross negligence of the driver whose lawless speed was such as to make a collision unavoidable, though a lawful speed and reasonable care would have prevented the casualty. The issues of slight negligence and gross negligence were questions for the jury under the evidence and circumstances.

ANNA PRESCHER, APPELLEE, V. BAKER ICE MACHINE COMPANY, APPELLANT.
273 N. W. 48

FILED APRIL 23, 1937. No. 30087.

1. **Master and Servant:** INDEPENDENT CONTRACTOR. "An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562.
2. ———: ———. A person who contracts to unload a car of coal from a railroad car to the employer's coal bin for 25 cents a ton; who has the right to employ his own assistants; who has the right to determine the hours of labor; and who has the power to direct how and when the detail of the work shall be performed is an independent contractor within the meaning of the workmen's compensation law.

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

Brown, Fitch & West, for appellant.

Lawrence I. Shaw and *William H. Thomas, contra.*

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

CARTER, J.

This is a suit brought under the workmen's compensation law. The plaintiff, Anna Prescher, as a dependent, obtained an award of compensation in the district court on account of injuries suffered by and resulting in the death of her son, Arthur Prescher. From this award, defendant Baker Ice Machine Company appeals.

The only question necessary for our consideration is whether the deceased was an employee of the defendant Baker Ice Machine Company or an independent contractor.

The deceased sustained injuries resulting in his death while unloading a car-load of coal for the Baker Ice Machine Company. The evidence shows that on and prior to January 9, 1936, Rudolph Prescher, a brother of the deceased, was regularly employed by the Baker Ice Machine

Company. It appears that Rudolph Prescher learned that the Baker Ice Machine Company would soon have a car of coal to unload and he inquired of one Stender, the foreman in charge of the coal, if his brother Arthur could have the job of unloading. It also appears that he informed Arthur that evening that he might get the job of unloading the coal. The next day Arthur Prescher and W. H. King, a roomer at the Prescher home, went to the plant of the Baker Ice Machine Company and applied for the job of unloading the coal. Neither of them had previously worked for the defendant company. Stender, the foreman, gave them the job and told them that he would call them when the coal came in. It was also agreed that they were to receive 25 cents a ton for unloading the coal. On January 8 Stender notified them that the coal was in and that they could start work the next morning. On the morning of January 9, at 7 or 7:15 o'clock, they appeared at the plant of the Baker Ice Machine Company and the night watchman gave them the tools and planking necessary to carry on the work. Arthur Prescher received his injuries at or about 3 p. m. of the same day in an unknown manner but apparently by a fall.

Plaintiff contends that the deceased was an employee because of evidence tending to show that Stender, the company foreman, was directing the work. The evidence on this point shows that in the forenoon it became necessary to move the car and that Prescher and King were unable to do it with the means at hand. Stender sent a number of regular employees and a company truck to assist, and, upon their failure to move the car, called upon the railroad company to send a switch engine to move it. It also appears that after the accident Stender assisted in estimating the amount of coal unloaded, in order to determine the amount that Prescher had earned.

Defendant points out, however, that King and Prescher chose their own hours to work, which were different than those of the regular employees of the company; that after the accident King got one Heinze to help him complete the

job; that King and the deceased were not required to punch the time clock as were the regular employees of the company; and that they were not placed upon the pay roll of the company nor paid from the pay roll account of the company.

Whether the deceased was an employee or an independent contractor cannot be decided by a hard and fast rule. The relationship can only be established by a consideration of the facts and circumstances of the case. *Showers v. Lund,* 123 Neb. 56, 242 N. W. 258. An independent contractor usually enters into a contract to do a specified piece of work for a specific price; makes his own subcontracts; employs, controls, pays and discharges his own employees; furnishes his own tools and materials; and directs and controls the execution of the work. As we said in the case of *Reeder v. Kimball Laundry,* 129 Neb. 306, 261 N. W. 562, where these conditions concur, there is no difficulty in determining his character as such. It is only when one or more of these conditions do not exist that a question arises.

The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified piece of work for a specific price. The agreement in the case at bar to unload one car of coal for 25 cents a ton provides this necessary element. In addition thereto, the evidence shows that King and Prescher fixed their own hours, controlled the method and means of doing the work, and, after the injury to Prescher, King engaged Heinze to help him complete the job. The assistance rendered by Stender and other employees of the company in helping to move the car does not indicate that the relationship of employer and employee existed. The interest of the company in assisting to spot this car was the same whichever relation may have existed between them. It is true, however, that the company furnished the tools and materials necessary to unload this car. While this is indicative of the existence of the relationship of employer and employee, it is in no sense controlling. It appears that, because of the location of the coal bin, it was necessary to use

certain planks and a wheelbarrow in unloading the coal. The company apparently kept this equipment available because of the peculiar situation. Under these circumstances, we cannot say that the furnishing of this equipment is of itself sufficient to establish the relation of employer and employee. It is quite apparent that the Baker Ice Machine Company was interested only in having this car of coal unloaded and not as to the manner and means of its accomplishment.

After a consideration of all the evidence in this case, we are convinced that the deceased was an independent contractor and not an employee. The trial court therefore erred in awarding compensation to the plaintiff.

REVERSED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. EDWARD F. WHITE ET AL., APPELLEES.
272 N. W. 769

FILED APRIL 23, 1937. No. 29946.

1. Homestead: EXECUTION: LEVY: NOTICE. A notice signed by both husband and wife to a sheriff, who has levied an execution upon the separate property of the wife for her individual debt, that they claim a homestead in the property is sufficient to require the sheriff to take the statutory steps for an ascertainment of the homestead.
2. ———: ———: ———: SALE: VALIDITY. The sheriff has no judicial discretion to determine, without such steps being taken, that the property claimed is not a homestead, and where a proper notice is served and a sale is made without such steps being taken, the sale is void and will be set aside.
3. ———. The evidence in this case is sufficient to sustain the finding of the trial court that the property claimed is the homestead of the claimants.

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

Allen, Requartte & Wood and *Lee Card,* for appellant.

Charles A. Fisher, contra.

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

CLEMENTS, District Judge.

This action arises from the levy of an execution upon real estate claimed to be the homestead of debtors and the sale of the real estate upon the execution. Upon motion of the debtor the sale was set aside by the trial court and the case comes here on appeal.

In the trial of this case no evidence was offered by the judgment creditor, appellant herein. The facts in the case must be gathered from the evidence presented by the appellees.

A summary of this evidence shows that Daniel O. Cleghorn and Maude E. Cleghorn are husband and wife. For about 30 years prior to the trial in this case, Mr. Cleghorn had been and then was a railroad conductor running out of Chadron, Nebraska, on the Northwestern railroad.

At the time the controversy in this case arose, Mr. Cleghorn owned three pieces of real estate in Chadron—a house and lot on Shelton street, a house on Main street and a house on King street. The properties on Shelton and King streets are under foreclosure. It does not appear that the Main street property is mortgaged, but it is under lease by the terms of which the rental is applied upon a note owed by Mr. Cleghorn.

In 1928 Mrs. Cleghorn acquired a small tract of land about ten miles south of the city of Chadron and built some buildings thereon. It appears that Mr. Cleghorn furnished the money for this enterprise, but the title to the property was taken in the name of his wife and the property has always been considered as belonging to her. The buildings constructed on this tract consisted of a main building and garage used by Mrs. Cleghorn as a residence during the summer months, and a number of smaller buildings used for rental purposes. Ever since she acquired the property and built the buildings Mrs. Cleghorn has operated it as a summer camp for tourists and others.

Owing to the fact that Mr. Cleghorn's business required

him to be on the road a large part of the time and to Mrs. Cleghorn's business enterprise, the residence of these people at times has been very uncertain. Mr. Cleghorn kept a room in the Shelton street house which he occupied as a sleeping apartment when he was not out at the summer camp. The Shelton street property is an apartment house consisting of four apartments and two rooms. At the time the summer camp property was acquired the Cleghorn's were occupying one apartment in the house. The other apartments were rented. After the building of the residence at the summer camp the Cleghorns gave up their apartment in the Shelton street house, reserving the one room where Mr. Cleghorn slept. The reason for reserving this room seems to have been the necessity of Mr. Cleghorn having a place in Chadron where he could be called for duty. In the winter months the Cleghorns reserved two rooms and the basement in the Shelton street property where they lived during the cold months. In the summer Mrs. Cleghorn lived at the summer camp and Mr. Cleghorn was there with her as much of the time as he was able from his duties as a conductor.

Up to the time that this litigation arose the parties never seemed to have made any formal selection of a homestead.

Some time subsequent to the time Mrs. Cleghorn acquired the summer camp, she became indebted by reason of certain notes she signed as surety, and on the 18th day of March, 1931, a judgment in the sum of $2,850.76 was rendered against her in the district court for Dawes county on these notes. On February 27, 1936, an execution was issued on this judgment, levied upon the summer camp property, and this property was advertised for sale to satisfy this judgment.

On March 30, 1936, Maude E. Cleghorn and Daniel O. Cleghorn caused a notice to be served upon the sheriff holding the execution that they claimed a homestead in this property, that it does not exceed in value the sum of $2,000 and is exempt from forced sale. The sheriff took no action on this notice but sold the property to the judgment creditor

for the sum of $900. On April 4, 1936, Maude E. Cleghorn filed a motion in the district court for Dawes county, as follows:

"Comes now the defendant Maude E. Cleghorn, and moves the court to set aside and vacate the sheriff's sale under execution held on March 31, 1936, for each of the following reasons, to-wit:

"1. That the property levied on and sold by the sheriff under the execution, in this action, was exempt to the defendant Cleghorn as a homestead.

"2. That, after the levy of the execution and before the sale, said defendant and her husband had served on the sheriff and Lee Card, attorney for plaintiff, a written notice claiming the real estate levied upon as a homestead, and that the same was, therefore, exempt from sale on execution, and that the judgment creditor failed to have claimants' homestead right determined, as provided by sections 40-105 and 40-106, Compiled Statutes of Nebraska, 1929."

A copy of said notice was attached to the motion.

It is from the court's ruling on this motion setting aside the sale that the appellant appeals and brings this case here.

The appellant contends, first, that the execution was issued upon an indebtedness of the wife, was levied upon her separate property, that she was not the head of the family, and that a notice signed by her did not require the sheriff to take the statutory steps to determine the homestead, and that the parties could not select a homestead from her property; second, that the evidence shows that the property in question was not the homestead of the claimants; that they had a homestead elsewhere in property belonging to the head of the family.

The first contention of appellant is answered by our holding in *Quigley v. McEvony*, 41 Neb. 73, 59 N. W. 767. In this case writ of attachment was levied upon the separate property of Sarah A. Quigley and for her individual debt. She was a married woman residing at the time with her husband in Sioux City, Iowa. The property levied upon

was a residence in O'Neill, Nebraska. Mrs. Quigley caused a notice to be served on the sheriff that she claimed the property as a homestead. The sheriff disregarded the notice, judgment was rendered in the attachment proceedings and an order to sell the premises issued. Mrs. Quigley brought an action to enjoin the sale and have the property declared to be a homestead. The attaching creditor made the same contentions which are advanced here, namely, Mrs. Quigley was not the head of a family; a notice signed by her did not require the sheriff to determine the homestead; the evidence did not support the court's judgment that she was entitled to a homestead in the O'Neill property. In this case we held that the notice signed by the wife, the owner of the property, was sufficient, using this language:

"A statutory exemption of a homestead was intended and enacted in the interest of, and for the benefit of, the debtor, and it is the policy of the law that such enactments be liberally construed, so that the intention of the legislature shall be enforced or carried out to its fullest and greatest extent. * * * The primary and sole object and purpose of the notice required by the section of our statutes doubtless was and is that the sheriff, and the attachment or execution creditors, should and shall be apprised of the debtor's right or claim of right in the premises, that they may act or proceed accordingly; and we think that the notice in this case, given as it was by the party owning the property, and as soon as it was ascertained that a levy had been made, was sufficient to apprise the sheriff and creditor of the right claimed by the debtor in the property, and was sufficient, both as to the person signing and giving it and as to the time of service, to satisfy and fulfil the requirements of the law in regard to the notice."

It is apparent that unless we desire to disavow the holding in the *Quigley* case, which we do not, we must find that in the instant case the notice served by the parties in this case was sufficient, and that it became the duty of the sheriff to take the steps provided by statute for the ascer-

tainment of the homestead. He having failed to do this, the sale upon the execution was void and the decision of the trial court setting it aside is right.

We cannot agree with the contentions of the appellant that the evidence shows that the Cleghorns had selected the Shelton street property as their homestead and therefore should not be awarded a homestead in the residence in the summer camp. The evidence discloses that for a number of years prior to the time this controversy arose these parties have vibrated between several places of abode. Prior to the acquisition of the Shelton street apartment house, they lived in a rented house in Chadron, then in an apartment in the Shelton street property, then at Rapid City, South Dakota, then in the summer camp, giving up the apartment in the Shelton street house, reserving only one room for the convenience of Mr. Cleghorn, then back for the winter to two rooms and a basement in the apartment house. We do not think this shows a state of facts sufficiently strong to overcome their positive statement that they had not selected the Shelton street house as their homestead or to require us to hold that there is not sufficient evidence to support their claim to a homestead in the residence in the summer camp.

The ruling of the trial court should be affirmed.

AFFIRMED.

NEBRASKA MUTUAL INSURANCE COMPANY, APPELLANT, V. LOUIS C. BORDEN, APPELLEE.

272 N. W. 767

FILED APRIL 23, 1937. No. 29811.

Appeal. When the judgment is clearly against the weight of the evidence, it is the duty of the court to set it aside.

APPEAL from the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Reversed.*

Tunison & Joyner, for appellant.

A. E. Henry, contra.

Heard before GOSS, C. J., ROSE, GOOD, PAINE and CARTER, JJ., and RYAN and KROGER, District Judges.

RYAN, District Judge.

The Nebraska Mutual Insurance Company, an assessment insurance company organized under the laws of the state of Nebraska, brought this action against Louis C. Borden, a member, to collect assessments for the purpose of paying losses it had sustained. The petition alleged in substance that the plaintiff company was incorporated in the year 1892, and continually since that time had been in the business of insuring its members against loss from fire, tornado and windstorm; and that the defendant became a member by making an application in writing. Pursuant to the application, a policy of insurance was issued to him, and during the time of his membership assessments were made for the years 1931 to 1933, inclusive, aggregating $43.75; that assessments represent the defendant's proportionate share of the losses and expense of the company; that he had failed, neglected and refused to pay the same. The answer of the defendant was a general denial. A jury was waived and trial was had to the court. The court entered judgment in favor of the defendant and dismissed the plaintiff's petition with costs. Motion for a new trial was filed and overruled. Plaintiff appeals to this court.

The appellee has not filed any brief in this court, and consequently the court is not advised as to the propositions upon which he relies to sustain the judgment of the trial court.

The evidence consists solely of the deposition of W. T. Wilson, the secretary of the plaintiff company. It appears that his duties were to keep the minutes of all meetings of the directors of the company, and to keep its books, records, and perform any other duties required by the board of directors. It appears from the testimony that the defendant applied for membership and insurance in the plaintiff company on April 4, 1927, and that a policy was issued to him

in the sum of $3,450, indemnifying him against loss by fire, lightning, tornado and windstorm. This policy was reduced on January 31, 1928, to $2,650. The defendant paid his assessments up to and including the assessment levied on April 2, 1930. The assessments which are the subject of this suit were levied January 21, 1931, February 17, 1931, January 19, 1932, and January 17, 1933. It also appears in the testimony that the aggregate amount of these assessments is the sum of $38.43 instead of $43.75 as stated in the petition, there having been an error of $5.32 in the computation of one of the assessments. The sections of the statute applicable to an assessment insurance association, such as the plaintiff, are sections 44-402 and 44-901 to 44-911, Comp. St. 1929. Construing the rights of the parties in the light of these sections of the statute, we are at a loss to understand how the learned trial court arrived at the conclusion that the plaintiff should not recover in this action.

The evidence shows in detail the amount of insurance in force, the amount of losses and expenses for the years 1931, 1932 and 1933, being the years for which the plaintiff seeks to recover assessments from the defendant. Assessment No. 37, which is the regular assessment for 1931, was levied on January 21, 1931, at 40 cents a hundred on defendant's policy of $2,650. At that rate, this assessment would amount to $10.60. On February 17, 1931, a special assessment was levied at the rate of 20 cents a hundred. This special assessment, therefore, amounts to $5.30. On January 19, 1932, assessment No. 38 was levied at 40 cents a hundred, and as the same amount of insurance was in force, the defendant's assessment amounts to $10.60. On January 17, 1933, assessment No. 39 was levied at the rate of 45 cents a hundred, and as defendant's policy was $2,650 as theretofore, this assessment amounts to $11.93. The total amount due from the defendant for these three regular assessments and one special assessment is $38.43. The evidence further shows that all of the assessments concerned in this suit were made at regular and special

meetings of the board of directors of the plaintiff company, at which meetings a necessary quorum for the transaction of business was present. We have carefully scrutinized the by-laws of the plaintiff company, and find that they meet the requirements of the statutes referred to above. Notices of these assessments were regularly sent to the defendant as well as additional letters urging payment. Defendant at no time surrendered his policy for cancelation, nor did he give notice to the secretary of the plaintiff company and tender the cancelation fee of 50 cents together with the amount of his share of all claims against the company, as required by section 44-904, Comp. St. 1929, and section 15 of the by-laws of the company.

It is an elementary proposition of law that when a judgment is clearly against the weight of evidence it should be set aside. *Bentley v. Hoagland*, 94 Neb. 442, 143 N. W. 465; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976; *Hileman v. Maxwell*, 97 Neb. 14, 149 N. W. 44.

The judgment of the trial court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MAX C. BRODSKY ET AL., APPELLANTS, V. NATHAN BRODSKY ET AL., APPELLEES.

272 N. W. 919

FILED APRIL 30, 1937. No. 29837.

1. **Trusts.** No resulting trust necessarily arises in favor of a person furnishing the consideration, in whole or in part, for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift.
2. **Husband and Wife.** "Though a wife renders services outside of the ordinary household duties, it is generally held that there is no implied obligation on the husband's part to pay her for them." 13 R. C. L. 1089, sec. 113.

3. Evidence in the record examined *de novo*, and *held* to support the judgment of the trial court.

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

Weaver & Giller, for appellants.

Fradenburg, Webb, Beber, Klutznick & Kelley, contra.

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

EBERLY, J.

This is a suit in equity. Plaintiffs, appellants, are a son and daughter of defendant Nathan Brodsky by his former wife, now deceased. Defendant Ann Brodsky is the present wife of defendant Nathan Brodsky, and will hereinafter be referred to as Ann Stein Brodsky. The petition contains allegations as to the method and manner of acquirement, by the joint efforts of defendant Nathan Brodsky and his wife, Anna Brodsky, of certain real estate and personal property. It charges that, though the legal title was taken in the name of defendant Nathan Brodsky, their mother, in equity, was at all times the owner of an undivided one-half thereof; that their mother, Anna Brodsky, died on July 10, 1928, intestate, seised and possessed of such interest; that defendant Nathan Brodsky married Ann Stein Brodsky in 1932; and that on or about July 14, 1933, he deeded all of his real estate, which theretofore had been the joint property of himself and his deceased wife, Anna Brodsky, to his present wife, Ann Stein Brodsky, under deeds of survivorship, so that in event of Nathan Brodsky predeceasing his present wife, Ann Stein Brodsky, all of the property interest of Anna Brodsky, the first wife, would vest in Ann Stein Brodsky, and plaintiffs would be deprived of their right of inheritance thereby. The prayer of plaintiffs' petition is that they may be awarded as their inheritance from their mother's estate, which is now held in trust by defendant Nathan Brodsky, one-third of all property de-

scribed in their petition, and for proper judgment to secure the same.

To this petition, defendants pleaded the statute of limitations, and denied generally "each and every allegation contained" therein.

Upon trial to the district court, a decree was entered finding "upon the issues joined generally in favor of defendants and against plaintiffs," and dismissing the petition. From this judgment plaintiffs appeal.

This is an attempt to establish a resulting trust in favor of the plaintiffs, the son and daughter, against their father as to certain property alleged to have been accumulated during the married life of their father and mother, now deceased, through the joint efforts of both, but the legal title thereof admittedly at all times being in the name of the father, Nathan Brodsky.

In the determination of the issue presented by plaintiffs, it will be remembered that the rule is: "To establish a resulting trust the evidence must be full, clear, and satisfactory." *Klamp v. Klamp*, 51 Neb. 17, 70 N. W. 525. See, also, *Doane v. Dunham*, 64 Neb. 135, 89 N. W. 640.

While the details of a lifetime of labor by Brodsky are in some degree a matter of dispute in the evidence, it fairly appears (or at least the evidence to the contrary certainly lacks much of being full, clear, and satisfactory) that Brodsky was 71 years of age at the time of the trial; that he came to Omaha in 1893 and started to peddle fruits and vegetables; that he bought a small store at Seventeenth and Marcy streets about a year after the exposition of 1898. The value of the stock of merchandise then purchased was approximately $200, and the fixtures were valued at $25. The purchase was made by the purchaser on the basis of paying off the debts on the stock, amounting to $200. Brodsky continued his daily peddling from 4:30 or 5 a. m. until about noon. He ran the store after dinner, and his wife attended to customers during his absence in the forenoon. During this time his wife had a few weeks' employment as a seamstress at a low wage, the amount so

earned not being definitely fixed by the evidence but being contributed to the business or spent in the home. He also at one time purchased a store at Eighteenth and Leavenworth streets, which was continued approximately one year, and of which Nathan Brodsky took personal charge. The store at Seventeenth and Marcy streets, during this period, is said to have been supervised by Anna Brodsky. The store at Eighteenth and Leavenworth streets was then disposed of, and the business at the old location was continued until the site was required for railway improvement. It was then sold and a new location obtained by the purchase of the Monaghan building on Grace street. This place was subsequently improved by the erection of a brick store building thereon. Mrs. Brodsky took care of the family home, and from time to time assisted in the store. Certain real estate was purchased by Brodsky out of the profits of the store. Mrs. Brodsky contributed no money, save small earnings as a seamstress. She cared for the family and assisted in the business, but to what extent the evidence is not in agreement. It appears that Mrs. Brodsky was in ill health for some years prior to her death. This necessitated various trips to health resorts. The expenses of her last illness, which terminated with her death on July 10, 1928, amounted to $3,000. All of these expenses were defrayed by Brodsky. The family consisted of Brodsky, his wife, and the two children, now plaintiffs herein. They were educated in the public schools, and assisted in the family grocery business, and at their respective marriages they were each given $2,000 as a marriage present. When the mother died, the father turned over to the daughter $1,700, the proceeds of a savings account of her mother.

There is no competent evidence in the record which definitely negatives Brodsky's testimony as to his financial situation at the time of his wife's death. In substance, he stated that at the time his first wife died the grocery stock was worth between $600 and $700, and the fixtures were worth about $400; that he owed the wholesale houses, and had no savings account at the time of his wife's death;

that he barely had money enough to run the business, and was on a c. o. d. basis; and that he owed $700 or $800 in taxes at the time.

It appears without dispute that the business had always been carried on in the name of Nathan Brodsky. His was the sole name on the sign. Goods were purchased in his name alone, and the sales thereof were carried on by his direction. The real estate was purchased in his name, and by him, and the record title has at all times been continued with him as sole owner thereof. For a period of time Mrs. Brodsky was very active in assisting her husband. After 1905 her health largely prevented these activities. However, there is no evidence of an express agreement at any time, between her and her husband, for her compensation. Certain conversations between the father and his children were testified to by the latter, and denied by the former. But, even if true as the son and daughter testify, their probative effect would fall far short of establishing the foundation on which a resulting trust might rest. Even in cases of insolvency involving the advancement of money as part of the purchase price, we have long been committed to the view that no resulting trust arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. *Solomon v. Solomon,* 3 Neb. (Unof.) 540, 92 N. W. 124; *Brownell v. Stoddard,* 42 Neb. 177, 60 N. W. 380; *Kobarg v. Greeder,* 51 Neb. 365, 70 N. W. 921; *Doane v. Dunham,* 64 Neb. 135, 89 N. W. 640.

The rule also appears to be: "Though a wife renders services outside of the ordinary household duties, it is generally held that there is no implied obligation on the husband's part to pay her for them." 13 R. C. L. 1089, sec. 113. See, also, *Whitaker v. Whitaker,* 52 N. Y. 368, 11 Am. Rep. 711; *Coleman v. Burr,* 93 N. Y. 17, 45 Am. Rep. 160;

Blaechinska v. Howard Mission and Home, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215, and note; *Matter of Callister*, 153 N. Y. 294, 47 N. E. 268, 60 Am. St. Rep. 620.

In addition to the foregoing, the established rule of this jurisdiction is that, while equity appeals are tried *de novo*, yet, where the evidence is conflicting, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

A review of all the facts and circumstances disclosed by the evidence in this case clearly establishes the conclusion that the judgment of the trial court is correct, and it is

AFFIRMED.

JAMES L. FLUCKEY, EXECUTOR, APPELLEE, V. BERTHA LEOLA ANDERSON, APPELLANT.
273 N. W. 41

FILED APRIL 30, 1937. No. 29897.

Contracts. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts, sec. 90.

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

J. J. Harrington, for appellant.

Julius D. Cronin and *W. J. Hammond, contra.*

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

EBERLY, J.

This is an action at law brought by James L. Fluckey, as executor of the last will and testament of Austin L. Fluckey, upon a promissory note, in usual form, signed by Bertha

Leola Anderson. The answer of the defendant admitted the appointment and qualification of the executor, and the execution and delivery of the note in suit, and then pleaded at length facts establishing that the instrument in suit was wholly without sufficient consideration. The new matter set forth in defendant's pleading was denied generally by plaintiff's reply. The pleadings, of course, imposed the burden of proof upon the defendant. *Plaza Hotel Co. v. Hotel Stratton, ante,* p. 396, 272 N. W. 224.

The trial court submitted the issues to the jury, solely on the question of consideration, and the verdict returned was for the plaintiff as prayed. From the order of the trial court overruling her motion for a new trial, defendant appeals.

The verdict of the jury necessarily determined certain questions of conflicting evidence in favor of plaintiff. On this basis, it may be said that Austin L. Fluckey was the father of three daughters and two sons; that he advanced and loaned various sums to these children and to their respective spouses; that as early as 1915 he loaned a certain sum to George Anderson, who was the husband of his daughter, Bertha Leola Anderson, *nee* Fluckey; that the notes evidencing this loan were renewed from time to time, the original and each renewal note being executed by George Anderson and his wife, Bertha Leola Anderson, the latter signing as surety, but she then possessed no sole or separate estate; that George Anderson died in 1924 leaving an insolvent estate; that his wife, at the demand of her father, substituted her own promissory note for that executed by her husband and herself, and which she thereafter renewed. In June, 1929, the father, who was ill, had a family conference, at which were his three daughters, including Bertha Leola Anderson, and two sons. So far as pertaining to the present litigation, Mr. Fluckey then said to his children there assembled: "I want you that owe me notes to keep them up to date, and those that are past due to renew them now while you are here; and he says to my sister Mrs. Kellar, yours is past due, and he spoke to Bertha

Anderson and told her that hers was past due. Mrs. Hopkins renewed her note that day. Then he asked Bertha (Anderson) to renew her note, and she objected to renewing it because she felt he was showing partiality to Art (a brother) on this insurance policy." He, the father, then said: "I want you to understand this, if you are unable to pay these notes while I live they must be taken out of your share of my estate before distribution or division is made. * * * If any of you don't keep your notes from outlawing, and permit them to outlaw, I will fix it so that that will be all of my estate that you will receive." Later the father sent his son, James L. Fluckey, over to the home of Mrs. Bertha Anderson, and it was again made plain to her, by her father's message then delivered by the son, "that if she allows it to outlaw that that will be all of my estate she will ever receive." Under these circumstances Mrs. Anderson renewed the note at a later time, and executed the note in suit. The note in suit bears date May 28, 1931. Austin L. Fluckey executed a last will and testament on August 8, 1931, and also executed a codicil thereto on February 28, 1933. These instruments were duly admitted to probate in Holt county.

The fourth paragraph of the codicil includes the following:

"Three-fourths of all of my property remaining, wherever situated and whether real, personal or mixed I give, devise and bequeath to my children Annella M. Hopkins, Bertha Anderson and James L. Fluckey, share and share alike."

The appellant insists that under the circumstances set forth the controlling principle is: "A married woman who signs a note as surety for her husband and receives no part of the consideration and does not agree to bind her separate property and estate for the payment of the debt and at the time she signed the original note as surety for her husband, and all renewals thereafter, she did not have any separate property or estate and that she signed renewal notes after the death of her husband, but without any new

consideration, such a note is unenforceable." In support of this statement *Bank of Commerce v. McCarty,* 119 Neb. 795, 231 N. W. 34, is cited.

Appellant also insists that the doctrine of reciprocal promises is inapplicable, because reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon to enforce the same, otherwise such agreement is *nudum pactum.*

Appellee contends that the evidence in the record establishes a definite agreement between the daughter and the father; that a promise to defendant that under certain circumstances she would share in decedent's estate may be inferred from circumstances and statements of the deceased. It is also insisted by appellee that the question is one of fact, and that the inference may be drawn from circumstantial as well as direct evidence. *McDonald Bros. Co. v. Koltes,* 155 Minn. 24, 192 N. W. 109. We deem the question of the determination of the validity of the reciprocal promises of this father and his daughter not necessary for the proper disposition of this case.

It is thought that this view of the doctrine of consideration and the necessity of the same to assure the validity of contracts, as advanced by appellee, is too restricted as applied to the facts of the record. The defendant, under the situation outlined, certainly could reasonably expect that her written promise to pay would induce action in the event her father made a will which would assure her a share of his estate, if he died testate, or if he made no will, forbearance on her father's part that would assure her a distributive share of his estate by inheritance. This anticipated action, it appears, was induced. The evidence discloses that the father actually made a will, and that by its terms she received the equivalent of an undivided one-fourth of his estate, both real and personal, as a legacy. On the other hand, the fact is patent that a refusal of the daughter to conform to the father's demand for the renewal of her note would have resulted in the loss of her inheritance in

his estate. Now that the father is dead, may the daughter retract the promise on which the father relied, to the prejudice of his legatees?

The principles of law necessarily invoked by the facts of the instant case, as stated in a standard text, are:

"It is generally true that one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two (or their representatives) deny the truth of the representations, and some courts have sought to apply this principle to the formation of contracts, where, relying on a gratuitous promise, the promisee has suffered detriment. It is to be noticed, however, that such a case does not come within the ordinary definition of estoppel. If there is any representation of an existing fact, it is only that the promisor at the time of making the promise intends to fulfil it. As to such intention there is usually no misrepresentation and if there is, it is not that which has injured the promisee. In other words, he relies on a promise and not on a misstatement of fact; and the term 'promissory' estoppel or something equivalent should be used to make the distinction." 1 Williston, Contracts (Rev. ed.) sec. 139.

The applicable rule as found in the Restatement of the Law is:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts, sec. 90.

We made a practical application of the foregoing doctrine in *Ricketts v. Scothorn*, 57 Neb. 51, 77 N. W. 365. In that case we sustained the validity of a promissory note and affirmed the judgment entered thereon, when challenged because of insufficient consideration. The facts involved in the *Ricketts* case, as shown by the opinion of Sullivan, J., are as follows:

"According to the undisputed proof, as shown by the

record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration."

True, in such *Ricketts* case, it appears there was a plea in the nature of an equitable estoppel presented by the defendant, and a technical estoppel was not formally pleaded in the instant case. However, "Where the facts showing estoppel are in issue and are admissible for any purpose under the pleadings, estoppel is available as a defense without being specially pleaded." So, too, "Evidence of estoppel is admissible without being pleaded in order to rebut evidence introduced by the opposite party." 21 C. J. 1246. See, also, *City Nat. Bank of Hastings v. Thomas,* 46 Neb. 861, 65 N. W. 895; *Seng v. Payne,* 87 Neb. 812, 128 N. W. 625; *Smith v. Liberty Life Ins. Co.,* 118 Neb. 557, 225 N. W. 688.

It will be noted that the Restatement doctrine is not related to pleading but is a statement of substantive law. As applied to the facts in the instant case, it supplies sufficient consideration, or the equivalent of it, to assure the validity of the transaction involved. Whether proper terminology would require it to be designated as conventional consideration may be a question for the text-writers, but a careful analysis of the entire situation discloses that beyond ques-

tion it amounts to a technical consideration because of the necessary detriment to the promisee involved.

It follows, therefore, that the judgment of the trial court is as to all matters of substance correct, and it is

AFFIRMED.

ETHYL FALKINBURG, APPELLANT, V. INTER-STATE BUSINESS MEN'S ACCIDENT COMPANY, APPELLEE.
272 N. W. 924

FILED APRIL 30, 1937. No. 29945.

1. Evidence: SUICIDE: PRESUMPTION. The presumption against suicide does not have the force of evidence in favor of plaintiff, and vanishes from the case upon introduction of evidence as to the cause of death.
2. ———: ADMISSIONS AGAINST INTEREST. A statement made by a party to an action as to any fact in issue unfavorable to the conclusion contended for by such party is relevant, and may be introduced in evidence as an admission against interest.

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

Brome & Thomas and *Harold A. Moore,* for appellant.

J. W. Kinsinger, Brogan, Ellick & Shoemaker and *Robert B. Hamer, contra.*

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

PAINE, J.

Plaintiff brought suit on an accident policy for the death of her husband. Defendant denied that the death was caused by an accident. The jury returned a verdict for the defendant, and upon the motion for a new trial being overruled, plaintiff appeals.

The assignment of error sets out that the verdict is contrary to the evidence and to the law, and that the court

erred in giving instruction No. 6, and that the court erred in overruling the plaintiff's objection to the testimony of David H. Brown respecting questions and answers given by the plaintiff at the taking of her deposition in another proceeding.

The petition alleged that on April 17, 1913, the plaintiff's husband took out a policy of insurance in the defendant company, which provided a payment of $5,000 if the insured came to his death from accidental injury, and the plaintiff was named as beneficiary therein; that on February 20, 1935, the plaintiff's husband was fatally injured by the discharge of a revolver, and died as a result of such injury eight days later, and plaintiff maintained that the discharge of the revolver was accidental, and brought suit for $5,000.

The defendant in its answer denied that the discharge of the revolver was accidental, and alleged that the policy of insurance provided that there would be no liability on the part of the defendant company if the bodily injury was produced by the discharge of firearms unless the accidental character of the injury should be established by the evidence of one eyewitness. The defendant also alleged that the policy provided that, if the insured should carry other insurance covering the same hazard without giving written notice to the company, said company would only be liable for proportionate amounts of the benefits, and charged that, without notice, the insured carried accident insurance in the Prudential Insurance Company of America in the sum of $3,600, and also a policy in the North American Accident Insurance Company in the sum of $7,500, and that the three policies of accident insurance in force at the time of his death were for a face amount of $16,100, but the court refused to admit over the plaintiff's objection evidence relating to the other accident insurance carried by the deceased, and also refused to submit to the jury that there could be no recovery if the death was caused by firearms unless there was an eyewitness to the accident.

The sole issue submitted to the jury by the trial court

was whether the discharge of the revolver was accidental, and the burden of proof was upon the plaintiff to prove that the discharge was accidental in character.

The evidence disclosed that for many years the deceased had been a Pullman conductor, and had made a satisfactory record; that he had lost practically no time in the service, but in July of 1934 he was compelled to stop work by illness, which was not physical but rather nervous in its nature; that he made at least two attempts to go back to work, but was unable to perform the work; that he had been under the care of two physicians, one of whom was somewhat of a specialist in mental diseases; that he drew some disability payments from a group insurance policy carried by the Pullman Company on its employees.

The plaintiff and her husband had lived together very happily during these years, and she was sympathetic to him in his disability. There was no mortgage on their home, and they had seven or eight hundred dollars in cash in the bank. The evidence disclosed that on the morning of the fatal shooting he had been out washing the windows on the outside of their home; and that he came into the house when his work was completed, and the plaintiff was working in the bathroom; that they visited for a few moments, then he walked through the dining-room and into a bedroom and had opened one of the upper drawers of a chiffonier in the bedroom and had taken from this drawer a 38-caliber Iver-Johnson revolver. The plaintiff rushed into the bedroom when she heard the explosion of the gun. Her husband was just falling to the floor, and said: "Toody, the gun went off." The plaintiff helped him get up on the bed and called for help, and neighbors came at once. He was taken to a hospital in the ambulance, and got along fairly well for a few days and then developed pneumonia and died eight days after the injury. The physician who examined him at the Immanuel Hospital after his arrival said that the bullet went in between the fifth and sixth ribs, a little over three inches to the left of the mid-line, and "just about the place where you can feel your heart beat," about

one inch below the nipple; that it came out between the tenth and eleventh ribs in the back.

An expert in firearms from Kansas City testified that he had examined and tested some 20,000 firearms, and had some 400 in his possession; that he had testified as an expert in 211 cases; that the Iver-Johnson revolver was the most common type of gun, and that he had tested an average of about 30 of them a month since 1927; that he had fired the gun introduced in the case at bar; that it is a double-action gun; that when the trigger is pulled a safety-block rises, and when the hammer is released by pulling the trigger further it hits the block, which in turn hits the firing-pin; that the hammer never strikes the firing-pin; that this model is known as "hammer the hammer," and is so advertised, and means that one can hit the hammer without discharging the gun; that he fired ammunition from this gun and made thorough tests of it. There was found in the gun a shell which had been discharged, and just ahead of it a shell which had misfired, and this expert said he found bright, untarnished spots in both of the primer caps at the place of indentation.

Another expert witness called by the defendant testified that he was ordnance officer and had formerly been stationed at Fort Omaha; that he had had charge, at the Frankfort arsenal and Springfield armory, of making tests with ammunition and guns, and had written two text-books for army use upon this subject; that he owned a gun of the same make as the one introduced in evidence; that it took a pressure of approximately seven pounds to discharge the hammer after it had been cocked, but that when the trigger was pulled in double action to pull back the hammer it required a pressure of approximately 15 pounds to discharge the gun; that the bottom of the indentation of both the discharged cartridge and the one that had misfired were bright, showing the recent exposure of the bright undersurface by the sharp blow of the firing-pin; that he examined these two shells on May 16, and again on July 8, 1935; that the first time that corrosion was noted on the

primer caps was on July 8, 1935, and that they were both corroded over.

At the time of the shooting the deceased was in his own bedroom, and as the plaintiff came into the room she first saw him falling to the floor, and the gun was falling to the floor at the same time.

The third assignment of error is that the court erred in giving instruction No. 6, which reads as follows: "You are instructed that the law presumes that the insured did not intentionally take his own life, and this presumption obtains until evidence is produced tending to show that the insured did in fact take his own life, and after considering all of the evidence, if you find from a preponderance of all of the evidence and the consideration of this presumption that the deceased, Orville G. Falkinburg, came to his death by the accidental discharge of the revolver, then your verdict will be in favor of the plaintiff, but, if you find that all of the evidence and this presumption against suicide as above set forth fails to prove by a preponderance of the evidence that the insured, Orville G. Falkinburg, died as a result of the accidental discharge of the revolver, then your verdict will be for the defendant." The first few lines of this instruction were taken practically verbatim from instruction No. 2 requested by the plaintiff.

Plaintiff insists that in the last part the court told the jury that this presumption has merely the force of proof, and thereby destroyed the entire purpose of the rule; that this is responsible for the confusion in the minds of the jury, and was prejudicial to the plaintiff. In the opinion of this court, this instruction was more favorable to the plaintiff than it should have been, in that it told the jury that both the evidence and the presumption should be considered by the jury.

In *Del Vecchio v. Bowers*, 296 U. S. 280, 80 L. Ed. 229, it is said in an opinion by Justice Roberts: "No rags or other material were discovered such as would suggest that Bowers was cleaning the pistol. * * * The parties agree that the

injury was self-inflicted, but are in controversy as to whether it was accidental or intentional. * * * The natural love of life, the comparative infrequency of suicide as contrasted with accident, * * * justify a presumption, which the law indulges in such a case, that the death was accidental. * * * Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. * * * The court of appeals erred in holding that as the evidence on the issue of accident or suicide was, in its judgment, evenly balanced, the presumption must tip the scales in favor of accident." Other cases in support of this holding are: *Dodder v. Aetna Life Ins. Co.*, 104 Neb. 70, 175 N. W. 651; *Green v. New York Life Ins. Co.*, 192 Ia. 32, 182 N. W. 808; *Sawyer v. Mutual Benefit Health & Accident Ass'n*, 121 Neb. 504, 237 N. W. 615; *De Bruler v. City of Bayard*, 124 Neb. 566, 247 N. W. 347; *In re Hawkins v. Kronick Cleaning & Laundry Co.*, 157 Minn. 33, 195 N. W. 766, 36 A. L. R. 394.

The plaintiff alleges prejudicial error in admitting the testimony of the witness David H. Brown, over the objection of the plaintiff, as to testimony given by the plaintiff, Ethyl Falkinburg, in a deposition taken in an action pending between other parties, and to which the defendant was not a party. Mr. Brown was a notary public and shorthand reporter, who had in court his original notes taken by him of the evidence given by the plaintiff in a deposition on July 25, 1935, in which he was allowed, over the objection of the plaintiff, to testify that she did not hear her husband state how it happened that he was shot; that he did not tell in her presence, as she had gone to another room to get a blanket to put around him. Plaintiff insists that, as this deposition was taken in another case and at the instance

of another party, who is not a litigant in the case at bar, it was a glaring example of the misuse of this evidence, and cites 3 Wigmore, Evidence (2d ed.) sec. 1415, that, if a witness is available for testifying, his deposition may not be used, and section 20-1246, Comp. St. 1929, showing under what conditions a deposition may be used in court. It is the opinion of this court that this evidence so taken was admissible without the necessity of laying a foundation, for it was clearly an admission against interest upon a material matter, and was admissible against the plaintiff as original evidence. Two opinions of this court on this point are *Luikart v. Korbmaker*, 128 Neb. 199, 258 N. W. 263, and *Gentry v. Burge*, 129 Neb. 493, 261 N. W. 854, in which latter case the admissions had been made before a referee in bankruptcy, and in the opinion of this court the trial court was right in allowing the evidence to be read to the jury. The most recent opinion is *McDaniel v. Farlow*, *ante*, p. 273, 271 N. W. 905, which is squarely in point.

We have discussed the errors alleged by the plaintiff and have reached the conclusion that the rulings of the trial court on evidence and the instructions given the jury were in no wise prejudicial to the plaintiff, and that the evidence sustains the verdict returned. The judgment of the trial court is hereby

AFFIRMED.

CARTER, J., dissenting.

I cannot agree that the evidence of the witness David H. Brown was admissible as an admission against interest. His evidence was clearly of an impeaching character only and therefore not admissible until a proper foundation was laid for it.

LINCOLN JOINT STOCK LAND BANK, APPELLEE, V. LUCIEN B. FULLER, PRO PER AND TRUSTEE, ET AL., APPELLANTS.
273 N. W. 14

FILED APRIL 30, 1937. No. 29964.

1. Appearance. A person who appears generally and objects to the confirmation of a sale of the real estate in a foreclosure suit, by virtue of an interest in the property sold, thereby makes a general appearance for all purposes of the case and is in no position thereafter to complain that the proceedings were void for the reason that he was not made a party.
2. Courts. "Where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; and where property is *in gremio legis*, if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained." *Terry v. State*, 77 Neb. 612, 110 N. W. 733.
3. ———. But where one of two courts having concurrent jurisdiction takes cognizance of a case and thereafter loses jurisdiction over the *res*, the other is no longer deprived of its right to assume jurisdiction over it.
4. Mortgages: FORECLOSURE: SALE: CONFIRMATION. When the record shows that the property sold for a fair and reasonable value, under the circumstances, and there is no showing that it would bring more at another sale, the trial court did not err in confirming the sale.

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

Perry, Van Pelt & Marti and *L. B. Fuller*, for appellants.

Beghtol, Foe & Rankin and *Clyde Anderson, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Chase county confirming a sale of real estate under a foreclosure decree entered in that court.

It is the contention of appellants that Harris L. Fuller, as executor of the estate of Cash D. Fuller, was a necessary party and should have been made a party to the suit,

that the district court for Chase county was without jurisdiction to sell the lands, and that the property sold for such a grossly inadequate price that another sale should have been awarded.

The record discloses that Cash D. Fuller died seised of the lands involved in this litigation prior to the commencement of the foreclosure suit and that Harris L. Fuller and the Lincoln National Bank & Trust Company were duly appointed as coexecutors under the will of Cash D. Fuller. It further appears that on April 20, 1931, the executors of the estate of Cash D. Fuller obtained a license to sell the lands in Chase county to pay the debts of the estate. On November 3, 1931, the county court of Lancaster county removed Harris L. Fuller and the Lincoln National Bank & Trust Company as executors of the estate and appointed Fred E. Bodie in their stead, as administrator with will annexed. This order of removal was appealed from by Harris L. Fuller and, on March 23, 1933, the order of removal was reversed and Harris L. Fuller reinstated as executor of the estate of Cash D. Fuller by this court. *In re Estate of Fuller*, 124 Neb. 591, 247 N. W. 415. On November 18, 1931, this suit to foreclose plaintiff's mortgage was commenced, in which Fred E. Bodie, administrator with will annexed, was named as a party defendant. It is the contention of appellants that, as Fred E. Bodie was never regularly and legally appointed administrator with will annexed of the estate of Cash D. Fuller, the personal representative of the estate was never made a party and that the decree of foreclosure is therefore void. We do not deem it necessary to determine whether the personal representative of the estate was a necessary party, in view of the fact that the record shows that Harris L. Fuller as executor made numerous appearances in the case and thereby submitted to the jurisdiction of the court. The record shows that on February 16, 1936, Harris L. Fuller, as executor, filed objections to the confirmation of the sale held on December 2, 1935, and procured an order from the court setting aside the sale. Harris L. Fuller, as executor,

also filed objections to the confirmation of the sale held on April 27, 1936, and on May 7, 1936, appeared by his attorney and participated in the hearing which resulted in the confirmation of sale from which this appeal was taken. Under these circumstances, Harris L. Fuller, as executor, is in no position to urge error for the reason that he was not made a party to the suit. In *Nelson v. Nebraska Loan & Trust Co.*, 62 Neb. 549, 87 N. W. 320, this court said: "It is quite obvious from the foregoing that, whatever may have been the situation as to want of jurisdiction over the person of the plaintiff in error prior to the time he obtained leave to be made a party defendant and enter objections to the confirmation of sale, he thereby made a general appearance and the court acquired jurisdiction over him for all purposes of the case. He has invoked the power of the court regarding other matters than that of challenging its jurisdiction over him; has made a general appearance and waived all objections as to the manner in which he was brought into court. The appearance made was a general one, and comes entirely within the rule stated in *Welch v. Ayres*, 43 Neb. 326. See, also, *Aultman & Taylor Co. v. Steinan*, 8 Neb. 109, 113; *Burnham v. Doolittle*, 14 Neb. 214; *White v. Merriam*, 16 Neb. 96, 98; *Bucklin v. Strickler*, 32 Neb. 602; *Leake v. Gallogly*, 34 Neb. 857; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29." Harris L. Fuller is clearly within the rule thus announced.

The appellants also contend that, when the district court for Lancaster county granted a license to the executor to sell the Chase county lands, exclusive jurisdiction was obtained over said lands and that the district court for Chase county was without jurisdiction to proceed with the sale of the property. The record shows that the license to sell issued by the district court for Lancaster county was under date of April 20, 1931. This license to sell expired one year from the date of its issuance, under the provisions of section 30-1114, Comp. St. 1929. Assuming that exclusive jurisdiction to sell the property in question was obtained by the district court for Lancaster county on April 20, 1931,

that exclusive jurisdiction was lost one year later by the statutory limitation above noted. The last order of sale issued by the district court for Chase county was under date of March 23, 1936, and there having been no new license to sell the property issued by the district court for Lancaster county after the expiration of the license to sell issued under date of April 20, 1931, and prior to the issuance of the order of sale by the district court for Chase county on March 23, 1936, it is apparent that jurisdiction to sell the property then reposed in the district court for Chase county. This being true, the district court for Chase county was no longer divested of its statutory authority to enforce its decree of foreclosure by a sale of the property.

We are familiar with the rule announced in *Terry v. State,* 77 Neb. 612, 110 N. W. 733, in which we said: "It is a well-settled rule that where one court of competent jurisdiction in a proceeding *in rem* obtains jurisdiction of the *res,* or, in other words, the thing in controversy, no other court can acquire jurisdiction over it." The reason for this rule is well expressed in *Leigh v. Green,* 62 Neb. 344, 86 N. W. 1093, in which this court said: "This rule has its foundation, it would appear, not merely in comity, but in necessity; for were it otherwise, the orders of one court might be offset by those of another, and the parties left without any remedy; besides, in their rivalry for possession of property in controversy, a conflict would arise that would not only be embarrassing in the administration of justice, but would be liable to lead to unseemly strife and personal conflicts between the officers of the different courts. A study of the cases cited shows that in each case the property was in the actual or constructive possession of the court whose jurisdiction was invaded. The decisions are based, in most cases, upon the facts that the subsequent proceedings in another court would interfere with such possession." The reasons for the rule do not exist in the case at bar, therefore the rule does not apply. The property involved herein was not in constructive possession of the district court for Lancaster county for the rea-

son that it had lost its claimed exclusive jurisdiction over it. The powers and authority of the district court for Lancaster county were not invaded by the prosecution of this suit in Chase county for the reason that it had, at the time, no power or authority over the *res* to be invaded.

Appellants next contend that the property did not sell for a reasonable and fair value and that the sale price was so grossly inadequate that it should have been set aside by the trial court. The property sold for $1,899.44, subject to prior liens of more than $10,000 so that the property in fact sold for almost $12,000. Appellants produced the affidavits of several witnesses who stated that the reasonable cash market value of said land is at least $20,000. Appellees offered no evidence as to the value of the land. The record shows, however, that this land had been sold twice previously at foreclosure sales, which sales had been set aside by the trial court. There is no evidence in the record that the land would bring any greater amount at a subsequent sale or that there were any prospective purchasers who would bid a greater amount if another sale was had. The question is whether the trial court was justified in confirming the sale on this state of the record.

We are convinced that the results obtained from three sales of this property furnish a fair and just criterion of the value of the property upon which the court might act. It is at least sufficient to present an issuable fact as against the opinion evidence contained in the affidavits offered in evidence by the appellants. In the case of *Nitro-Phosphate Syndicate v. Johnson,* 100 Va. 774, 42 S. E. 995, the court said: "In the light of this well-established doctrine, we might, without further consideration, dismiss the subject of the alleged inadequacy of price, for it will hardly be contended that if this sale had been effected between the parties hereto, that a court of equity would, at the instance of the vendor, set the sale aside upon the ground that the price paid was inadequate. It may, however, be added that after full notice, an open sale fairly conducted, in the face of such competition as can be attracted, the highest bid which is

made is a fair and just criterion of the value of the property at that time; and so, after stated opinions, affidavits of under value, etc., are regarded with but little favor, and estimated as of little weight, in the presence of the fact established by the auction and its results. *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 591." While this court is unwilling to adopt this statement as the law of this jurisdiction, we believe that it is authority for our statement that three sales of real estate may furnish a sufficient criterion of the value of the property upon which a trial court may act. While opinion evidence is almost always necessary in fixing the market value of land, it is not always controlling. The trial court apparently gave it little weight in the case at bar when the results of three public auctions of the land were presented to it. In this we believe the trial court was justified. Opinion evidence must give way to facts, and, after three sales, none of which brought over $12,000, it would seem that the trial court was amply justified in finding that the market value did not exceed that amount.

We find no error in the record and the judgment is affirmed with leave to redeem granted to the owners of the equity of redemption prior to the issuance of the mandate of this court.

AFFIRMED.

GRACE F. LINDHOLM, APPELLEE, V. HYMAN RESNICK ET AL., APPELLANTS.
272 N. W. 913

FILED APRIL 30, 1937. No. 29956.

1. **Vendor and Purchaser:** ACTION FOR DAMAGES. Whether a statement by one offering property for sale that he is the owner and has the right to sell it is a statement of fact or the expression of an opinion depends on the circumstances surrounding the transaction.
2. ———: ———. Where it appears that it was known to the purchaser that the title to the property is in dispute and that litigation is pending in a court to determine the ownership, and that the title depends upon the future action of the court, state-

ments of the seller that he owned the property, had a right to sell it, and that the court would so determine, although couched in positive language, can only be taken as an expression of an opinion and cannot form the basis for an action for damages for false and fraudulent representations.

3. ———: ———. Where the vendee refuses to rely upon statements of the vendor as to his title to the property, but demands and receives a bond indemnifying against loss from failure of title, such statements, even though the title fails, will not support an action for fraud.

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

Leon & White, for appellants.

John A. McKenzie, contra.

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

CLEMENTS, District Judge.

In this action plaintiff and appellee, Grace F. Lindholm, seeks to recover damages from the defendants and appellants, Hyman Resnick and Rose Resnick, for false and fraudulent representations alleged to have been made by them in connection with the sale to the plaintiff of a piece of real estate in the city of Omaha, Nebraska. A trial to a jury in the district court for Douglas county resulted in a verdict for the plaintiff in the sum of $1,500. A motion for a new trial was overruled, and defendants bring the action here on appeal.

The amended petition sets out in substance:

"1. That on or about the 8th day of June, 1931, the defendants sold to the plaintiff certain real estate in the city of Omaha, for a consideration of $18,700; that in order to induce the plaintiff to purchase said real estate, the defendants, and each of them, orally stated, represented and held out to the plaintiff:

"(a) That the defendants were the absolute owners of a certain easement, being an easement over a strip of land five feet wide and 80 feet long, lying immediately west of

the property being offered for sale by the defendants to the plaintiff.

"(b) That the easement consisted of the right to use said five-foot strip of land for any and all purposes, for entrance and exit purposes, for storage purposes, for the passage of light, air, and any and all other purposes.

"(c) That the right to use said easement and the title thereto had been wrongfully and without right questioned by certain persons known as Polyzois.

"(d) That the said litigation, which was without any merit whatsoever, had been instituted by the said Polyzois against the defendants, and was then pending in the district court, wherein the right of the defendants to the full enjoyment of said easement had been drawn in question.

"(e) That in the event that the plaintiff should purchase the property belonging to the defendants, that the defendants would convey to the plaintiff the said easement, and the defendants would indemnify the plaintiff against any loss that might be sustained by reason of the failure of the defendants to put the plaintiff in the full possession and enjoyment of said easement.

"(f) That the title of the defendants to said easement was so certain, clear, plain and unquestioned, and the litigation above referred to so frivolous, that the defendants could positively say that they themselves were the absolute owners of said easement.

"(g) That the defendants, and each of them, would reimburse the plaintiff for any and all losses she should sustain, in the event it would be determined that the defendants were not the absolute owners of said easement.

"(h) That the said Polyzois had no right, title, or interest whatsoever, of, in, or to said easement.

"(i) That the defendants were entirely familiar with all the facts connected with the litigation referred to, and were fully advised as to all questions of law that were raised and involved in said litigation, and that with their knowledge of the facts and the law, that they could say positively that they were the absolute and unquestioned

owners of the said easement over the said five-foot strip of ground.

"(j) That the right of the defendants in the said easement was a valid, present, subsisting right, constituting a perpetual easement in favor of the land being conveyed to the plaintiff in fee simple.

"2. Plaintiff further alleges that the statements made by the defendants, and each of them, as above set out, were false and untrue; that they were known by said defendants, and each of them, to be false and untrue at the time they were made, and were made by said defendants, and each of them, for the purpose of cheating and defrauding the plaintiff out of a large sum of money; that the plaintiff had no knowledge of the truth or falsity of the statements and representations so made to her by the defendants, and each of them; that she relied upon said statements, believed the same to be true, and, relying thereon, did purchase from said defendants a certain tract of land in the city of Omaha, Nebraska, including the easement above referred to, and did pay therefor the sum of $18,700."

Then follows an allegation that plaintiff never got possession of said five-foot strip and that she was damaged in the sum of $3,000. A demurrer to the petition, on the grounds that it does not state facts sufficient to constitute a cause of action and for an improper joinder of causes of action, was filed and overruled. An answer was then filed in which the defendants deny that they made any false or fraudulent representations to plaintiff, allege that she had knowledge of all the facts and circumstances relating to the title of said strip of ground and the litigation pending in relation thereto, and that she requested and received from the defendants an indemnity bond to protect and indemnify her in the event said litigation was decided adversely to the defendants. The plaintiff's reply was a general denial.

We have set out the allegations of the pleadings at some length because it is strenuously contended that the petition does not state a cause of action and that defendants' de-

murrer should have been sustained. While this is not at all free from doubt, we are disposed to hold that, if all the material allegations of the petition are taken to be true, which must be done in considering a demurrer, the petition is sufficient to state a cause of action and the demurrer was rightfully overruled.

The next consideration is: Does the evidence sustain the allegations of the petition and is it sufficient to support the verdict? There is some conflict in the testimony as to just what was said and done by the parties in making the sale of the property in question. In our consideration we will assume, where there is a conflict, that the evidence submitted by the plaintiff is true. Assuming this, it appears, on the 9th day of June, 1931, and for sometime prior thereto, the defendants, Hyman Resnick and Rose Resnick were the owners of a certain brick business property, consisting of a brick building containing four rooms suitable for and being used for store purposes. This building was situated at the northwest corner of Thirty-third and Cass streets, in Park Place Addition to the city of Omaha. At the rear of this building and located on property belonging to a party by the name of Polyzois was a ten-foot strip of pavement used as an alley. Defendants claimed an easement in the five-foot strip of this pavement that adjoined the building in question. This claim was disputed by Polyzois and an action had been brought in the district court for Douglas county to determine the rights of the parties to this strip. This action had terminated in a decision of the district court upholding the right of defendants to an easement in the strip. An appeal from this decision had been taken to this court. Sometime prior to June 9, 1931, negotiations were entered into between the plaintiff and defendants for a sale of this property to the plaintiff; plaintiff being represented in the negotiations by her son, a law student, who was in the habit of transacting business for her; defendants being represented by Frank B. Heintze and Fred A. Skow, their agents, for the sale of the property.

On the 9th day of June these negotiations had progressed

to a point where the parties assumed the deal could be closed and they met in the office of Fred A. Skow in the First National Bank Building for that purpose. There were present Mr. Resnick, Mr. Skow, Mr. Heintze, Mrs. Lindholm and her son. It does not appear that prior to this meeting the plaintiff had any knowledge that the defendants' right to the easement in question was in litigation, but she had employed an attorney, one Kenneth S. Finlayson, to examine the title to the property and to assist her in closing the deal. While the parties were in Mr. Skow's office and before the deal had been closed, the purchase money paid or the deed delivered, Mr. Finlayson came into the office and said:

"It appeared that that title was in litigation and he didn't know anything about it, had just found out, and commenced to question Resnick about it, and Resnick said, well, that didn't amount to anything; he said there had been a little trouble there with Polyzois but the thing had been settled and he had won, and there wasn't anything to it. * * * Our attorney said, yes; it did amount to something; he said the thing had been appealed. * * * Resnick said, well, he knew it didn't amount to anything; he said he was familiar with all the facts, he had been a party to the deal; there was absolutely nothing to their claim—Polyzois was just trying to get blood money out of it, wanted something for nothing, * * * that he didn't have any lawsuit, * * * it was just a question of whether he would pay him a little money to get rid of him. * * * When it got to the supreme court they would throw it out. He said they had decided in his favor in the district court and there wasn't any question about it. * * * Our attorney said, well, maybe, it don't amount to anything, he didn't know anything about the case, but as far as I am concerned, I cannot approve it. I am acting as Mrs. Lindholm's attorney, and as long as the thing has been appealed there is always a possibility of the supreme court reversing the decision of the lower court; maybe it don't amount to anything, but as far as I am concerned, I don't think I will advise her to

go through with it the way it stands. * * * Resnick said he would put up a $1,000 bond to guarantee his word that he absolutely owned that five feet; he was giving it to her in the deed, and when she got it in the deed she would have the absolute right to use that, there wouldn't be any question about that at all. He said there was nothing to worry about, he owned that five feet. * * * He would absolutely stand back of his word; he was acting in good faith, and would absolutely guarantee to stand back of his word that he owned that five feet. * * * Finlayson said, well, all right, we will put up the bond then."

Mrs. Lindholm, in her testimony, details the same conversation as follows: "Well, Mr. Finlayson came in and he said he had discovered it was in litigation, and he said to Mr. Resnick, how about this? And Mr. Resnick said that it had been in court, but he won the case. Then Mr. Finlayson said, well, it was carried up and Mr. Resnick said, well, if it was carried up, * * * it would be thrown out of court, because there was nothing to it. He said he owned that five feet and he had a right to deed it to me, he could sell it; * * * and this Polyzois, all he wanted to do was just to make him trouble; he wanted to get some money out of it, just wanted to work him for some money. He said he didn't have any right to it, that he had a right to it, that Mr. Resnick owned it, and he could deed it to me." She was then asked: "Now, do you recall whether there was anything said about a bond there at that time?" And she answered: "Well, Mr. Finlayson said it might be reversed in the supreme court, and Mr. Resnick said it would probably be thrown out of court because this man was just trying to work him for some money, and if necessary he would put up this bond to show he meant to do the right thing, and he would stand back of his word. * * * Mr. Finlayson said he didn't know just what the case was, but if he was willing to put up this bond he thought it would be all right."

After this conversation a bond was drawn by Mr. Finlayson. This bond was for the sum of $1,000 and was

signed by Hyman Resnick and Rose Resnick and the United States Fidelity & Guaranty Company. The bond was delivered to Mrs. Lindholm, purchase money paid, and deed delivered and recorded. Mrs. Lindholm took possession of the property, used the five-foot strip for about one and one-half years when the decision rendered by the Douglas county court was reversed by this court. After the determination of the case Polyzois built a tight board fence at the edge of the five-foot strip preventing ingress and egress from the rear of the store building and shutting light and air away from the store rooms, and the plaintiff's title to said easement entirely failed.

We have not attempted to quote all the evidence of the witnesses relative to the conversation of the parties. Much of it consisted of repetitions. We think we have given a fair summary of the evidence upon which the plaintiff relied to establish her claim of false and fraudulent representations.

In determining whether the evidence is sufficient to establish actionable fraud two vital questions must be answered: First, were the statements made by defendants that they were the owners of the easement in question, had a right to sell it, and that the litigation then pending would so determine, statements of known facts upon which the plaintiff had a right to rely without further investigation? Second, did the plaintiff rely on such statements?

Whether a statement, by one offering property for sale, that he is the owner of and has the right to sell it is a statement of a fact or an expression of an opinion depends on the circumstances surrounding the transaction. Where, as in this case, it was known to the purchaser that the title to the property was in dispute and that litigation was pending in a court to determine the ownership and that the rights of the parties in the property depended upon the future action of a court, statements of the seller that he owned the property, had a right to sell it, and that the court would so determine, even if couched in positive language, can only be taken as an expression of opinion.

It is a matter of common knowledge, chargeable to everyone, that no one can state as a matter of fact what the future action of a court will be on litigation pending before it. The case of *Hurlbert v. T. D. Kellogg Lumber & Mfg. Co.*, 115 Wis. 225, 91 N. W. 673, is in point. This was an action for the contract price of saw logs. Defendant answered that, before the execution of the contract, plaintiff fraudulently represented that he owned the land from which the logs were cut and owed a certain sum on the purchase price, and solicited a loan of defendants to pay such debt agreeing to give defendant a mortgage on the land and deliver the logs free of charge. The court said page 227 of the opinion:

"It is said that fraud is not sufficiently alleged, in that the charge of fraud is a general allegation, and relates to an opinion upon a question of law, and not to a matter of fact. Doubtless, the question whether a given title is a good title or not is a question of opinion merely; but a direct representation made by one man to another that he has a fee title to certain described real estate cannot be considered as necessarily a mere legal opinion. The circumstances may show, perhaps, that it was a mere opinion as to the validity of a certain title, and was so understood by the parties, in which case, of course, fraud cannot be predicated upon it; but, on the other hand, the circumstances under which it was given may demonstrate that it was intended and understood as a representation of fact, and, if such is the case, and it was relied upon to the damage of the other party, it becomes an actionable fraud."

We think the circumstances in this case clearly show that the statements were not taken or understood to be statements of known facts, but were understood to be expressions of opinion only. To every assertion of the defendants that they were the owners of the easement and the court would so hold, plaintiff's attorney answered: "That may be so, but the case has been appealed and may be reversed. We never can know what the court will do." We are constrained to hold that the statements relied upon were not

statements of known facts which the plaintiff had a right to rely upon without further investigation, but were statements of opinion only and therefore not actionable.

Even if it were conceded that the statements of defendants were as to facts, actionable in a proper case, it is apparent that plaintiff did not rely upon them. It must be remembered that the plaintiff in the negotiations leading up to this sale was represented by an attorney; that this attorney knew of the litigation over the easement and advised the plaintiff in relation thereto; that he refused to accept as facts the statements of the defendants that the litigation was frivolous and would be determined in favor of defendants. He recognized, as he should, that these statements could only have the weight of opinions. He advised his client, in effect, not to rely on the defendants' statement and refused to approve the sale. To the statements of the defendants that the litigation amounted to nothing, that they owned the easement and had a right to sell it, and that the court would so hold, he answered: "I am acting as Mrs. Lindholm's attorney, and as long as the thing has been appealed there is always a possibility of the supreme court reversing the decision of the lower court; maybe it don't amount to anything, but as far as I am concerned, I don't think I will advise her to go through with it the way it stands."

When the suggestion of an indemnity bond was made, the attorney said: "Well, all right, we will put up the bond then." He drew the bond, had it signed by the principals and surety, saw it delivered to the plaintiff, and acquiesced in the closing of the deal. We think the evidence clearly shows that plaintiff recognized that the statements of defendant as to title were expressions of opinion only, that she refused to rely upon them and only consented to complete the deal when an indemnifying bond was given her.

There are many cases that hold a vendee is justified in relying upon a representation in all cases where the representation is a positive statement of a fact and an investigation is necessary to discover it. We know of no case that

holds that such a representation can be the basis for the recovery of damages, when it clearly appears that it was not relied upon and where the vendee has demanded and received a bond to indemnify against loss by reason of a failure of title.

Complaint is made that the trial court erred in the giving of instruction No. 4 on its own motion. This instruction is as follows: "You are instructed that if you find from the evidence that plaintiff had full knowledge of the dispute and litigation over the five-foot strip, nevertheless, she would be entitled to rely upon any representations of fact made by defendants regarding their right and title to said easement, and if false representations were made with respect thereto and plaintiff was thereby induced to make the purchase which she would not otherwise have done, plaintiff may recover if she has established all the matters required to be proved by her in instruction No. 3." This instruction is not applicable to the facts in this case and is therefore erroneous.

In consideration of the foregoing, the judgment of the trial court will have to be reversed.

REVERSED AND DISMISSED.

FRED ERICSSON, APPELLEE, V. ALEX F. STREITZ ET AL., APPELLANTS.

273 N. W. 17

FILED APRIL 30, 1937. No. 29865.

1. **Pleading**: AMENDMENT. It is within the discretion of trial court to permit an amendment of a petition during trial, by correcting mistake in alleged date of a bond sued upon; and error cannot be predicated thereon unless an abuse of discretion is shown to the prejudice of defendants.
2. **County Judges**: ACTION ON BOND. In action on an official bond of a county judge, providing for the faithful discharge of all duties required by law of the principal, to recover distributive share of a devisee, paid to a county judge by an executor for the use and benefit of the person entitled thereto, and which the county judge has failed to pay either to his successor in office or

to the devisee, as required by statute, *held*, that the liability of both principal and surety on the bond is original and primary; that action was not based on a liability created by statute; and that action lies against both principal and surety without first having sued the principal for the tort; and, further, that the time limit within which the action must be brought is ten years after the cause of action accrued.

3. ———: ———: LIMITATIONS. Action accrues on official bond of a county judge when he fails to pay to his successor in office, on the expiration of his term, any money in his possession due to an heir or other person, which has not been paid to the person entitled thereto.

4. ———: ———: DEFENSES. Where statute (section 27-545, Comp. St. 1929) authorized the executor, upon making "satisfactory showing" to the court of inability of such executor to find any legatee or devisee, to pay the county judge having settlement of the estate in charge the amount of any legacy or sum ordered paid for the use and benefit of such person, *held*, that the county judge was thereby authorized to receive such money; that he alone had authority to say whether "satisfactory showing" had been made of inability of executor to find devisee, and after having acted on tender of funds by executor and accepted and retained the money, he cannot successfully urge want of "satisfactory showing" or that he never made an order directing executor to pay money to him. Having acted within the scope of his authority as county judge, his actions were by virtue of his office, even though he may have exercised that authority irregularly.

5. ———: ———. The provisions of section 27-546, Comp. St. 1929, requiring proof of identity of claimant to satisfaction of the county judge, apply only to case where money is "held by the county judge," and do not apply in an action brought against a former county judge on his bond to recover money belonging to a devisee which such former county judge failed to pay to his successor on retiring from office.

6. ———: SETTLEMENT OF ACCOUNTS. The county commissioners have no authority to settle the account of a county judge for funds held by him in his official capacity for the use and benefit of a legatee or devisee to whom they were ordered paid, and the action of the county commissioners upon report to them showing disposition of such funds is futile.

7. Evidence: DEATH: PRESUMPTION. The presumption of death arising from the continued and unexplained absence of a person from his place of residence for seven years disappears when evidence has been produced showing that the party was in fact alive; and, in such case, proceedings had for the administration

of his estate, but wherein no distribution has been made, are wholly void.

8. **County Judges:** LIABILITY. "A county judge is liable on his official bond for trust funds coming into his hands by virtue of his office, which funds he has lost by reason of insolvency of bank in which he had deposited them, notwithstanding he may have acted in good faith and without negligence in the selection of a depository." *Knox County v. Cook*, 126 Neb. 477; 253 N. W. 649.
9. **Appeal.** The records of the district court as certified to this court import verity; and where, as in this case, the records show that all parties move for a directed verdict, such record cannot be contradicted by statements in briefs of counsel. All parties to this action appearing to have moved for a directed verdict, the court did not commit error in taking the case from the jury.
10. **Interest.** Funds in possession of county judge due to an heir or devisee do not bear interest until demand or application made for payment, and proof of identity. Where demand is not shown to have been made prior to commencement of action, funds will not bear interest prior to that date. In such case, where appellants denied any liability whatever to appellee, and contested his right to all recovery on numerous grounds, other than on question of identity, *held*, appellee entitled to recover interest at the rate of 6 per cent. per annum from date of commencement of action, on the amount found to have been due him, together with all costs incurred in the instant case.
11. **Insurance:** ATTORNEY'S FEES. Where judgment is properly rendered against a surety company on an official bond, a reasonable attorney's fee may be taxed as costs in favor of parties securing such judgment, under section 44-346, Comp. St. 1929.

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

E. H. Evans, Urban Simon and *Hoagland, Carr & Hoagland*, for appellants.

George B. Dent, Jr., Shuman & Overcash and *F. J. Byrd, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

ELDRED, District Judge.

Peter S. Ericsson died testate in Lincoln county in 1923, and his will was probated in that county. Fred Ericsson,

plaintiff and appellee herein, was a residuary legatee under said will. On January 2, 1925, a decree was duly entered by the county court directing that the executor pay to Fred Ericsson the sum of $1,951.75 as his share of the residuary estate. Fred Ericsson, plaintiff herein, had not, up to that time, appeared in the probate proceedings, and possibly had not been in the county since about 1908. The executor was not at the time the order was made able to locate plaintiff, and on October 2, 1925, the executor of the estate of Peter S. Ericsson, deceased, paid to the defendant, appellant, Alex F. Streitz, the county judge of said county, $1,951.75, distributive share of plaintiff, Fred Ericsson. This money was deposited by appellant Streitz, as county judge, in the Platte Valley State Bank in the name of "A. F. Streitz, County Judge, Estate of Fred Ericsson." The bank failed and the money was lost. Appellant Streitz retired from the office of county judge January, 1929. He did not turn this fund over to his successor in office. None of the money was ever paid to plaintiff.

June 8, 1932, Fred W. Ericsson, first cousin of Fred Ericsson, plaintiff, filed a petition for the probate of the estate of Fred Ericsson, alleging that Fred Ericsson, plaintiff and appellee herein, had been missing and lost for more than seven years. On June 30, 1932, a decree was entered by the county court wherein it was found that Fred Ericsson "disappeared during the year of 1908 and is presumed to be dead," and ordering administration of his estate. April 24, 1934, an inventory was filed in said last-mentioned proceeding scheduling as assets a claim against the defendants, Alex F. Streitz and Fidelity & Deposit Company of Baltimore, Maryland, his bondsman, appellants herein, for the sum of $1,951.75, being the item involved in this action. No order was made for the distribution of this fund in those proceedings. March 7, 1935, Fred Ericsson, appellee, filed in the county court an application for the dismissal of the proceedings for the probate of his estate, which application is not shown to have been acted upon.

March 14, 1935, Fred Ericsson, as plaintiff, commenced

in the district court for Lincoln county this action against Alex F. Streitz and Fidelity & Deposit Company of Maryland, defendants, upon the official bond of defendant Streitz, as county judge, on which the surety company was surety, to recover the amount decreed by the county court to be due the plaintiff as residuary legatee under the will of Peter S. Ericsson, deceased, $1,951.75, with interest, costs and attorney's fees.

Answer of defendant Streitz pleads, first, a denial; second, the finding in the county court that Fred Ericsson "disappeared during the year of 1908 and is presumed to be dead," was binding, unappealed from and *res judicata* upon the matter of death of plaintiff; third, the statute of limitations and laches; fourth, that plaintiff never identified himself before the county court as an heir of Peter S. Ericsson, and that the county court had exclusive jurisdiction of probate matters. Answer of the surety company raises all issues raised by the answer of defendant Streitz, and further pleads that the money sought to be recovered by plaintiff was not received by the defendant Streitz in his official capacity, but as an accommodation to the administrator of the estate of Peter S. Ericsson, deceased; and that the surety upon his bond was not liable therefor; and, further, that Streitz acted in good faith, without negligence, in depositing said money in the Platte Valley State Bank.

Trial was had before court and jury. After both the plaintiff and the defendants had rested, all parties moved for a directed verdict. Jury were discharged and court entered judgment in favor of the plaintiff and against both defendants for $1,951.75 with interest at 7 per cent. from the date of the judgment, December 5, 1935; taxed all costs to the plaintiff, and denied recovery of attorney's fees. Motion of plaintiff to retax costs was overruled, and motion of plaintiff and separate motions of defendants for new trial were overruled. Defendants have appealed from judgment, and plaintiff has filed a cross-appeal from that part of the judgment disallowing interest and denying recovery of costs and attorney's fees.

Error is assigned by appellant surety company that the court erred in permitting the plaintiff to amend his petition during the progress of trial by changing the date on bond, "Exhibit A," attached to plaintiff's petition. While the transcript does not indicate that an exhibit was attached, the bond purports to be set out in full in petition. It is contended that the copy before the change was permitted was dated the 31st day of December, 1925. The petition alleges that the bond was executed December 31, 1924; the petition further alleges that bond was filed January 3, 1925, where it was recorded; and that it was approved January 8, 1925. It is thus evident that in indicating by the purported copy of bond that it was dated December 31, 1925, instead of December 31, 1924, there was a typographical error. The record does not disclose the appellants to have been prejudiced by the amendment. The amendment was properly permitted. Comp. St. 1929, sec. 20-852.

Appellants contend that the petition, on its face, shows the action to be barred by the statute of limitations, and the following statutory provisions are cited:

"Within four years, an action upon a contract, not in writing, expressed or implied; an action upon a liability created by statute, other than a forfeiture or penalty." Comp. St. 1929, sec. 20-206.

"An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." Comp. St. 1929, sec. 20-212.

The appellant Streitz' term of office expired January 3, 1929. It was his duty, upon the expiration of his term of office, to pay to his successor in office any fees, moneys, costs, legacies, devises or money due any heir or other person, in his possession, which had not been paid to the persons entitled thereto. Comp. St. 1929, sec. 27-546.

The condition of defendant's official bond conforms to the requirements of section 12-112, Comp. St. 1929, providing:

"All official bonds shall be obligatory upon the principal

and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds."

If the fund involved herein was held by appellant Streitz in his official capacity as county judge (which question will be considered later) and he failed to pay it to his successor in office at the expiration of his term, the cause of action accrued at that time. It is urged by appellants that plaintiff's cause of action as against Streitz was on a liability created by statute and barred in four years; and that the liability of the surety company as surety on the official bond, which defendant contends is a collateral obligation, is also barred. A number of authorities are cited from other jurisdictions in support of this position. We do not deem it essential to analyze or distinguish those citations in this opinion. The allegations of plaintiff's petition make this action, in substance and in form, an action upon an official bond, not on a liability created by statute. The question here considered appears to have been settled by this court, adverse to the contention of the appellants, in an early case brought against the county treasurer and his bondsman on an official bond to recover for illegal fees collected by such officer. "In such case the liability of both principal and sureties in his bond, is original and primary; and the action lies against both without having first sued the officer for the tort." *Kane v. Union P. R.*, 5 Neb. 105.

This holding was cited with approval in *City of Scottsbluff v. Southern Surety Co.*, 124 Neb. 260, 246 N. W. 346, and appears never to have been departed from by this court as to the point here involved; although *Kane v. Union P. R., supra,* was apparently overruled by *Hurlburt v. Palmer,* 39 Neb. 158, 57 N. W. 1019, on a question of jurisdiction. We conclude that the liability of both appellants, as principal and surety on the bond sued upon, is original and primary, and as to time of commencement of action to be governed by the provisions of section 20-209, Comp. St. 1929, providing: "An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff,

or any other officer, * * * can only be brought within ten years." See *Chicago, B. & Q. R. Co. v. Philpott,* 56 Neb. 212, 76 N. W. 550.

Was the fund involved received by appellant Streitz by virtue of his office as county judge? Streitz, in his brief, states: "The executor merely turned over the share of money due Fred Ericsson to Tillie Blankenburg, clerk of the county court, who receipted therefor." On the part of the appellant surety company it is urged that Streitz received the money, not as county judge, but as an individual. Attention is directed to the provisions of section 27-545, Comp. St. 1929, and it is suggested that the "County Judge, Alex F. Streitz, never made or entered an order directing the executor to turn over to the county judge the share which was found due Fred Ericsson." The section last cited provides: "In case of an executor of a last will and testament, which has been admitted to probate in any county court in this state, * * * upon making a satisfactory showing to the court of the inability of such an executor to find any legatee or devisee named in the will, * * * it shall be lawful for any executor * * * to pay the county judge of the county having the settlement of such estate in charge, the amount of such legacy, devise or sum so ordered paid * * * for the use and benefit of such persons." Under this provision appellant Streitz was authorized as county judge to receive such money. The decree entered by the county court ordered distribution to Fred Ericsson "address unknown." The following excerpt from the testimony of appellant Streitz, not only indicates that he considered that the plaintiff, Fred Ericsson, could not then be found, but, also, that the money was paid into court and how it was disposed of:

"Q. Relate, as near as you can, the circumstances attendant upon the final windup of the estate. A. The estate was slow in being settled on account of some of the heirs being in Sweden, and the last heir was the plaintiff in this case, and his share was brought into court. He could not be found. Q. Who brought that in? A. That was brought in

by Mr. Kelly. Q. In what shape was it brought in? A. In a check, if I remember rightly, a check from his own bank in Gothenburg. Q. Did you take that check? A. Yes, sir. Q. And what did you do with it? A. I deposited it in the Platte Valley Bank. Q. Did you receive any evidence of the deposit? A. Yes; at the time I got a little book, called Savings Book. Q. Did you afterwards change the character of the deposit, the manner it was deposited there? A. No; I think not. Q. You had a Savings Book at all times? A. Yes, sir. Q. What became of that? A. That was turned in with the claim that I filed with the receiver of the bank after it failed. Q. This deposit remained in the bank continuously, did it, until the failure of the Platte Valley Bank? A. Yes, sir."

It is the contention of the defendant surety company that Streitz received plaintiff's, Fred Ericsson's, share of Peter S. Ericsson's estate as a matter of convenience from the executor of said estate, to hold and deliver to an administrator, to be later appointed for the estate of Fred Ericsson, who, it is claimed, was supposed to be dead at that time. In the opinion of the court the evidence does not support such contention. The money received was money belonging to Fred Ericsson, a devisee under the will of Peter S. Ericsson, and had been ordered paid by the county court to Fred Ericsson. No other or different order was ever made as to its disposition. The executor, as authorized by the statute, section 27-545, Comp. St. 1929, paid the money to the county judge. The county judge was authorized to receive and hold it for the use and benefit of the person entitled thereto. In so doing, both parties to the transaction were acting within the scope of their authority as such officers. No presumption will be indulged in that they were acting otherwise in the absence of proof. Whatever presumption of the death of Fred Ericsson may have existed at any time has been very clearly refuted. The county judge was apparently satisfied that the whereabouts of this devisee was not known at the time he received the money. He alone had authority to say whether "satisfactory show-

ing" had been made. In any event, having acted upon the tender made him by the executor and accepted and retained the money, he cannot now successfully urge a want of satisfactory showing for such payment, or that he never made or entered an order directing the executor to pay the money to him. He having acted within the scope of his authority as county judge, his actions were by virtue of his office, even though he may have exercised that authority irregularly. We conclude that the funds involved herein were received by appellant Streitz in his official capacity as county judge.

Appellant surety company cites in support of its contention that the money was not received by Streitz in his official capacity, *Stephens v. Hendee,* 80 Neb. 754, 115 N. W. 283. That case is readily distinguished from the instant case. In *Stephens v. Hendee, supra,* the county judge requested that the property be turned over to him and he received it at a time when no administration proceedings were pending; he was not acting at the time in his official capacity nor within the scope of his authority.

Section 27-546, Comp. St. 1929, made it the duty of the appellant Streitz, upon expiration of his term of office, to pay to his successor in office all legacies, devises or moneys due any heir or other person, in his possession, which had not been paid to the persons entitled thereto. The appellant Streitz never paid the money to his successor in office, and his failure to do so constituted a breach of the conditions of his official bond for the faithful discharge of all duties required by law.

It is urged that plaintiff, appellee, was guilty of laches barring his recovery. Plaintiff's cause of action accrued January 3, 1929, at the time when appellant Streitz retired from office; this action was commenced March 14, 1935, a little more than six years after the cause of action accrued, and well within the ten-year period of the statute of limitations. "When suit is brought within the time fixed by the analogous statute of limitations, the burden is on the defendant to show the existence of circumstances

amounting to laches." *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N. W. 630. Generally, in such case, lapse of time alone, short of the period of limitations, will not operate as a bar. The case presents question of delay alone, without evidence that plaintiff had any actual notice of his own rights, or of any prejudice to the defendants in the making of their defense, or of any intervening claims of third parties. While laches is a creature of equity, yet, if the doctrine of laches was applied to this, a law action, neither the pleadings nor the proof are sufficient to establish such defense.

It is urged that district courts are without jurisdiction to determine heirship. These proceedings were not instituted to determine heirship, but were brought by a legatee whom the county court had found to be entitled to participate in the residue of the estate involved. The county court in the matter of the estate of Peter S. Ericsson, deceased, by its final decree entered January 2, 1925, specifically found who were entitled to participate as residuary legatees under such will, and the amount each was entitled to receive. The plaintiff was one of those found by the county court to be a residuary legatee and is here suing, not to establish that he is an heir, but for the recovery of the amount found by the county court to be due him.

Section 27-546, Comp. St. 1929, provides: "It shall be the duty of the county judge to pay to * * * any legatee or devisee, the amount of any legacy, or devise, held by the county judge, as aforesaid, upon proof, to the satisfaction of the judge, of the identity of such person." It is contended, under this statute, that the county court has exclusive jurisdiction to determine identity of the claimant. It will be observed that this section relates to funds "held by the county judge." Here the county judge succeeding the appellant Streitz did not have the money; it was not under his control, never having been paid to him by his predecessor in office, the appellant Streitz. Streitz having retired from office, the fund was not thereafter held by him as county judge. This provision of the statute referred to

applies only in cases where the county judge has the money; then, on proof of identity, he is required to pay the money to the person entitled thereto; it has no application to a situation such as presented by this case.

The appellant Streitz attempted to make a settlement with the board of county commissioners when he retired from office, and claims to have filed a report disclosing disposition of fund involved herein; and that the report was approved by said board. The county commissioners are not vested with any authority to settle such a claim. The filing of such a report as to disposition of said fund with the board of county commissioners and securing its action thereon was futile and unavailing.

The proceedings instituted in the county court for the probate of the estate of Fred Ericsson, appellee, wherein the county court, on the 30th day of June, 1932, made the finding "that Fred Ericsson late of Lincoln county disappeared during the year 1908 and is presumed to be dead, intestate," are urged as *res judicata* as to the appellee's right to the fund involved herein at this time. In those proceedings an administrator was appointed and qualified, and filed an inventory scheduling the claim against the appellants herein as the only property of his estate. No disposition was made or attempted to be made of said money or claim in those proceedings. Those proceedings were had prior to the enactment of the present statutory provisions relative to the administration of the estates of persons absent seven years. While the county court found that by the absence of Fred Ericsson he "is presumed to be dead," such presumption did not take the case out of the operation of the general rule on the subject; and it being made to appear that he was in fact alive at the time such administration was granted, the proceeding for the administration of his estate is void. 23 C. J. 1007; *National Surety Co. v. Wages,* 48 Ga. App. 720, 173 S. E. 451; *Bank of Jonesboro v. Wilson,* 43 Ga. App. 839, 160 S. E. 653. In such case the presumption disappears when evidence has been produced showing that the party was in fact alive. *Smith v. Fall,*

122 Neb. 783, 241 N. W. 560; *Auld v. Auld*, 122 Neb. 576, 240 N. W. 756. In this case the identity of the appellee, Fred Ericsson, is established by the decisive weight of evidence.

It is further contended by appellants that the county judge was not an insurer and that he is not personally liable for funds deposited in a bank and lost by the failure of the bank in the absence of negligence in selecting depository; and that the holding, as applied to executors and administrators, in *Bank of Crab Orchard v. Myers*, 120 Neb. 84, 231 N. W. 513, should be extended to apply to county judges. The identical argument presented in this case appears to have been presented in the case of *Knox County v. Cook*, 126 Neb. 477, 253 N. W. 649. The opinion in the latter case by Good, J., while recognizing the correctness of the holding in *Bank of Crab Orchard v. Myers, supra*, as to administrators, states:

"However, the courts generally take a different view with reference to state and county officials, and the greater number of them hold to the effect that such officials are liable on their official bonds for the loss of any funds committed to their care by virtue of their office, except where the loss is occasioned by the act of God or the public enemy. For a half century this court has been committed to the doctrine of strict accountability."

The taking of the case from the jury by the trial court is assigned as error. The journal entry of the proceedings at the time of trial, after showing that plaintiff and both defendants rest, recites: "Thereupon the plaintiff moved the court that a verdict be directed for the plaintiff for the amount sued for herein, for interest and for attorney's fees, and the defendants also moved that a verdict be directed in favor of the defendants. Both sides having moved for a directed verdict the jury were thereupon discharged by the court and the cause taken under advisement by the court with leave granted to all parties to submit to the court any brief they desired to submit." The report of the oral proceeding as embodied in the bill of exceptions con-

tains the following: "Mr. Evans: The defendants make the same motion to direct a verdict as made at the close of plaintiff's case. * * * The defendants severally move that the jury be instructed to bring in a verdict for the defendants for the reason," which is there set out. Plaintiff's motion for a directed verdict is then shown. Then follows a statement by the court: "The Court: Let the record show that all parties having moved for a verdict to be directed in their favor, the jury were discharged and the cause will be submitted to the court and various counsel will be allowed to present arguments and briefs at a later date." Appellant surety company argues that the records are erroneous in showing that it joined in the motion for a directed verdict. But the records import verity and this court will not look beyond the record for the history of what occurred at the trial. All parties appearing to have moved for a directed verdict, the court did not commit error in taking the case from the jury.

By cross-appeal error is assigned in the refusal of the court to allow and include interest on the amount found due plaintiff and for which judgment was rendered, and to award costs against both defendants, and in failing to tax attorney's fees as against the appellant surety company. Funds in possession of the county judge due an heir or devisee would not bear interest until demand for payment was made. Section 27-546, Comp. St. 1929, makes it the duty of the county judge to pay the person entitled thereto any such fees, moneys and costs "upon application" and proof of identity. He is only required to pay upon application or demand. No demand for payment appears to have been made prior to bringing of this action. Bringing the action was the first demand. Plaintiff was not entitled to recover interest prior to that time.

The appellants urge that there was a failure on the part of the plaintiff to furnish proof of identity. Had the defendants withheld payment only for want of proof of identity, or indicated any willingness to pay on proof of identity being furnished, there would have been merit in the refusal

to award interest and costs until proof of identity was furnished. But, in this case, appellants denied any liability whatever to appellee, and contested his right to any recovery on numerous grounds other than the question of identity. Under such circumstances, plaintiff was not only entitled to recover interest at the rate of 6 per cent. per annum from the date of demand, the commencement of this action, but, under the provisions of section 20-1708, Comp. St. 1929, should have been awarded costs incurred in this case.

Should the plaintiff have been allowed an attorney's fee as against the defendant surety company, to be taxed as a part of the costs, in addition to the amount of his recovery? It has been held that section 44-346, Comp. St. 1929, was authority for the allowance of a reasonable attorney's fee for plaintiff as against the defendant surety company in a similar case. "Where judgment is properly rendered against a surety company on an official bond, a reasonable attorney fee may be taxed as costs in favor of obligee." *City of Scottsbluff v. Southern Surety Co.*, 124 Neb. 260, 246 N. W. 346.

On appellants' appeal, the judgment of the district court is affirmed. On the cross-appeal, the judgment is modified; and interest is allowed on the amount for which judgment was rendered from the commencement of this action, March 14, 1935, at the rate of 6 per cent. per annum, and all costs of this action are taxed to defendants, Alex F. Streitz and Fidelity & Deposit Company of Maryland. No attorney's fee having been allowed plaintiff by the district court, this court finds and allows plaintiff an attorneys' fee, for services of attorneys in the district court, as against the defendant Fidelity & Deposit Company of Maryland, in the sum of $200; and for services performed by attorneys for the plaintiff in the supreme court, as against defendant Fidelity & Deposit Company of Maryland, an attorneys' fee of $100 is allowed and will be taxed as costs.

AFFIRMED AS MODIFIED.

FAIR-WAY OIL COMPANY ET AL., APPELLEES, V. STATE OF NEBRASKA, APPELLANT.

272 N. W. 917

FILED APRIL 30, 1937. No. 29834.

Damages. In an action to recover damages to a leasehold estate in real property injured but not taken by a change in the grade of a street for public use, the measure of damage ordinarily is the amount of the depreciation in the value of the use for the unexpired term brought about by the cause of such injury, but if the cost of restoring such leasehold to its condition before such injury is less than such depreciation, then the cost of such restoration should be taken as the measure of damage.

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

William H. Wright, Attorney General, Paul P. Chaney and *Henry Mencke,* for appellant.

Robins & Yost, contra.

Heard before GOSS, C. J., DAY, PAINE and CARTER, JJ., and TEWELL and YEAGER, District Judges.

TEWELL, District Judge.

This action is brought by the plaintiffs, Fair-Way Oil Company, a corporation, and A. J. Conrad, to recover damages alleged to have occurred to their leasehold interest in a portion of a lot in the city of Blair, Nebraska. A gasoline filling station had been built on the lot by the plaintiffs. The damages are alleged to have arisen on account of a change made in the grade of a street by the department of roads and irrigation. Trial by jury was waived and the cause was tried to the court. From a judgment awarding damages to plaintiffs the defendant appeals.

A resolution of the legislature gave the consent of the state to the commencement of this action. State of Nebraska is the defendant.

The evidence discloses that the property in which the plaintiffs own a leasehold interest consists of the north 140 feet of a lot. Eighth street, which extends from north to

south, forms the eastern boundary of this lot, and South street, which extends from east to west, forms the northern boundary thereof. Prior to the change in the grade of the street, South street, including the portion thereof that is also a portion of Eighth street, hereinafter called the intersection, was paved. Before the change in the grade state highway No. 73 extended northward on Eighth street to this intersection and then turned westward on South street. At the time of the change in grade this highway was routed along Eighth street and then northward from such intersection. Plaintiffs leasehold interest extended from May 1, 1932, to May 1, 1934, with a privilege of a four-year renewal and with an option to purchase the lot during the period of the lease. At the time plaintiffs erected their filling station the said intersection was paved and plaintiffs did not know of any contemplated change of its grade. At that time South street as it approached the intersection from the west sloped downward, and Eighth street as it approached such intersection from the south sloped upward. The change in the grade of Eighth street, made in preparation for the paving of such street, resulted in such intersection being raised about 4 inches at its center, and about 14 inches at its south edge. The center of Eighth street was raised about 22 inches at a point 100 feet south of the center of such intersection. The surface of Eighth street was thus raised above the surface of the lot to such an extent that trucks or cars driving into plaintiff's station were compelled to drive down a steep incline as they entered the lot. The driveway into the plaintiffs' station extended diagonally across the plaintiffs' leasehold from the southeast to the northwest. Thus the front wheel of any truck entering the station would drop down over the incline before the other front wheel did, and cause the load, if any, in the truck to be thrown to one side. The plaintiffs raised their filling station about 12 inches and filled their lot to the new grade of the street. The plaintiffs also made a new driveway which entered their leasehold closer to the south end thereof than had the former driveway. The cost of

causing the plaintiffs' leasehold to be in approximately the same condition with relation to the grade of Eighth street after the change in grade as it was before such change, including a longer driveway than existed before the change, was the sum of $550.53. In the petition the plaintiffs alleged the cost of such repairs and also alleged that the leasehold had been diminished in value by such change in grade to the extent of $2,000. The trial judge viewed the premises. The judgment of the court was for the sum of $433.66. In the petition the plaintiffs also alleged a damage of $100 for additional sidewalks that it was claimed the change in grade necessitated, and a damage of $1,500 from an alleged change in the drainage of rain waters from the premises, as well as an alleged damage of $750 for loss of business during the time their premises were undergoing repair.

No contention seems ever to have been made to the effect that liability did not attach to the defendant in any amount, and we do not concern ourselves with such a contention now. This court has held that a tenant of real estate for a fixed term has such a property right therein as to allow him recovery of damages for an injury to his leasehold that arises from the taking of property for public use. *Gledhill v. State,* 123 Neb. 726, 243 N. W. 909. The appellant contends that the only evidence introduced was relative to cost of restoration to an approximate former condition, and that such is not the measure of damage in this action, when the landlord, who is the owner of the reversionary estate, is not a party to the action. In an action to recover damages to a leasehold estate in real property damaged but not taken by a change in the grade of a street for public use, the measure of damage ordinarily is the amount of the depreciation in the value of the use for the unexpired term brought about by the cause of the damage, but if the cost of restoring such leasehold to its condition before the injury is less than such depreciation, then the cost of such restoration should be taken as the measure of damage. 20 C. J. 741, 751, and cases cited in the footnotes. Evidence

of loss of business was excluded. The attempt to recover the cost of sidewalk was abandoned by plaintiffs. In this case the premises are shown not to have been placed in any better condition with reference to grade than the condition in which they were before the change in grade, aside from the construction of some additional driveway, the reasonable cost of which the trial court may have deducted from the cost of restoration. The cause was tried to a court without the intervention of a jury, and it is not possible from the record to tell what measure of damage was used by the court in computing the damages allowed. The trial judge viewed the premises. Evidence of cost of restoration, terms of the lease, length of time that access to the premises was interrupted and other circumstances bearing upon the question of damages were before him. The evidence is ample to sustain the findings of the trial court, even if the measure of damage contended for by appellant or the rule above stated was used.

Finding no error in the record prejudicial to the rights of the defendant, the judgment of the trial court is

AFFIRMED.

FRED DABELSTEIN, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

273 N. W. 43

FILED APRIL 30, 1937. No. 29839.

1. Negligence. A contractee cannot be held liable in an action for damages for personal injuries arising wholly from an act of negligence on the part of an invitee upon his premises who is only the employee of the contractor.
2. ———. The duty of a contractee to keep premises safe for a servant of the contractor who enters thereupon as an invitee extends only to then existing dangers of which such invitee reasonably is not aware.

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

Reed, Ramacciotti & Robinson and *Albert F. Wahl,* for appellant.

Seymour L. Smith, Harold C. Linahan, W. W. Wenstrand, A. C. R. Swenson and *Kennedy, Holland, De Lacy & Svoboda, contra.*

Heard before ROSE, DAY and PAINE, JJ., and TEWELL, CHAPPELL and YEAGER, District Judges.

TEWELL, District Judge.

This action was brought to recover damages arising from personal injuries and alleged to have been proximately caused by negligence on the part of servants of both the defendants. At the close of plaintiff's evidence the court discharged the jury and rendered a judgment of dismissal of the plaintiff's action in favor of both defendants. The plaintiff appeals.

One question presented is that of whether or not the evidence introduced required the submission of the case to the jury. The answer to this question necessitates a minute examination of the evidence. The rule to the effect that the evidence must be given that reasonable construction that is most favorable to such a submission to the jury must be kept in mind. This rule is so well established that it need not again be declared. *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902.

The evidence discloses that the plaintiff, at the time of his injury, was employed by the civil works administration, which was an organization set up by the United States to furnish work for persons otherwise unemployed. He drew wages only from the United States. The plaintiff and about 300 other C. W. A. workers were engaged in repairing the street of the defendant city and the street railway track of the defendant company at a point between Forty-second street and Thirty-third street on Q street in the city of Omaha. The plaintiff was one of a gang of about 25 workers, one of whom was the foreman of that gang. To repair the railway track the rails were raised by jacks

to a position about 20 inches above the surface of the street. They were held in such raised position by piles of brick that were placed under each rail about 15 feet apart. These bricks were taken from the street adjacent to the track. From long use the edges of one side of each brick had become worn and caused each brick, in the language of some of the witnesses, to be "shaped like a loaf of bread." No tie rods to fasten one rail to the other were used and the wooden ties beneath the rails were so rotted as not to form such a tie. Just prior to the time the plaintiff received his injuries, these rails were raised and resting on piles of brick for a distance of at least two blocks. In making these repairs the workers began about Forty-first street and advanced eastward on Q street. Near the east end of the advance some men jacked up the rails. Just west of those who raised the rails other men broke the concrete pavement into chunks. Immediately west of those who broke the concrete were men, of whom the plaintiff was one, who were engaged in shoveling the broken concrete from between the rails to a position on either side of the railway track. A large number of the workers were engaged in making the repair at various points west of the plaintiff's position. On the afternoon of December 20, 1933, while the plaintiff was standing between the two rails of the track and facing southward, the south rail of the track fell from the piles of brick upon which it had rested. This rail fell toward the north to the ground level upon which the plaintiff was standing, upon its side and with its top pointing northward. It fell upon the instep of the plaintiff's right foot and produced the injuries for which damages are sought. The evidence is conclusive to the effect that the fall of this rail began near Forty-first street and advanced eastward toward the plaintiff. The C. W. A. officials had an office near the project at which the C. W. A. workers reported for work assignments each morning. A timekeeper and a man to render first aid in case of injury were at this office. Both of these were employees of the United States. The plaintiff testified that he saw some of the workers

being brought to work in a truck belonging to the defendant company, and that in his opinion some of the workers were not employed by the C. W. A. The evidence shows that some of the tools used by the workers bore a mark that indicated ownership by the defendant city and some a mark that indicated ownership by the defendant company. The agreement or arrangement between the United States and the defendants under which this project was undertaken is not shown by the evidence. Anything from which its nature might be inferred, aside from the nature of the work, cannot be gleaned from the evidence. There is no evidence of the rail that fell having been as much as touched by any one just before its fall, except that one might infer that the men using the jacks a block east of where plaintiff stood were raising that rail. One Mr. Wadum, an employee of the defendant company, was occasionally around this Q street project. He furnished the men a stick to measure the depth and width of the excavation that was necessary beneath the rails to accommodate the new ties beneath the rails and to cause the rails to be of the proper grade when relaid. He is not shown to have given any other type of orders or directions. The men were directed only by their foremen. One or two servants of the defendant city were at times seen about the project, but are not shown to have given any directions as to how, when, or where any man should work.

The plaintiff contends that he was a mere invitee, and not an employee, of the defendants, and that the defendants were guilty of negligence proximately causing his injuries in furnishing him an unsafe place to work without warning him of the danger arising from the failure to use tie rods between the two rails of the track. The defendants contend that no negligence on the part of the servants of either of them is shown, and that, even if it were, the plaintiff would occupy the position of a special employee of the defendants and thus be restricted in his right of recovery to the provisions of the workmen's compensation act, assuming that the defendants exercised the right of

control of the plaintiff to the extent that the plaintiff alleges. To support the contention that the plaintiff could have been a general employee of the United States and at the same time a special employee of the defendants and therefore entitled to compensation from either of his employers, but restricted to such right of recovery, the defendants cite among others the following authorities: 1 Schneider, Workmen's Compensation Law (2d ed.) sec. 24; 28 R. C. L. 764, sec. 58; *Spodick v. Nash Motors Co.*, 203 Wis. 211, 232 N. W. 870; Annotation in 58 A. L. R. 1467; 39 C. J. 36. The record shows that the plaintiff is receiving compensation from the United States under the provisions of the federal compensation act.

To regard the plaintiff as an invitee on the premises of the defendants, which is the status he claims to have occupied, is, perhaps, to regard him in a status most favorable to his recovery. What was the immediate cause of the rail's fall cannot be told from the evidence. The immediate cause, as distinguished from the proximate cause, may reasonably have been the act of some one of the plaintiff's coinvitees prying upon it at any point in its raised position, or reasonably may have been that it slipped from the rounded surface of the bricks upon which it was raised, or reasonably may have been any one of several other causes. Tied at both ends to portions of the track that were not raised, a condition not shown by the evidence, and being of rigid steel construction, it could not have fallen if it had been tied to the north rail by a tie that was sufficient to prevent either rail from turning upon its side without one rail being elevated the width of the track above the other. Let us for brevity and clarity assume that the failure to use such a tie was an act of negligence that proximately caused the plaintiff's injuries, and that all other reasonably possible immediate causes came about in a sequence of events that reasonably could have been anticipated to follow such failure. Whose servants committed this act of failure? The evidence does not show that the defendants or any of the servants of either of them had anything to

do with the manner in which this work was accomplished. With the evidence affirmatively showing the plaintiff and his coinvitees as employees of the government taking orders only from their foremen, and failing to show that such foremen were directed by any one, we cannot assume that the failure to tie the rails together came about on account of any act or omission of the defendants merely because the work was done upon their premises. A more reasonable assumption would be that the defendants were in the position of contractees and the United States in that of a contractor. A contractee cannot be held liable in an action for damages for personal injuries arising wholly from an act of negligence on the part of one who is only an employee of the contractor. Annotation 44 A. L. R. 932, and cases cited under section 3, p. 945.

It is contended by the plaintiff that he had been a farmer all his life, was not acquainted with the danger connected with raising rails of a railway track, and that the defendants were guilty of negligence in not warning him of such danger. It is not to be presumed that the civil works administration and its various foremen who had charge of raising the rails were uninformed as to such dangers. Furthermore, the danger was one apparent to any normal adult person. The defendants furnished the plaintiff and his coinvitees a safe place to work, namely a clear street, so far as latent dangers were concerned. The evidence will not support a finding to the effect that the place furnished was the street after the rails had been raised. If the defendants were shown affirmatively to have told the plaintiff's coinvitees who had charge of raising the rail that tie rods were not necessary to safety, a condition of concurrent negligence might be involved, if sufficient lack of knowledge on the part of such coinvitees existed to the knowledge of the defendants. No such condition is shown in the record and no set of facts calling for an application of the doctrine of concurrent negligence is shown in the record. The duty of a contractee to keep premises safe for a servant of the contractor who enters thereupon as an

invitee extends only to then existing dangers of which such invitee reasonably is not aware. 45 C. J. 837; 20 R. C. L. 55, sec. 51.

Since the evidence is insufficient to bear a construction to the effect that the plaintiff was an employee of any kind of the defendants, it is not necessary to decide the question of whether or not the provisions of the workmen's compensation act would bar the maintenance of this action if the plaintiff was merely a special employee of the defendants.

Finding no error in the record prejudicial to the rights of the plaintiff, the judgment of the trial court is

AFFIRMED.

VERNER MARKEL, APPELLEE, V. RICHARD GLASSMEYER, APPELLANT.

VERNER MARKEL, APPELLEE, V. RICHARD GLASSMEYER, APPELLANT.

273 N. W. 33

FILED MAY 7, 1937. NOS. 29988, 30012.

1. **Bill of Exceptions.** Under section 20-1140, Comp. St. 1929, upon a satisfactory showing of diligence, a trial court is authorized to give additional time, not exceeding a total of 80 days, for service of the bill of exceptions on the adverse party, and such order may be made during the additional time allowed and after the first 40 days have expired. *In re Estate of Boschulte*, 128 Neb. 316, 258 N. W. 530.
2. **Change of Venue.** Section 20-410, Comp. St. 1929, allows the court to "change the place of trial to some adjoining county, wherein such impartial trial can be had; but if the objection be against all the counties of the district, then to the nearest county in the adjoining district."
3. **Appeal.** "Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue." *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N. W. 431.
4. **Evidence: RES GESTÆ.** "A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." *Tongue v. Perrigo*, 130 Neb. 564, 265 N. W. 737.

APPEAL from the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Case numbered 30012 affirmed and case numbered 29988 reversed.*

Spencer & Neumeister, Moran & James and *William A. Robertson,* for appellant.

W. G. Kieck and *Lloyd E. Peterson, contra.*

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

GOSS, C. J.

The main case here is No. 29988. There are two transcripts but only one bill of exceptions. The cases are briefed and argued together. There is in effect but one case. Plaintiff sued defendant for damages for personal injuries arising from an alleged assault on plaintiff's wife. Trial by jury resulted in a verdict and judgment for plaintiff April 29, 1936. Defendant's motion for a new trial was overruled June 3, 1936, and notice of appeal was given.

August 17, 1936, defendant filed another motion for a new trial, stating that he had served a bill of exceptions on plaintiff on July 23, 1936, within 40 days after the April term had adjourned *sine die* on June 15, 1936, but that plaintiff and his attorneys had retained the bill of exceptions beyond the time appellant had to procure a settlement of the same. The motion alleged that the court and clerk had lost jurisdiction to settle the bill of exceptions, that the proposed bill was subject to a motion to quash in the supreme court, and that appellant should not be deprived of his right of appeal through failure of plaintiff to return the bill of exceptions. This proceeding was given the case number 30012.

There was a hearing on August 28, 1936. The court denied the motion for a new trial and gave defendant an additional 40 days from the expiration of the first 40 days allowed in which to serve the bill of exceptions which was directed to include the stipulations and affidavits on this hearing.

The bill of exceptions was allowed on September 2, 1936. This was less than 80 days after the adjournment of the April term on June 15. We held in *In re Estate of Boschulte*, 128 Neb. 316, 258 N. W. 530, that, under section 20-1140, Comp. St. 1929, upon a satisfactory showing of diligence, a trial court is authorized to give additional time, not exceeding a total of 80 days, for service of the bill of exceptions on the adverse party, and such order may be made during the additional time allowed and after the first 40 days have expired. That exactly meets the situation here existing. The appellee consented to the settlement of the bill of exceptions and raised no objections thereto in his brief. There was really no purpose in the extra appeal except to try to obtain a new trial in the original action. There was no error in the ruling of the trial court on this point.

The alleged assault occurred in Otoe county. Mrs. Markel had sued defendant, and as a result there had been a great deal of newspaper publicity, which is set forth in an application for a change of venue. Affidavits tending to show that a fair trial could not be had in this cause in Otoe county appear in the record. The court allowed a change of venue to Cass county, which is another of the three counties in the same judicial district. This is assigned as erroneous and relied on as an abuse of discretion, preventing defendant from having a fair trial.

We find that the affidavits were sufficient to raise the question whether a fair and impartial trial could be had in Otoe county. In such circumstances section 20-410, Comp. St. 1929, allows the court to "change the place of trial to some adjoining county, wherein such impartial trial can be had; but if the objection be against all the counties of the district, then to the nearest county in the adjoining district." We take judicial notice that Cass and Otoe counties are in the same (second) judicial district. We find that the court abused no discretion in granting the change of venue. "Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a

motion for a change of venue." *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N. W. 431. See, also, *Smith v. Coon*, 89 Neb. 776, 132 N. W. 535; *Boyd v. Chicago, B. & Q. R. Co.*, 97 Neb. 238, 149 N. W. 818.

The alleged assault took place at the farm where plaintiff and his wife lived at the time. It occurred about 11:30 in the morning. Plaintiff was absent on a trucking trip to Omaha. He first saw his wife in Nebraska City, at her mother's, when he returned in the afternoon. It was some hours after the assault and miles from where the assault occurred. Over objection he was allowed to testify that his wife told him what had happened and that defendant had struck her, the court remarking on overruling the objection, "It is a part of the *res gestæ*." John Casper, a witness for plaintiff, was permitted on the same theory to testify to what Mrs Markel said to him after the assault was over and after she had later driven to school with the midday lunch for her children and had returned.

This testimony of plaintiff was concerning matters learned by the witness too late to be admissible in evidence as a part of the *res gestæ*. "A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." *Tongue v. Perrigo*, 130 Neb. 564, 265 N. W. 737. The admission of this testimony was prejudicially erroneous.

Sixteen errors are assigned and relied upon as to the instructions alone. To discuss them would obviously take unwarranted space unless we should determine that some of the assignments are valid. We have considered them and find that the instructions as a whole presented the issues fairly though they might have been stated more clearly and consecutively. They were not prejudicially erroneous.

The judgment in number 30012 is affirmed because neither party ever questioned the legality of the bill of exceptions resulting from the order in that case which was really brought about by defendant merely out of his overabundance of caution.

The judgment in number 29988 is reversed for the reasons disclosed in the opinion.

CASE NUMBERED 30012 AFFIRMED.
CASE NUMBERED 29988 REVERSED.

MAY LENA F. SCOTT, APPELLEE, V. EMMA SWANK, APPELLANT.
273 N. W. 25

FILED MAY 7, 1937. No. 29887.

1. **Deeds**: CANCELATION. In a suit in equity to cancel a deed on the grounds of duress by grantee and mental incompetency of grantor, where the testimony of experts and nonexperts on the different sides is in direct conflict, the court, for determining factors, may resort to evidential circumstances about which there can be no reasonable controversy.
2. ———: ———. "Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside." *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409.
3. ———: ———. "A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused." *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409.
4. ———: ———: BURDEN OF PROOF. "The circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition, or fraud, but is the intelligent and deliberate act of the grantor." *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409.
5. ———: VALIDITY. Deed to a second wife for a farm *held* voidable at the suit of an adopted daughter on the grounds of grantor's mental incompetency and grantee's duress.
6. ———: ———: DURESS. In a court of equity duress may be regarded a species of fraud and the ground on which a contract is voidable for duress is the same as in a case of fraud.
7. **Appeal**. An order overruling a motion for a new trial on the ground of newly discovered evidence will not be reversed on appeal where the record does not show an abuse of discretion by the trial court.

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

Ferneau & Ferneau, Raymond B. Morrissey, Hugh La Master and *Sidney S. Stewart,* for appellant.

Charles A. Dafoe, Harry K. Livingston and *Armstrong & McKnight, contra.*

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

ROSE, J.

This is a suit in equity to cancel a deed to a 160-acre farm in Johnson county, Nebraska, on the grounds of grantor's incompetency and of duress by grantee and her agent. The district court canceled the deed and defendant appealed.

The appeal requires a trial *de novo* on the record made in the district court. Plaintiff, May Lena F. Scott, is the adopted daughter of Noah Swank, who was twice married, and his first wife. The Swank family of three, the foster parents and plaintiff, their adopted daughter and only child, formerly resided on the 160-acre farm in Johnson county, but they all moved to Polk county, Arkansas, near Mena, in 1911. Plaintiff was married to George Scott in 1914. Her foster mother died July 22, 1932, and her foster father, Noah Swank, married defendant, Emma Swank, November 16, 1933, and died March 30, 1934. The deed in controversy purported to convey the Johnson county farm from Noah Swank, grantor, who owned it, to his second wife, Emma Swank, grantee, defendant. It was dated March 12, 1934, and recorded in the public records March 30, 1934. It thus appears that the deed to the second wife was signed 3 months and 26 days after the second marriage of grantor and 18 days before his death.

In connection with the facts stated, which are undisputed, the petition contains in detail pleas to the effect that grantor was 79 years old March 12, 1934; that he had been weakened mentally and physically by a paralytic stroke and other infirmities to such an extent as to incapacitate

him for business transactions; that in this condition defendant and her agent procured the deed by duress; that consequently the deed was voidable; that plaintiff, under the Nebraska statute of descent, inherited from her foster father the undivided three-fourths of the 160-acre farm and that defendant inherited the undivided one-fourth of it.

In addition to a general denial of unadmitted allegations in the petition, defendant alleged in her answer that grantor conveyed the title to her in consideration of love and affection while in full possession of his mental faculties and fully competent to transact business; that on March 12, 1934, he was of sound mind and under no restraint, influence or compulsion of any kind. There was a prayer for a dismissal of the cause. The reply to the answer is in the nature of a general denial.

With the pleadings as thus outlined, the district court found the issues in favor of plaintiff after a long trial. and canceled the deed.

What does equity require in view of all the facts and circumstances? The solution of the problem depends on the evidence. The principal task is to ascertain the truth from a record full of contradictions in many respects.

The deed from Noah Swank, grantor, to his second wife, Emma Swank, grantee, was dated March 12, 1934. He had a paralytic stroke in January, or February, 1934, and was unconscious for a short time, required constant care and was never again able to be out of his house. He was confined to his bed most of the time and died March 30, 1934.

An expert in mental diseases testified on behalf of plaintiff, in substance, that he had been grantor's physician for 20 years; treated grantor for Bright's disease for two years prior to his death; patient had high blood pressure, around 200; hardening of arteries; stroke incapacitated him mentally; witness saw grantor two months before he died and had occasion to note his mental condition while treating him for Bright's disease and high blood pressure; mind began to fail about July 1, 1933, and seemed to get weaker; easily influenced; did not have mental capacity to

make a deed before he was stricken and his condition thereafter would be worse.

Another physician testified he attended grantor in January, 1934, and found him unconscious from apoplexy; was unconscious next day when physician again called; saw grantor the day before he died; he was not competent to transact business after he was stricken with apoplexy. In answer to hypothetical questions, other physicians testified to the opinion that grantor was not mentally competent to transact important business or to execute a deed March 12, 1934. Nonexpert witnesses who knew grantor before and after the death of his first wife and after he signed the deed in suit, and who had observed his conduct and condition, expressed opinions to the effect that he changed both mentally and physically after his paralytic stroke and was not mentally competent to execute a deed March 12, 1934. Their testimony contains also statements that Swank, after the death of his first wife, expressed a purpose to leave his property to the Scotts, his daughter and her husband.

Other physicians were produced by defendant, Emma Swank, the grantee. They qualified as experts and testified in her behalf. One of them said, in substance, that he had known grantor about seven years; that he called on him February 15 and 16, 1934, and on March 11, 1934; had conversed with him, but would not say they talked about business; had one little stroke, but was practically over it when witness called; did not think grantor was easily influenced; detected nothing wrong with his mind; mentally same as always—"A-one" every time they met; capable of transacting business when he made his deed. Many nonexpert witnesses were also produced by grantee. In effect they testified to long acquaintance with grantor; to conversations with him; to his business transactions; to observations of his conduct and condition before and after his stroke; to utterances by him that he wanted his property to go to his second wife and not to his adopted daughter or to her husband. Each of these witnesses disavowed any interest in the case. On facts to which they testified they

expressed the opinion that grantor was sound of mind when he deeded his Nebraska farm to his second wife; that he was then mentally competent to transact important business, including the transfer.

Defendant contends there was no clear, satisfactory and convincing evidence of grantor's mental incompetency or of duress to overthrow the duly executed deed and properly adduced testimony of the subscribing witnesses that grantor was of sound mind and competent to transact business, including the making of the deed, March 12, 1934, that date alone being the time for the test of competency or incompetency or of duress.

In determining the issues, the court may resort to material factors found in circumstances under which the deed was prepared, signed and witnessed; to the agencies that directed what was said and done at the time; to the physical and mental condition of grantor and the natural or unnatural effect of the transaction upon the objects of his bounty; to all other features of the proofs. The agreed value of the Johnson county farm was $4,800 and it was the principal part of his estate. The deed, if valid, left the daughter without a substantial inheritance. There is no evidence of any hostility on the part of grantor toward his daughter before the second wife and the latter's agent and confidential manager, Grant Oster, appeared on the scene. This agent, who was also attorney in fact for both grantor and grantee, declared his intentions and purposes, after the death of the first wife but before the second marriage and before the making of the deed, to one or more disinterested witnesses, according to their testimony, which may be condensed as follows: The old man did not have mentality enough to transact his own business; "I am going to take charge of what he has got and attend to it for him" and "he is going to pay me for everything I do; he has got the money and I just as well have it as anybody else." He ought to marry and get somebody to take care of him. "She (adopted daughter) will just get $5 willed to her." Further: "Was going to run the business;" that Swank

"wanted him to look after the thing." Also, "He was not capable of running his own business" and if "he would advise him he would know how to do things." In addition: "Was going to see that Mr. Scott didn't get anything." A purported will antedated the deed. Referring to Oster, one of the disinterested witnesses testified:

"He said Mr. Swank wanted him to write the will and that they 'had got it wrote' and probated and put on record, and said May didn't get anything but would just get $5 willed to her; said 'she wouldn't get fat on $5.' "

Oster as a witness denied the truth of this testimony, but other evidence shows clearly that he proceeded to carry out his declared purposes and intentions, as related by witnesses, and that defendant, the second wife, participated directly and actively in his plans. December 23, 1933, 37 days after the second marriage, Oster prepared and Swank and defendant, his second wife, signed what purported to be their joint will, each giving to the survivor all property of every kind belonging to either, naming the survivor as executor or executrix until the death of both and nominating Oster to be sole executor thereafter. The second paragraph of this instrument reads thus:

"After the death of both of us, it is our will, and we do hereby bequeath, devise and give our daughter, May Scott, of Mena, Ark., the sum of Five Dollars to be paid to her out of our estate after the death of both of us; and it is our will, and we bequeath all the remainder of our estate, one-half divided equally to J. B. George and R. G. George, and the other one-half to Mrs. Rebecca Hoover."

This purported will was drawn by Oster and executed with the same formality and solemnity as the later deed now in controversy, both with practically the same end in view—termination of the rights of the daughter, as legal heir. Defendant had no property to bequeath at the time of joining in this will. She had not contributed anything to her husband's estate, but plaintiff had been grantor's daughter from infancy to womanhood and had aided him in his farming operations on this very Johnson county

farm. She had taken care of his first wife in her last illness. The probate court and the circuit court of Polk county, Arkansas, and a jury found that this will was void and defendant herself testified it was thrown out.

Swank and his first wife had bound themselves by oath to adopt Lena Ferguson by the name of May Lena F. Swank with the status of a natural heir, including property rights. They procured a decree of adoption containing the same conditions and declaring that the child should have the same legal rights, privileges, immunities and heirship as if born to her foster parents in lawful wedlock.

It is a proper inference from all evidential facts and circumstances that Swank had the mentality and independence to respect his oath and his properly assumed and natural obligations to his daughter until he was mentally and physically weakened by paralysis and other infirmities and until he fell under the influence of Oster and the second wife. He was not with either of them when procuring his marriage license but went alone and accepted a license to marry "Annie Ferguson" instead of "Emma Ferguson." The law presumes, in absence of evidence, that the licensing officer performed his duty, but defendant testified that Swank knew her name and she attributed the error to some officer without disclosing personal knowledge of the fact.

Defendant, the second wife, gave her age as 64. She had been married three times before becoming the wife of Swank, whom she had known but three or four months. She admitted her marriage to him occurred in Arkansas about a month after she was divorced from a former husband. On the witness-stand she said that she married Swank to take care of him; that she was married at her brother's home in Mena where she remained thereafter for three weeks, but that she had a sore foot and could not then do any work; that her new husband had a little spell with his heart but was able to walk from his home in Mena to his little farm—40 acres just beyond the city limits; that Oster helped her to move her goods from her brother's

home to the little farm. The evidence tends to prove that Oster, in addition to his powers of attorney, kept in a box in his own home papers belonging to both Swank and his new wife; that he transacted business for both; that he had been with Swank in the latter's home every day from the date of his stroke until his death, remaining for two hours or more at different times; that he had made trouble between Swank and his son-in-law; that Swank feared the latter meant to poison him; that the Scotts sent fresh meat to Swank by neighbors to whom it was returned with a warning of poison; that the neighbors ate and relished the same meat without any harmful result.

Before controversy arose between Swank and the Scotts, but after the death of his first wife, he entered into a contract with his daughter to convey to her his 40-acre farm near Mena, worth perhaps $350, on terms permitting him to make his home with them there and obligating them to support him and care for him. Oster did not approve this transaction. Swank became dissatisfied and complained that he had been mistreated by the Scotts. After litigation over the contract was commenced, but before trial, the controversy was settled and the daughter reconveyed the property to her father. Animosity between Oster and Scott arose from minor incidents growing out of a public sale of personal property belonging to Swank. Scott objected to what he considered Oster's interference with his personal affairs. There is nothing in the record, however, to justify the fear of an attempt by Scott to poison Swank or to change the natural attitude of the father toward his daughter. Fear and hostility were obviously created by delusions or by external influences which controlled him.

The deed, like the disinheriting will, was drawn, signed and witnessed without notice to or knowledge of the daughter, who had been turned from her father's door two or three days before he died. She was not notified of his death but found him later at the morgue. Oster was entrusted with the deed and withheld it from public records until the date of grantor's death.

Oster testified to his services in the making of the deed and to the attending circumstances. His version of the transactions and testimony of others present may be condensed to what follows: Swank sent for Oster March 12, 1934, and, after he arrived at the home of the former, told him he was going to deed his Nebraska farm to his wife; that there was a blank deed in his box in Oster's house and a deed containing a description of the farm; gave directions to have the blank deed typed and to bring some one to validate it. Oster got the papers; met W. L. Parker, a notary and attorney, and both men went to the office of Parker, where the deed was prepared by him, except for part of the description of the land. Oster took Parker to the home of Swank the same day. They had access to his bedroom through the kitchen. He was in bed. Parker talked to Swank and told him about the deed. The latter supplied the omitted part of the description. Parker read the deed to him, asked him if that was what he wanted and he said it was. Parker wrote the name of Swank on the deed and made his mark, the latter touching the pen. There were present Oster, Parker, Flora Hardy and Swank. Oster and Flora Hardy signed the deed as witnesses. Parker took the acknowledgment and handed the completed instrument to Swank, who gave it to his wife after she had been called from the kitchen. She immediately gave the deed to Oster who kept it in his house until he sent it to the register of deeds the day grantor died. Swank could not sign his name, though he formerly wrote fairly well. Before he touched the pen held by Parker he said he was "kind of nervous." He talked slowly. It was difficult for some people to understand him. Parker was attorney for grantee, Emma Swank, in another suit involving the same land. Oster was beside the bed. The other subscribing witness, Flora Hardy, was a friend of Emma Swank, was staying with her at the time and had previously been her employee in a former home.

No one would attempt to destroy plaintiff's rights as an heir without intending to use the essential forms of law

and to procure the necessary witnesses for the accomplishment of that purpose. Parker, Oster and Flora Hardy testified to the opinion that Swank was of sound mind and mentally competent to execute the deed. Testimony of this kind and other evidence of a similar import do not, however, determine the issues of incompetency and duress in favor of grantee, as argued in her behalf. In the search for the truth in the interests of justice, courts of equity may look impartially for motives, personal interests and bias behind the forms of the law and beyond any means devised to give evil the appearance of virtue. In the search for the truth, the voiceless story of circumstances about which there can be no reasonable controversy may be more potent than a written deed or oral testimony. Such circumstances, separated from writings and pictures, do not bear on their faces any questionable signatures or import what they are not or commit perjury or shift positions or show bias. The circumstances that Swank, during long years of mental and physical vigor, kept his oath and declared purpose to make plaintiff his daughter and heir and departed therefrom only after he was stricken with apoplexy and after he fell under the influence of his second wife and Oster, in connection with other circumstances already related, show that there was a radical change in his mentality, notwithstanding oral testimony to the contrary. This view is supported by the evidence of his incompetency as disclosed by both expert and nonexpert witnesses called by plaintiff. In the light of the entire record, the making of the deed was not a voluntary act prompted by a competent mind free from restraint. It was unnatural and unreasonable. This is a typical case for the application of the following rules of equity announced in an opinion by Commissioner Pound:

"Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside.

"A court of equity will scrutinize jealously a transaction

as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused.

"The circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition, or fraud, but is the intelligent and deliberate act of the grantor." *Bennett v. Bennett,* 65 Neb. 432, 91 N. W. 409.

These rules of equity have been applied in many cases: *Gibson v. Hammang,* 63 Neb. 349, 88 N. W. 500; *Chamberlain v. Frank,* 103 Neb. 442, 172 N. W. 354; *In re Estate of Noren,* 119 Neb. 653, 230 N. W. 495; *Holtman v. Lallman,* 122 Neb. 183, 239 N. W. 820; *Broeker v. Day,* 124 Neb. 316, 246 N. W. 490.

Defendant did not maintain her burden of proof. On the contrary, there was sufficient evidence to prove both incompetency and duress, which made the deed voidable.

It was insisted in argument that the petition does not allege fraud and that a decree in favor of plaintiff cannot be based on fraud. Plaintiff pleaded duress which is a species of fraud. The ground upon which a contract is voidable for duress is the same as in the case of fraud. 9 R. C. L. 711, sec. 2.

The failure of the district court to grant a new trial on the ground of newly discovered evidence is presented as a ground for reversing the decree below, but the record does not disclose an abuse of discretion in that particular. The independent findings on appeal are the same as the findings of the district court.

AFFIRMED.

HAZEL FROM, GUARDIAN, APPELLEE, V. GENERAL AMERICAN LIFE INSURANCE COMPANY, APPELLANT.

273 N. W. 36

FILED MAY 7, 1937. No. 29977.

1. **Evidence.** A witness who is well acquainted with another and has had opportunity to observe his ability to perform farm work and labor may testify with reference to such ability or want thereof.
2. **Appeal.** Admission, over objection, of evidence to prove an admitted fact is not ground for reversal unless prejudicial to complaining party.
3. **Insurance: POLICY: CONSTRUCTION.** Provision in an insurance policy for payment of disability benefits when insured has become totally and permanently disabled, and which further provides that the original cause of the disability must have occurred or been contracted after the first annual premium has been paid on the policy, covers a disability caused by a disease first manifesting itself after the period mentioned.
4. **Estoppel.** "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen*, 103 Neb. 791, 174 N. W. 422.
5. **Appeal.** A party may not complain of court's refusal to give a requested instruction, the substance of which is embodied in the court's charge to the jury.
6. **Insurance: POLICY: CONSTRUCTION.** Where an insurance policy provides for the payment of disability benefits when insured has become totally and permanently disabled from bodily disease, so that he is thereby and will be permanently, continuously and wholly prevented from pursuing any occupation whatsoever for remuneration or profit, such provision does not mean that the insured must be absolutely and literally helpless and unable to do anything. The term "occupation," as used in the policy, means the occupation or employment of the insured in which he was engaged or for which he was fitted. The words "total and permanent disability" do not mean that the insured must be rendered absolutely and totally unable to perform every duty of his occupation in order to recover. It is sufficient in that respect if the insured is disabled by bodily disease from performing one or more of the necessary acts of his occupation.
7. **Appeal.** Alleged error in allowance of attorney's fees in an action on an insurance policy will not be reviewed by this court

unless such question has been first presented to the trial court for correction.

8. Evidence examined and *held* sufficient to sustain the verdict.

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

Loren H. Laughlin, Allen May and *J. R. Burcham,* for appellant.

Ginsburg & Ginsburg, contra.

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

GOOD, J.

In an action on two life insurance policies plaintiff recovered judgment for disability benefits and for premiums charged to have been wrongfully exacted on such policies. Defendant has appealed.

International Life Insurance Company issued to David Harold From two policies of life insurance, each for $2,500, the first issued in 1925, the second in 1928. Each policy provided for the payment of $25 monthly to insured if he should become totally and permanently disabled. Each policy provided that disability, to be total and permanent, must be such as to cause insured to be wholly disabled by bodily injury or disease, so that he is thereby and will be permanently, continuously and wholly prevented from pursuing any occupation whatsoever for remuneration and profit. There was a further provision that, where such disability has existed continuously for six months or more, it shall be presumed to be permanent, provided that no indemnity be payable for the first six months of such disability. The policies also provided that the company would waive payment of any premiums falling due subsequent to the date of approval by the company of proof that the insured has become permanently disabled as set forth in the policy. The second policy contained an additional provision that the original cause of the disability must have

occurred or been contracted after the first annual premium had been paid on the policy.

In August, 1928, Missouri State Life Insurance Company assumed and agreed to carry out and perform all the obligations of both of such policies. On the 7th of September, 1933, the defendant, General American Life Insurance Company, took over the assets of Missouri State Life Insurance Company and assumed and agreed to carry out all the obligations of Missouri State Life Insurance Company with reference to the two policies.

April 1, 1931, David Harold From was adjudged incompetent, and his wife, Hazel From, plaintiff herein, was duly appointed and qualified as his guardian.

In 1930 insured made proof to Missouri State Life Insurance Company that was satisfactory to it, showing that he was totally and permanently disabled. That company refused to make payments, however, until a guardian had been appointed for the insured, and, after appointment of the guardian, the payment of $50 monthly was made until the assumption of the obligations of the policies by the defendant company. Defendant continued to make the payment of $50 each month to and including December 12, 1934. Defendant then made some further investigation and declined to continue payment of benefits. December 17, 1934, defendant wrote insured as follows:

"We have again reviewed your claim and as a result it has been found necessary to discontinue further benefits. Premiums falling due hereafter must be taken care of by you in the regular manner if your policy is to remain in good standing. * * * We do not mean to infer that you are now in perfect health or that you may not be somewhat partially disabled, but it is our opinion that you are not totally and permanently disabled as defined in your policies." Payments were thereafter discontinued, and this action was brought, with the indicated result.

From the record it appears that insured was married in 1920; that he and his wife engaged in farming; that they were thrifty and successful until November, 1929, when

he had an attack of coma or stuporous condition which lasted for about a week; that similar attacks occurred at intervals thereafter; that he lost interest in his work; became morbid; seemed to lose affection for his wife and children; avoided friends; avoided company; could not work steadily; had hallucinations or delusions, and became unable to perform any work of consequence. The medical evidence tends to prove that he was and is suffering from *dementia præcox,* which is a disease affecting the mind, is progressive in its nature and incurable. Plaintiff's evidence tends to prove that insured was totally and permanently disabled from 1930 to the time of trial.

Defendant contends that the trial court committed reversible error in permitting a neighboring farmer of insured to testify and give his opinion as to the ability of insured to perform duties of a farmer, and that insured was disabled from performing farm labor. Defendant contends that the witness was not an expert and is merely permitted to state facts within his personal knowledge, and that his conclusion or opinion with respect to matters in issue, or relevant to the issues, cannot be received in evidence.

We think the applicable rule is that a nonexpert witness, who has had opportunity for observation and knowledge, may state his opinion as to the appearance, state of health and ability of another person to perform work or labor, especially where he states the general facts upon which he bases his opinion. One of the most common applications of the principle is that a nonexpert may, after detailing the facts on which he bases his opinion, give his opinion as to the sanity or insanity of another person. This court has held: "A nonexpert witness may testify to a conclusion when, from the nature of the subject under investigation, it is not possible to lay before the jury all the facts from which such conclusion is drawn." *Missouri P. R. Co. v. Palmer,* 55 Neb. 559, 76 N. W. 169.

In *Young v. Beveridge,* 81 Neb. 180, 115 N. W. 766, it was held: "The ability of a person to perform manual labor

is not a matter so exclusively within the domain of medical science that witnesses who were acquainted with him and had opportunity to observe his ability cannot testify with reference thereto." Among other cases holding to a like tenor are *Eastwood v. Klamm,* 83 Neb. 546, 120 N. W. 149; *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285, 125 N. W. 535; *Clarke v. Irwin,* 63 Neb. 539, 88 N. W. 783; *Kehl v. Omaha Nat. Bank,* 126 Neb. 695, 254 N. W. 397; *Gartner v. Mohan,* 41 S. Dak. 406, 170 N. W. 640. See, also, 22 C. J. 618; 3 Jones, Commentaries on Evidence, p. 2306. We think the trial court did not err in this respect.

Defendant asserts that the trial court erred in admitting over objection the decree of the court appointing insured's wife as guardian for insured. The pleadings admit that insured has been placed under guardianship, and it is insisted that the court should have excluded the evidence offered to prove an admitted fact. Defendant cites as authority for this proposition *Thompson v. Colfax County,* 106 Neb. 351, 183 N. W. 571. The holding in that case is that it was not error to exclude such testimony, but, even if the admission of the decree was technically erroneous, it is no ground for reversal, unless it was prejudicial to the defendant. The pleadings admit that the insured was under guardianship. The record discloses that defendant had admitted insured's total disability and had paid benefits for a period of 15 months. The evidence also clearly shows that the only disability of insured was from his mental disease. Clearly, the admission of the decree could not have been prejudicial to the defendant because it related to a time long anterior to the commencement of this action and to a time when the insurance company, predecessor of defendant, insisted upon the appointment of a guardian before it would make the payments. It is a rule that harmless error will not work reversal of a judgment.

Defendant argues that there can be no recovery of disability benefits under the second policy of insurance which contains the provision that the original cause of the disability must have occurred or been contracted after the

first annual premium had been paid on the policy. There is evidence to the effect that *dementia præcox*, the disease from which insured was suffering, is an inherited disease, and it is contended, therefore, that the original cause of the disease antedated the issuance of the policy. It is no doubt true that an insurance company may limit its liability for disability benefits to a disease or condition or cause arising subsequent to the issuance of the policy. However, we think the general rule applicable is that the disease or cause must have been one which had manifested itself prior to the time, fixed in the policy, when the cause should first exist.

In *Davidson v. First American Ins. Co.*, 129 Neb. 184, 261 N. W. 144, it was held: "A provision in a policy of insurance indemnifying the insured 'for loss of time * * * from any bodily sickness or disease * * * which is contracted and begins after this policy has been in continuous force for not less than fourteen days' covers sickness or disease first manifesting itself after such period, although the medical cause may have antedated the policy." Even in one of the cases cited by defendant, *Valencia v. Continental Casualty Co.*, 127 Neb. 820, 257 N. W. 57, it was held, in effect, that a policy, providing for benefits for bodily sickness, which is contracted and begins after the date of the policy, covers disease or sickness first manifesting itself after such period, although medical cause may have antedated issuance of the policy. This is undoubtedly the rule in Nebraska, as well as in most jurisdictions. In the instant case there is no contention that the disease of *dementia præcox* ever manifested itself in insured until November, 1929.

Moreover, there is another reason why this contention is not available to defendant in the instant case. After it had paid disability benefits for a period of 15 months, defendant discontinued the payments and gave as the only reason for the discontinuance that insured was not totally and permanently disabled, and did not claim that the cause of his disability originated prior to the issuance of

the policy or the payment of the first annual premium. It has long been a rule in this jurisdiction that, "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen,* 103 Neb. 791, 174 N. W. 422; *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841, 248 N. W. 397; *Pittenger v. Salisbury & Almquist,* 125 Neb. 672, 251 N. W. 287; *McDowell v. Metropolitan Life Ins. Co.,* 129 Neb. 764, 263 N. W. 145; *Ballou v. Sherwood,* 32 Neb. 666, 49 N. W. 790; *Powers v. Bohuslav,* 84 Neb. 179, 120 N. W. 942.

Defendant argues that the court committed error in the giving and refusing of instructions. So far as the instruction refused is concerned, the court, in fact, embodied it, in almost identical language, in one of the instructions which it gave.

Complaint is made of instructions Nos. 7, 8 and 9, given by the court. It is contended, first, that the court, in defining total disability, did not attempt to define the term "permanent," and thus the meaning of the term "permanent disability" was not given to the jury. By instruction No. 5 the court informed the jury that the burden rested on plaintiff to prove by a preponderance of the evidence that insured "was totally and permanently disabled * * * by reason of a mental disease on and since December 12, 1934, to and including this date" (May 7, 1936). In no instruction requested by defendant was the term "permanent" defined. The word "permanent" is one of common use, and we think that the jury could not have been misled by failure of the court to give a definition of that term. Moreover, the policy provided that, if total disability existed for a period of six months, it would thereby be presumed to be permanent, so that where the court, by its instructions, required proof, by a preponderance of the evidence, of total disability existing from December 12, 1934,

to May, 1936, and if the jury so found, it would, in effect, under the policy be equivalent to permanent disability. The instruction was not prejudicial in this respect.

Defendant also contends that the instruction was erroneous in that it permitted the jury to find that there was total disability if insured was unable to perform the substantial duties of his business or occupation. The evidence shows that insured was a farmer; that he was not acquainted with, was not fitted for, and had no other business than that of a farmer.

The rule as stated by the court is substantially in compliance with that laid down in *Hamblin v. Equitable Life Assurance Society, supra,* and in *Oswald v. Equitable Life Assurance Society,* 128 Neb. 173, 258 N. W. 41. In the *Hamblin* case it was said (p. 845): "The term 'total disability' is rarely, if ever, given a strictly literal meaning of absolute helplessness or entire physical disability, but rather inability to do substantially, or practically, all material acts for the transaction of insured's business in the customary and usual manner. * * * Sound reason and the great weight of authority sustain this view." A like holding was made in *Oswald v. Equitable Life Assurance Society, supra.* We think the term "total disability" was properly defined as applied to the facts in the instant case. If defendant had desired a more definite statement as to the meaning of the term "permanent," a request therefor should have been made in proper form. Instructions refused and given disclose no prejudicial error.

Defendant complains that the allowance made plaintiff for attorney's fee was excessive. That question is not properly before this court. We do not find that the question was called to the attention of the trial court either in the motion for a new trial or otherwise. This is a court of review, and if it were believed that the court committed error in this respect, the matter should have been submitted to the trial court for action before bringing the question to this court for consideration.

Finally, defendant complains that the evidence is in-

sufficient to sustain the verdict that insured was totally and permanently disabled, within the meaning of the policies. As heretofore pointed out, it had been determined and accepted by Missouri State Life Insurance Company, which was in privity with defendant in this case, that total and permanent disability had existed. Defendant admitted that such condition existed for a period of 15 months and made the payments, as provided for in the policies. There is nothing in the evidence that shows there has been any change for the better in insured's condition since the original allowance of the claim by defendant's predecessor in interest, and the evidence, as a whole, is sufficient to sustain the finding that insured is and has been totally and permanently disabled from December 12, 1934, to the time of trial of this action.

It is conceded by defendant that, if plaintiff is entitled to recover for the disability benefits under both of the policies, then she is entitled to recover for the premiums on the policies exacted by defendant subsequent to December 17, 1934.

The record appears to be free from prejudicial error.

AFFIRMED.

INEZ M. KUCERA, APPELLEE, V. CYRIL PELLAN, APPELLANT: ANNA PELLAN ET AL., APPELLEES.
273 N. W. 10

FILED MAY 7, 1937. No. 29978.

1. **Vendor and Purchaser**: FRAUD. Representations of fair market value of the land per acre have been generally regarded as mere opinions, or sellers' statements, and when made to the buyer, who had examined the land in the absence of the seller, are held not to constitute actionable fraud.
2. ———: ———. Where representations as to the character and condition of the soil were mere expressions of opinion of the seller, and the farm was carefully examined by the buyer, who was himself an experienced farmer, and the surface indications of this land abutting the Platte river told their own story, such representations *held* not to constitute fraud under the facts in this case.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Coufal & Shaw, for appellant.

Skiles & Skiles, contra.

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

PAINE, J.

The plaintiff, Inez M. Kucera, brought action to foreclose a mortgage upon a Butler county farm, and a decree was entered, finding the amount due on said mortgage to be $12,136, with interest at 8 per cent., and directing that the premises be sold, as provided therein. A motion for new trial was overruled, and defendant Cyril Pellan appealed, and charges that the court erred in refusing to allow him recoupment on his cross-petition for damages caused by the alleged false representations of August A. Hayek concerning the value, quality, and character of the farm.

The answer and cross-petition set up by way of cross-petition against the plaintiff and August A. Hayek, a co-defendant, that Pellan had owned 160 acres in Saunders county, Nebraska, for more than 20 years prior to March 18, 1928, and that on said date the land was of the fair market value of $25,520; that Hayek owned a farm in Butler county, Nebraska, on the south side of the Platte river, which contained when platted 222.5 acres, but actually contained only 190 acres, as the Platte river had washed away 32.5 acres thereof prior to 1928; that on March 18, 1928, Hayek came to the Pellan home in Saunders county and made a full, thorough, and complete examination of their farm, and proposed to purchase their farm for $160 an acre if the cross-petitioners would purchase his Butler county farm at $175 an acre; that at that time Hayek represented that the tract contained 220 acres, that it had 90 acres in cultivation, that it was of good character and quality of soil, that the land not under cultivation was all

good, fertile, productive land, and could all be cultivated and put into crops; that they relied upon these representations; that the parties met on Monday morning, March 19, 1928, and Pellan executed certain instruments, delivering a deed to Hayek in fee simple for a consideration of $25,520 for his 159.5 acres, and Hayek conveyed to him his Butler county farm for a consideration of $38,500, the difference in the price of the two farms being represented by the note and mortgage foreclosed in this case; that each party retained his own farm for one year, and that on March 1, 1929, cross-petitioner Pellan moved upon the farm he had purchased, and that, after experimenting in the cultivation of said farm for several years, he discovered in 1933 that the representations as to productivity, quality, and character of the land were false, and also discovered the shortage in acreage, and alleges that, by reason of such deficiencies, said land did not have the market value that was represented; that prior to the discovery of such frauds cross-petitioners paid interest on the mortgage in the sum of $3,000, and alleged that he had been damaged in the sum of $15,980.

The cross-petitioners further allege that when Hayek learned that the fraud had been discovered he transferred his mortgage and note to the plaintiff, who then represented herself to be a purchaser for value, without notice or knowledge of the fraud; that said Hayek is insolvent, and that the plaintiff herein had full knowledge of the fact that Hayek had defrauded the cross-petitioners before she placed her assignment of mortgage on record, and acted with Hayek in attempting to defeat recovery by such method, and the cross-petitioners pray that the real estate mortgage be canceled and that they recover against the plaintiff and Hayek, and each of them, a judgment for $15,960, with 6 per cent. from March 29, 1928.

Cyril Pellan testified that he was born in 1886 on the farm which he traded to Hayek, and that when he was 22 years old he acquired the farm from his father; that since the age of 18 he had been afflicted with deafness, and that

at the time of this trade he was unable to carry on an ordinary conversation; that a schoolhouse is located on the Pellan farm in Saunders county, and that the schoolteacher employed therein was courted by one Steve Macholan, who on one of his trips to see the teacher told Pellan that Hayek had this farm for sale, but the trial court allowed no evidence to be given as to what Steve said about the farm.

Pellan was interested in getting a larger farm, and two weeks after he heard about the farm he drove over and saw it for the first time on Saturday, March 17, 1928, on which date he drove with Steve along the highway between two 80-acre tracts of this farm, and went to see Hayek in his bank at Brainard. Hayek told Pellan he wanted $175 an acre for it. Pellan asked if he would trade farms, and he agreed to come over the next day and see Pellan's farm, which he did. After looking it all over, they went in the house and Pellan testifies he said to Hayek: "I told him I guarantee my land he can plow every foot of land, that he can plow every piece of the land except those ditches, if he can work them up he can raise a crop too, and he told me that his farm is the best land on the bottom river, that if anybody raise a crop he get a crop, that he guarantee a crop every year. * * * He said he was giving too cheap, that that land is worth more than $175."

Hayek testified that the Pellans with their grown boys moved on the Hayek land in March, 1929, one year after they had bought it; that they at once began to farm and use the land; that the spring they moved on they took steps to prevent further washing or erosion of the land; that they paid interest on the mortgage given for the balance between the farms in 1930 and in 1931, but in 1932 they did not pay the interest, but gave a chattel mortgage to secure the payment. In 1934, six years after they purchased the land, and five years after they had lived upon it and farmed it, and after the petition for foreclosure was filed, Cyril Pellan for the first time claimed that he had been defrauded.

Nearly two days of the trial in the district court were spent with a soil expert showing in detail the depth of the soil, the kind of soil, the depth to water and gravel, and the opinion of the expert on the productivity of such land, but counsel for Hayek claims that there is no record in evidence of any statements or representations ever made by Mr. Hayek in reference to the soil or its depth or quality.

Mr. Hayek did not appeal from the court's finding of a shortage of only 18 acres, considering five acres of an island which Hayek had included in his deed. There appears to be no dispute that the Pellans had farmed this land for five years and made no claim of fraud until after they applied for a Federal Land Bank loan and found they could not borrow enough on the land to pay out the mortgage in full. The admitted statement made by Mr. Hayek at the time the deal was closed was that his land was worth $175 an acre. He did not say it could be sold on the market for that; he merely, as his counsel says, expressed his own belief and opinion that it was worth $175 an acre, and it is insisted that the statement at the time it was made was substantially correct. The two farms were about 18 miles apart. The Pellans visited the Hayek farm twice, and took with them a neighbor who lived near the Hayek farm, and had every opportunity to examine it and to inquire about its value.

Many Nebraska cases are cited in the brief of defendant covering fraudulent sales of every sort, such as cattle with pink-eye, fake stocks of goods, a stallion falsely represented as registered in France as a Percheron, when it was not imported, but raised in the United States, several cases involving sales of land which the buyer did not examine personally, but relied upon the representations of the seller, also cases involving frauds in sales of bonds and notes. However, while each case is interesting, yet they are not especially helpful when applied to the facts in the case at bar.

This court has held that a statement as to value is deemed a mere expression of opinion unless the buyer is

a nonresident, or is induced not to make inquiry, or is prevented by fraud or device from inspecting the property. In this case the buyer had every opportunity to examine the farm in Hayek's absence, and had one year's time to ascertain every fact in relation to it before he moved onto the farm.

Representations of fair market value of the land per acre have been generally regarded as mere opinions, or seller's statements, and when made to the buyer, who is himself a farmer, and who had examined the land in the absence of the seller, are held not to constitute actionable fraud. *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275; *Musgrove v. Eskilsen*, 127 Neb. 730, 256 N. W. 883.

Pellan, the buyer, had been a farmer all his life. There was no fiduciary relation existing between the parties in any way. Pellan came to Hayek in his bank, saying he had heard about the farm, and wished to get a stock farm with more acreage than the one he had. Pellan then bought the place, and lived on and operated it for five years, and never, so far as the record shows, made one word of complaint until he was unable to refinance the loan and foreclosure was started.

The trial court found that the evidence failed to show a misrepresentation by the seller of material facts about the soil, and that the statements were mere expressions of opinion, and this has been held not to be a basis of fraud. *McKibbin v. Day*, 71 Neb. 280, 98 N. W. 845; *Wustrack v. Hall*, 95 Neb. 384, 145 N. W. 835; *Realty Investment Co. v. Shafer*, 91 Neb. 798, 137 N. W. 873. In the last case it was stated that the defendant's own testimony shows that he was competent to determine for himself the character and condition of the land, that it was open to his observation, and the surface indications told their own story. In several cases it has been held that, where ordinary prudence would have prevented the deception, an action for fraud will not lie.

This court holds that, where representations as to the character and condition of the soil were mere expressions

of opinion of the seller, and the farm was carefully examined by the buyer, who was himself an experienced farmer, and the surface indications of this land abutting the Platte river told their own story, such representations do not constitute fraud under the facts in this case.

We find no error in the decree of the trial court, and the same is hereby

AFFIRMED.

LOVENA STUTHEIT SHAGOOL, APPELLANT, V. HENRY L. YOUNG, APPELLEE.
273 N. W. 13

FILED MAY 7, 1937. No. 30010.

Mortgages. Where it appears that a deed absolute on its face was intended by the parties as security for moneys advanced, it will be decreed to be a mortgage by a court of equity.

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

Edith Beckman, for appellant.

Armstrong & McKnight, contra.

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

CARTER, J.

Plaintiff brought this suit to obtain a decree declaring a certain warranty deed executed and delivered by her to the defendant to be a mortgage and for an accounting of the rents collected by the defendant while he was in possession of the property. The trial court held that the deed was absolute, subject only to an oral agreement to repurchase with which plaintiff had failed to comply. Plaintiff brings the case to this court for review.

The record discloses that on May 6, 1929, the plaintiff, Lovena Stutheit Shagool, was the owner of the property involved in this action. It also appears that, prior to that date,

her husband, John W. Shagool, had been the owner of the legal title and had permitted a judgment obtained against him to become a lien on the property. On May 6, 1929, an execution had been issued and the sale of the property thereunder was about to be confirmed when plaintiff requested a loan from the defendant in order that she might protect her interest. Defendant at that time had a first mortgage on the property for $300. Defendant agreed to pay the judgment and costs under which the property was being sold on condition that plaintiff execute and deliver a warranty deed to him with the understanding that he would deed the property back to her whenever she paid the amount due him. Defendant thereupon marked the $300 note paid and returned it to plaintiff and thereafter undertook to collect the rents and to care for the property. The record shows that defendant advanced funds to the plaintiff from the rents he had collected and paid certain bills and accounts of the plaintiff at her request. Both parties state that the transaction was entered into in order that plaintiff might save her property. If the deed to the defendant was absolute, plaintiff had no interest and would be in no better position than if the execution sale had been confirmed. The letters between the parties appearing in the record clearly show that it was intended that plaintiff should have an interest in the property after the giving of the deed. We conclude, after a consideration of all the evidence, that the deed was given to secure defendant for the money advanced by him and that it is in fact a mortgage and not an absolute deed. The facts of this case bring it within the rule announced in *Sanders v. Ayres*, 63 Neb. 271, 88 N. W. 526, wherein the court said: "Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from their declaration and conduct, as well as from the papers which they subscribed." See, also, *Cox v. Young*, 109 Neb. 472, 191 N. W. 647.

The only question left for our determination is the amount remaining due the defendant that the deed was

given to secure. The record shows that the decree of the trial court was modified on June 16, 1936, and the motion for a new trial overruled on that date. We will, therefore, make the accounting of the amounts at issue between the parties as of that date on this appeal.

There are many items bearing upon the amount due which make it quite impossible for us to set out the accounting in detail in this opinion. The record shows that defendant advanced $207.25 to pay the judgment lien on the property which, with interest at 6 per cent. to June 16, 1936, amounts to $295.71. At the same time defendant returned a note secured by a mortgage on the property to plaintiff in the amount of $300 which, with interest from October 13, 1928, amounts to $508.18. Defendant also paid taxes amounting to $149.24; for labor and repairs expended $207.85; and made cash advances and paid bills of plaintiff amounting to $251.75, the total of which is $1,412.73. The record discloses that defendant collected rents amounting to $650, for which plaintiff is entitled to credit. The trial court allowed an item of $187.89 against the defendant because of his failure to collect all of the rents alleged to have been due. The evidence does not sustain this finding of the trial court. We necessarily conclude that there remains due and owing to the defendant the sum of $762.73, with interest at 6 per cent. per annum from June 16, 1936.

The judgment of the district court is therefore reversed, with directions to enter a decree of foreclosure on defendant's cross-petition in the amount of $762.73, with interest at 6 per cent. per annum from June 16, 1936.

REVERSED.

EDWIN D. CLOUGH, APPELLEE, V. ROSE CLOUGH, APPELLANT.
273 N. W. 31

FILED MAY 7, 1937. No. 29981.

1. **Divorce:** PLEADING. In an action by the husband, an accusation that a wife has been guilty of misconduct, where relied upon as a ground of divorce, is not of itself a sufficient basis for a charge of cruelty against the husband, if the accusation was made in good faith, and with reasonable cause for suspecting the wife's fidelity, even though it was in fact false.
2. ———: ALIMONY. Upon the granting of a decree of divorce, the matter of proper provisions for alimony and adjustment of property rights must, of necessity, be determined largely from the situation of the parties and the facts as disclosed in the particular case.
3. ———: ———. Record examined and the provisions as made by the trial court in this case approved.

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

Mapes, Johnson & Maynard, for appellant.

Cook & Cook, contra.

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

BLACKLEDGE, District Judge.

In a divorce action in the district court for Dodge county by the appellee, as plaintiff, against the appellant, the grounds alleged in the petition were extreme cruelty and adultery on the part of the defendant. The defendant answered denying the charges of the petition, and herself charged cruelty against plaintiff by reason of the charge of adultery made in the petition, and prayed that a divorce be granted to her.

The trial court found the charge of adultery not sustained and granted a divorce to plaintiff on the ground of extreme cruelty, allowing the defendant alimony in the division of certain property and a further money payment in the sum of $4,825.

Appellant here complains of that disposition of the case upon the grounds that the decree is not sustained by the evidence, that the appellant is entitled to a decree of divorce in her favor on the false charge of adultery made by the appellee in his petition, and that the alimony awarded is inadequate and was erroneously computed, in that certain losses had been charged against the joint accumulations of the parties, instead of to the plaintiff alone.

The trial of the case was commenced March 19, 1936, and the taking of testimony concluded March 23. The evidence is preserved in a bill of exceptions of 400 pages. It would serve no useful purpose to refer to the testimony in detail. We find therein ample evidence to sustain the decree in plaintiff's favor on the ground of extreme cruelty. This is one of that class of cases in which the opportunity to both see and hear the witnesses as they testify places the trial court in a much better position to know the weight and credibility that ought to be given to the testimony than a reviewing court can possibly be from reading a transcript thereof, and we conclude that the decree should not be disturbed upon that ground.

As to the matter of the charge of adultery and the effect thereof, the trial court makes no specific reference thereto in the decree proper, but finds for plaintiff and places the divorce awarded upon the ground of extreme cruelty. The trial judge did, however, in a memorandum opinion, give his view on that phase of the case, in which this language is used:

"The charge of adultery was not, in my judgment, proved by the evidence. However, I do not believe that under the law the charge constitutes cruelty which would entitle Mrs. Clough to a divorce. The circumstances were such that Mr. Clough had a right to believe that his charges were true, although not proved to the satisfaction of the court, especially in view of his physical condition, which doubtless caused these circumstances to assume greater significance to him than to a man with full physical and mental strength."

The appellant, however, not content with her acquittance on that charge, seeks to have the making of it considered as cruelty upon which the divorce should be awarded to her, and cites the cases of *McNamara v. McNamara*, 93 Neb. 190, 139 N. W. 1045, and *Sample v. Sample*, 82 Neb. 37, 116 N. W. 953. We do not find these cases to be authority for appellant's position. There is neither claim nor testimony that appellee in this case made the charge otherwise than in his petition. There is nothing to show that he made it maliciously or in bad faith. He did undertake to support it by evidence at the trial. The trial judge concluded that the circumstances were such that he had a right to believe that his charges were true. In the *Sample* case, the first paragraph of the syllabus is:

"Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious."

In the *McNamara* case, the second paragraph of the syllabus is:

"A false and malicious accusation of adultery by a husband against his wife is cruelty, and if, knowing it to be wholly unfounded, the husband wilfully makes such accusation, and is guilty of other acts of cruelty while her action for divorce is pending, such conduct on his part will be considered as aggravating former acts of cruelty relied upon for a divorce."

Also in the case the charge was made during its pendency, as a sort of defensive threat, in an effort to induce plaintiff therein to abandon her case. Its status and the extent to which the court gives it consideration are indicated by the following language taken from the opinion by Sedgwick, J:

"The defendant, without any ground therefor, as he and his counsel now substantially admit, wrote a long letter, ostensibly to his lawyer, reciting in detail accusations

against his wife. * * * This letter, though ostensibly written to his lawyer, was inclosed in an envelope addressed to his wife, and it was received by her. * * * It is urged that conduct after the action was begun cannot furnish a ground for divorce, but it has been held by courts of high authority that to falsely and maliciously charge a virtuous woman with crimes of this character, even if those charges are contained in the pleading and alleged as a matter of defense, if wholly unsupported by the evidence, would be regarded by the court as cruelty, and as aggravating other charges of cruelty relied upon as ground for divorce."

The case of *Steele v. Steele,* 237 Mich. 639, 213 N. W. 66, 51 A. L. R. 1186, is very much in point, and there is appended in 51 A. L. R. 1188, a note which well covers the authorities on the proposition. Also in *Berdolt v. Berdolt,* 56 Neb. 792, 77 N. W. 399, this court held, and states in the second paragraph of the syllabus:

"The charges made in a petition in a suit for divorce do not furnish proper and forceful grounds to be pleaded and urged in the cross-petition in the same action."

We conclude that, upon the facts disclosed in the instant case, the appellant's position is not tenable.

Coming now to the matter of alimony and property distribution as determined by the final decree, we have given the same careful consideration, as, also, we find, did the trial court. For we find that, after the filing of the memorandum opinion April 25, 1936, a decree was prepared May 21, following which each party by motion made objections to certain items and allowances in the matter of the property. These were reconsidered, and the trial judge, at the request of both parties, made a personal trip to inspect one of the properties on which a mortgage in the sum of $9,100 had been charged against plaintiff. A supplementary decree was entered July 16. This item was allowed to stand, although the court had before been of the impression that the security therefor was 160 acres of land when, in fact, it was but 80 acres.

Some minor changes were made, including the allow-

ance to appellant of $200 for corn sold, and the transfer by deed to her of two out of three Fremont lots. A result of this modification was an increase in the amount of cash to be paid appellant from $4,700 to $4,825.

The parties had each been previously married, each had children by the former marriage, and there were three children by the present marriage. This marriage had existed during twenty years, in which time the parties had been reasonably prosperous. Before the marriage the appellee had acquired 160 acres of land and $5,000 in money in addition to farm equipment. During the marriage they acquired an additional 80 acres of land valued at $6,000, and bonds, stocks and mortgages, so that at the time of trial the court valued the actual assets of appellee at $16,950. The court adopted the basis of allowing the appellee to retain the land held before the marriage and the $5,000, which item is deducted from the above figures, leaving $11,950 as the joint accumulations, not including $3,000 of elevator stock in which each held an equal amount. There were also other items considered, and liabilities of appellee, bringing the net amount to be divided to $9,400, which, on division, gives the appellant the $4,700 before mentioned, and was increased to $4,825 on reconsideration. The complaint seriously urged here by appellant as to this computation is that the court did not charge to appellee alone some $6,000 of "losses" but deducted the same from the joint accumulations before making the division. Of this amount some $3,200 was in loans to the children and a nephew of appellant. On one note it was thought a salvage of $500 might be had. The rest was in apartment house bonds, $2,600, and Blair bridge bonds, $1,500. These were not entire losses, although worth less than par, and what the court did with them, finding the actual value uncertain or indeterminable, was to divide them in kind equally between the parties and they are not included in the items leading to the final amount of $4,825.

We find that under the circumstances of this case the trial court adopted a just and proper basis for adjustment

of the property rights of the parties and that its final action in that regard should be approved.

It follows that the decree of the district court should be and it is affirmed.

Appellant is allowed an attorney's fee of $100 in this court to be paid by appellee. Otherwise, costs herein are taxed to appellant.

AFFIRMED.

BESSIE MCWILLIAMS, APPELLEE, V. WILLIAM GRIFFIN: SIDNEY R. LANG, APPELLANT.
273 N. W. 209

FILED MAY 14, 1937. No. 29931.

1. **Contracts.** Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part of the same.
2. ———. The provisions of a city ordinance come within the rule above stated.
3. **Bailment.** The contract of hiring the use of the automobile involved in this litigation is to be construed as though it read, by express agreement of parties, viz.: Car No. 10, when operated under this contract, within the corporate limits of the city of Lincoln, and over the public streets thereof, shall never be driven in excess of a maximum speed, as follows, "in the congested district, fifteen (15) miles per hour; on arterial streets outside of the congested district, twenty-five (25) miles per hour; on all other streets, twenty (20) miles per hour."
4. **Evidence** in the record examined in the light of the rights created by the contract of hiring involved and the obligations imposed thereby or flowing therefrom, and *held* wholly insufficient to sustain a judgment against defendant Lang.

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

Max G. Towle, for appellant.

Lee Basye, contra.

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

EBERLY, J.

Bessie McWilliams instituted this action against William Griffin and Sidney R. Lang, to recover for personal injuries received in an automobile accident occurring on May 4, 1935, in the city of Lincoln, at the bridge across Oak creek on North Tenth street. Defendants joined issue, and trial was had to a jury resulting in a judgment for plaintiff and against the defendants. From the order of the trial court overruling his motion for a new trial, Sidney R. Lang alone appeals.

The case on this appeal turns on the question whether the automobile involved in the accident in suit, let by Lang to Griffin, was defective, and whether the injuries for which plaintiff sues were received by her by reason of such defects, which the lessor might have discovered by reasonable inspection before letting. The defendant Lang's defense is a general denial, with which is coupled an allegation "that the injuries and damages sustained by the plaintiff, if any, were due to and the result of the carelessness, negligence and unlawful acts of the defendant William Griffin and the plaintiff herein, all of which were the proximate cause and contributed to the alleged damages to the plaintiff."

Defendant Lang is engaged in the business of letting automobiles for hire. Under his plan of doing business, he does not furnish a chauffeur. The party obtaining the car provides his own driver. It appears that on the evening of May 4, 1935, at about 8:10 p. m., defendant Griffin appeared at Lang's place of business and rented car No. 10, a Ford coach. On the delivery of this car to Griffin, he signed a printed certificate, of which the following is a copy:

"Arcade Rent-A-Ford Co. Phone B1647. Lincoln, Nebr. Date, May 4, '35. This certifies that I have this day rented from the above company, Car No. (indicated below) in good condition. I am a competent driver and operator of this make of car, and hereby agree to be responsible for said car and to return same to said company

in as good condition as when received by me, the ordinary wear and tear excepted. I have deposited $4.00 as a guarantee of good faith in keeping the terms of this contract, and agree to pay said company for the use of said car. Failure to lock steering wheel makes me responsible in case of theft. W. E. Griffin (Signature of lessee) Car No. 10, Insurance ————, Meter in ————, Time in ————, Meter out, 21345, Time out 8:10, No. Miles traveled, ————, Time ————, Amount refunded for gas, oil, etc. $————, B15502. Net $————. Don't Speed—Take No Chances—Safety First. Remember you are responsible for this car."

The automobile then received by Griffin was a 1933-V-8 Ford coach, and, as indicated above, was identified as "Car No. 10." It had been purchased by Lang in the middle of 1933, and had been used continuously since that time in his business. The record discloses that immediately prior to this transaction in suit, on April 30, 1935, Albert York had rented and driven car No. 10 five miles; on May 1, following, witness L. S. Long had rented and driven it 18 miles; on May 2, 1935, S. Seguin had rented and driven it 122 miles; on May 3, witness M. L. Lawson had rented and driven it 11 miles; and on the same day Vern Thomas had rented car No. 10 and had driven it 23 miles. So far as disclosed by the record, none of these parties complained to defendant Lang of the working of this car. The affirmative evidence of Lawson and Long is that while they were operating this car it functioned properly. Indeed, Lawson's testimony as to an occurrence on May 3, is: "Q. Do you remember how far you drove it? A. Well, I was almost to Malcolm to a farm out here and turned around and came back in. Q. How did the car drive? A. It drove all right for me. Q. Were the brakes working? A. They absolutely was, because I remember when I came in from Abe's Tavern, when I came around the curve there I was going 55 to 60, and a car came out from the road there and I had to stop to keep from hitting him. Q. Did the car shimmy? A. It did not. Q. The brakes worked all right, did they? A. They sure did."

This car No. 10, prior to being turned over to Griffin on May 4, had been inspected by witness Guild, who was an employee of Lang. He testified, with reference to car No. 10: "Q. What did you do to this particular car? A. I thoroughly inspected it, changed the oil, filled it with gas, tested the brakes up and down the aisle, inflated the tires, everything that needed to be done. Q. Was the air the same in the tires all the way round, just what it should be? A. Yes. Q. Did you know at the time that Mr. Griffin had ordered the car for the evening? A. No; I didn't know that he had ordered it. Q. Mr. Lang told you to get it ready and have it ready for the evening? A. Yes. Q. And you did that? A. Yes. Q. Was the car working all right? A. Perfect, so far as I know it was working perfect. Q. Did you take the car out and drive it around the street? A. I did, around the block."

Further, defendant Lang testified that on May 4, before it was turned over to defendant Griffin, he personally drove car No. 10 to the gas pump and filled it; that the brakes were then in good condition, and that there was nothing wrong with the accelerator, the spindles, or the steering device.

Car No. 10 was then delivered to defendant Griffin about 8:10 p. m. The record further discloses that Mr. F. H. Benton, who was Griffin's companion during the events which occurred on the evening of May 4, 1935, met Griffin at a beer tavern some time after 8:10 p. m., where Griffin was then eating. This beer tavern was located at the corner of Tenth and N streets in the city of Lincoln, and the rented car was then parked outside. Griffin, after a conference with Benton, called up the plaintiff, who testifies: "He * * * said there was another couple with him or going to be with him, a Mr. Benton and his girl friend, and he wanted to know if I would go along with them for the evening; and I said, no, I didn't think I would because I had worked late and was going to take an aspirin and lie down. but I said, 'You can call later and I will see how I feel then,' but instead of calling he (with Benton) came out

at about nine" to where plaintiff was living. The plaintiff finally consented to go along, and the "girl friend" not accepting Benton's invitation, the party of three then drove about the city of Lincoln, with Griffin at the wheel. Plaintiff further testifies: "When we got on Thirteenth street the car got in a street car track and that is the first I noticed that 'shimmy,' it was quite bad; he came to a stop button and stopped in order to get it to quit 'shimmying;' * * * I said it was awful good looking, but it doesn't seem to work so well." The party continued north to Yost's café. At this place the party drank "more than one bottle of near beer spiked with alcohol." The party then returned to the car, "rode up O street west, then started south on Tenth," and "the car did another shimmy on Tenth for almost a block before he (Griffin) could get it straightened out again." After a time the party went out on North Tenth street to "Abe's Tavern," and when they arrived at Abe's Tavern the party went in and indulged in more beer spiked with alcohol. The plaintiff testifies that after they had the beer they returned to the car and Griffin again took the wheel, the party returning to Lincoln over the same road over which they had arrived at the tavern. As to the return trip, the plaintiff says: "Well, he seemed to drive the car all right as far as I can remember; he parked all right, he got out of the parking all right; there was a lot of cars out there; he did speed up a little on the way back, but that was after we went down that small incline and, of course, there wasn't much farther to go to the turn, and Mr. Benton and I both spoke about him not speeding because the corner was close. Right then is when he tried to slow the car down, and I was watching him and he worked the brakes and foot feed and everything trying to slow the car down." Then the car struck the bridge and after that plaintiff does not remember anything. This caused the injuries plaintiff sustained. The roadway, a paved street with paving some twenty feet in width, turns sharply to the south as it approaches the bridge referred to. On the question of speed, plaintiff's testimony is, in part: "Q. Now,

do you know about how fast the automobile was traveling at the time you returned from Abe's Tavern; you have ridden in automobiles, have you? A. All my life, practically, and I wouldn't say it was going over 45 or 50. Q. About 45 or 50 miles an hour? A. Yes. * * * Q. What, if anything, did you say to the driver, the defendant Griffin, about the time you approached the curve, if anything? A. You mean the turn toward the bridge? Q. Yes? A. Well, we told him to be careful, that there was a sharp turn. Q. You told him that? A. I did. Q. And he was going about 50 miles an hour at that time? A. Well, he tried to slow the car down. Q. I asked how fast he was going? A. Yes."

However, four disinterested eyewitnesses of the accident, who were not members of this pleasure party, agree on their testimony that the car was traveling at the rate of 60 miles an hour or more as it approached the bridge; that the driver continued to feed gas until within 15 feet of the bridge, and was then apparently unable to make the turn, and crashed into the northeast corner of the bridge. All three persons of this pleasure party in the car at the time of impact occupied the front seat, with rear seat entirely empty when the accident occurred.

Plaintiff also says in her testimony, as to speed: "Q. Didn't you tell him (Griffin) if he didn't stop you would get out? A. He drove carefully until he got about half way between Abe's and that bridge. Q. Then you think the alcohol took hold? A. Then he did speed up, not much. Q. Didn't you say you wanted out of the car if he didn't stop driving so fast? A. No; I told him to be careful because we were coming to a turn and it was a short turn. Q. Didn't you say, 'If you don't quit driving so fast I will get out of the car?' A. You are misrepresenting it. Q. Wasn't he driving on the wrong side of the road? A. No; he wasn't. Q. And he wasn't driving in a reckless, careless, negligent manner? A. No; he wasn't."

Defendant Griffin testified as to the cause of the shimmy: "I would say it was caused from loose spindles or the car

being out of alignment." Further, "Q. Tell the jury what you mean by loose spindles. A. Loose spindles is where your wheels, your hub of the wheel fits on the spindle; where the wheel is worn that could cause it or the wheels being out of alignment." This conclusion, however, has for its sole foundation the fact that a shimmy occurred. None of the party, nor any one in their behalf, ever made an actual examination of the front wheels to ascertain the true facts as to the spindles being loose, or the wheels out of alignment. So also, no one testifies that a "shimmy" occurred in car No. 10 as they were approaching the Oak creek bridge just prior to the impact. Neither is Griffin's testimony entirely clear that the brakes failed at this point. Griffin testifies: "When I got within a block and a half from the corner * * * and I started breaking it, * * * the wheels did lock. * * * The car went straight ahead toward the bridge. I couldn't help myself. * * * I couldn't turn the wheels." Further, "The brakes wouldn't work after the wheels locked." Griffin further testified that he was traveling about 30 miles an hour when he collided with the northeast corner of the Oak creek bridge.

It also appears in the record, without objection of parties, that Griffin, on the night of the accident and shortly after it happened, was arrested by the city police for speeding and reckless driving. The police officer making the investigation of the accident, immediately after its occurrence, testified that the radiator of the car struck the northeast corner of the bridge almost "head-on;" and that the steel railing of the bridge "was driven through the radiator and up past the motor and through the dash so that there was about two or three feet of railing extended on through the dash into the front seat of the car."

Witness Fosbury, shop foreman for O'Shea-Rogers Motor Company, with an experience as an expert mechanic dating back to 1913, who repaired the wrecked car, examined car No. 10 the next day, and personally superintended the work of repairing it, and whose competency as an expert is not questioned, testified, in part, as to the

condition of the car: "The car had hit a post on a bridge just left of the center of the car (radiator); * * * the blow was just a little bit to the left although just about as close to the center as you could get it. It tore the radiator and motor and cylinder head and water pump and the hood and the cylinder block and all that stuff, it just mashed it up, mangled it up, it cut the radiator right in two; the radiator was damaged, the motor was damaged, the glass and doors, the frame, the bumper, the front spring, it really was a very bad wreck, showing a very, very hard blow. * * * Q. Tell the jury from this examination whether or not you found anything wrong at all with the mechanism or brakes on this car? A. In making an estimate of this description I would just like to explain what we do. We have to check over everything on the car because when a car is completed in our shop it has to go out and be guaranteed, and if anything isn't right about it in the eyes of the firm I was responsible. In this particular case here we checked up the rear end, the front end, tested the spindles and the brakes all the way through to know what we would have to do in the way of repairs. * * * I did this myself because I made up the estimate; none of the wheels were damaged in any way, this blow came in between the wheels; the spindles were all right, there were no unduly worn parts that we could see needed rebushing or rebuilding, anything like that; there were no bad parts there at all along that particular line, the wreck was all in the center of the chassis, rather than on the outside. Q. The brakes were all right, too? A. Yes, sir. Q. The tires were all up? A. Yes, sir. Q. Did you ever hear of what they call a car shimmying? A. Yes, sir. Q. You know what kind of an experience that is when an automobile does that? A. Certainly. Q. Sort of a vibration in the front wheels? A. Yes, sir. * * * Q. Could you find anything the matter with this Ford that would make it even possible for the wheels to lock? A. No, sir. Q. Could you find anything indicating any defective or worn parts that would cause it to refuse to turn? A. No, sir."

On the subject of the "shimmy," this witness testified, in part: "Q. What ordinarily causes that? A. There are two different types of shimmy; one is a shimmy and the other a road ramp; a car traveling from ten to twelve miles an hour will have what we call a shimmy; that is, the front wheels moving back and forth sideways. As you gain speed all that shimmy leaves and around 45 on up, depends on the condition of the car, we get what people term a shimmy, but it is really a road ramp, really an unbalance of the front wheels, causes the car to go down the street like this (indicating with hands), and makes the car shake considerably. As a rule that out balance with the wheels shows up most distinctly at 62 miles an hour. If the wheels are badly out of balance or something is badly wrong it may come in about 50 on up. As you increase the speed from 62 to 65 the unbalance leaves. Q. Isn't it true also that this is sometimes caused by a different amount of air in the two front tires? A. Yes. Q. Does the shimmy of an automobile come from the operation on a straight-a-way or can it come on a curve as well? A. As a rule when you go around a curve, particularly at high speed, you naturally throw the wheels again out of balance and the two out of balance seem to offset each other and you generally do away with road ramp going around a corner."

Plaintiff also introduced in evidence the traffic ordinance of the city of Lincoln, in force at the date of the accident. Section 517 thereof, reads as follows:

"Speed Regulated. Motor vehicles shall be driven at a rate of speed that is reasonable and proper having regard for the traffic and roadway and the condition of the street, and shall at all times be under the control of the driver. The maximum rates of speed shall be as follows: In the congested district, fifteen (15) miles per hour; on arterial streets outside of the congested district, twenty-five (25) miles per hour; on all other streets, twenty (20) miles per hour. It shall be unlawful for any person to operate a motor vehicle at a greater rate of speed than

herein set forth, or in violation of any of the provisions hereof." Appropriate penalties are provided for its violation.

We have thus quoted at length from the record testimony which, in view of the undisputed physical facts, establishes as a matter of law the character of the transaction in suit to be one wholly insufficient to sustain the judgment appealed from.

The accident occurred within the corporate limits of the city of Lincoln, on the public streets thereof. The entire transaction was within the purview of the public ordinance of that city in evidence, and its terms were applicable thereto. The transaction presented to us was a bailment, a letting of the automobile for hire by Lang to Griffin. It involved a contract of hire, partly in writing, partly oral. It contained, or at least justified, the implied inference that Griffin might use the automobile hired for the purpose of carrying other persons as passengers, either as guests, employees, joint adventurers, or otherwise. It is also to be conceded that this contract of bailment, impliedly at least, warranted that the thing bailed "is of a character and in a condition to be used as contemplated by the contract." 7 Am. & Eng. Ency. of Law (2d ed.) p. 306. See, also, *Williamson v. Phillipoff*, 66 Fla. 549, 64 So. 269; *Collette v. Page*, 44 R. I. 26, 114 Atl. 136.

The contract must also be deemed to render applicable the following rule: "There is on the part of the hirer an implied obligation not only to use the thing hired with due care and moderation, but also not to apply it to any other use than that for which it was hired; and if the hirer of an animal or other chattel, without the consent of the letter, uses it for a different purpose or in a different manner from that contemplated by the contract of hiring, or in any other way transcends the contract, and the thing hired is lost, destroyed, or injured while being so used, the hirer is liable absolutely, although without fault." 7 Am. & Eng. Ency. of Law (2d ed.) p. 312.

It thus appears in the present case that the terms and

obligations of this contract of hiring are determinative of the liabilities of the hirer. In this connection, it is settled that the laws which subsist at the time of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated therein. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. 13 C. J. 560; 6 R. C. L. 855, sec. 243; *Von Hoffman v. City of Quincy,* 4 Wall. (U. S.) 535; *Walker v. Whitehead,* 16 Wall. (U. S.) 314.

A contract is not merely what the parties expressly stipulate. It is that also which the existing laws of the county where the contract is made annex to it at the time when it was formed. *Ogden v. Saunders,* 12 Wheat. (U. S.) 213; *Bronson v. Kinzie,* 1 How. (U. S.) *311. See, also, *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U. S. 649, 43 Sup. Ct. Rep. 651; *Fidelity State Bank v. North Fork Highway District,* 35 Idaho, 797, 209 Pac. 449; *State v. Klein,* 63 N. Dak. 514, 249 N. W. 118; *Gregg School Township v. Hinshaw,* 76 Ind. App. 503, 132 N. E. 586; *Maxwell v. Eddy Paper Co.,* 232 Mich. 356, 205 N. W. 111; *Anderson v. Miller Scrap Iron Co.,* 169 Wis. 106, 170 N. W. 275.

Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into and becomes a part of the contract. This is true between individuals dealing between themselves by contract, and it is also true between individuals and the government. *Cobbs v. Home Ins. Co. of New York,* 18 Ala. App. 206, 91 So. 627; *People v. Levitt,* 145 Misc. 621, 260 N. Y. Supp. 458; *Walker v. Whitehead,* 16 Wall. (U. S.) 314; *City of Henderson v. Henderson Traction Co.,* 200 Ky. 183, 254 S. W. 332; 13 C. J. 560.

The foregoing rules were early adopted, and have been consistently applied and followed, in this jurisdiction. *Watkins & Co. v. Kobiela,* 84 Neb. 422, 121 N. W. 448; *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583.

Furthermore, this court is committed to the doctrine that city ordinances come within the rules just stated. *Gerner v. Church,* 43 Neb. 690, 702, 62 N. W. 51; 13 C. J. 561. Thus, in *Gerner v. Church, supra,* in an action upon a subscription contract, after a discussion of the authorities, we held: "These authorities recognize the doctrine that the ordinances of a city are within the rule that the law of the place where the contract is made enters into and becomes a part of such contract when the subject-matter of the contract is within the legislative jurisdiction of the city council. If the ordinances of the city of Lincoln had prohibited the erection of a wooden building where the opera house is situate, and the contract between Gerner and Church & Oliver had expressly provided that the latter should erect a wooden theatre on the site now occupied by the opera house, it certainly cannot be questioned that neither of the parties to such contract could have enforced it against the other. The contract in suit between the parties does not by its terms require Church & Oliver to erect a building of the character prohibited by the ordinances of the city; but the ordinances of the city were as much a part of Gerner's contract with Church & Oliver as if they had been written therein. In other words, the contract should be construed as though it read that Gerner would pay to Church & Oliver $200 when they erected an opera house covering a space of ground 100 x 142 feet on the site named, in accordance with the ordinances of the city of Lincoln regulating the construction of such buildings." This pronouncement is in line with the weight of authority. *Wright v. Computing Scale Co.,* 47 Wash. 107, 91 Pac. 571; *Citizens Ins. Co. v. Barnes,* 98 Fla. 933, 124 So. 722; *Dollman v. Pauley,* 202 Ind. 387, 174 N. E. 729; *Kansas City to use of Kansas City Hydraulic Press Brick Co. v. Youmans,* 213 Mo. 151, 112 S. W. 225; *Equitable Bldg. & Loan Ass'n v. Wolfangle,* 111 Cal. App. 119, 295 Pac. 388; *Briody v. De Kimpe,* 91 N. J. Law, 206, 102 Atl. 688; *City of Milwaukee v. Raulf,* 164 Wis. 172, 159 N. W. 819.

In the instant case the contract of hiring was made in

Lincoln, Nebraska, by residents thereof, and concerned "car No. 10" then located therein, and delivered to the hirer, under the terms of the agreement, within the limits of said city for immediate use, and for return on the completing of the use contracted for to the garage from which delivery was made. It necessarily follows that a portion of the use contracted for and in the contemplation of the parties would take place within the corporate limits of the city of Lincoln. At least as to that use the doctrine announced in *Gerner v. Church, supra,* would be applicable and determinative of all rights involved in the contract of hiring. This contract of hiring would thereby be construed as though it read, by agreement of parties, "car No. 10" when operated under this contract of May 4, 1935, within the corporate limits of the city of Lincoln, should never be driven in excess of a maximum speed, as follows: "In the congested district, fifteen (15) miles per hour; on arterial streets outside of the congested district, twenty-five (25) miles per hour; on all other streets, twenty (20) miles per hour."

Appellee cites as controlling, and relies on, *Milestone System v. Gasior,* 160 Md. 131, 152 Atl. 810, and similar precedents. We quote from the *Gasior* case, viz.: "If one engage in the business of letting, for a reward, to the public automobiles to be used and driven by the hirer, with or without guests or passengers, according to his pleasure, the success of the enterprise depends upon the immediate command of automobiles for instant, safe, and satisfactory use while hired; and there is so much danger involved to the class which hires, and to those who are the occupants of the automobiles they have rented, if the automobiles be not in reasonably safe condition for the normal purposes to which they may forthwith be put while let, that the law, notwithstanding some dissent, casts upon the letters of the use of automobiles the affirmative duty to know that the automobile rented is in fit condition for the purposes for which it is to be at once used."

Applied to the instant case, the words, "for the normal

purposes to which they may forthwith be put while let," limit, within the city of Lincoln, the use of the rented automobile to a speed of not to exceed 25 miles an hour. Immediately preceding the accident in suit, car No. 10 was being driven over the streets of Lincoln, according to plaintiff's own testimony, at a speed of from 45 to 50 miles an hour, and the slowest speed, even at the instant of impact with the Oak creek bridge, is stated by plaintiff's witness as "30 miles an hour." These circumstances, in view of all the evidence in the record, negative liability on part of defendant Lang.

As bailor, under the facts in this case, he is not liable for injuries to a third person by the bailee's negligent use of the property bailed. *Fisher v. Fletcher,* 191 Ind. 529, 133 N. E. 834; *Robinson v. Bruce Rent-A-Ford Co.,* 205 Ia. 261, 215 N. W. 724; *Hartley v. Miller,* 165 Mich. 115, 130 N. W. 336; *Eklof v. Waterston,* 132 Or. 479, 285 Pac. 201.

There is no evidence in the record that this automobile was defective so as to be dangerous to the public, or to the occupants thereof, when it was being operated at a lawful speed within the limits of the contract. In fact, the following evidence introduced on behalf of plaintiff is uncontroverted on that subject: "Q. What did you do,—how fast,—first, I will ask you if you drove up Eleventh street first? A. Yes. Q. After you left the place where Mrs. McWilliams lived? A. Yes, sir. Q. And how fast did you drive along in there? A. Twenty—twenty-five miles an hour. Q. And did you,—was there anything that called your attention,—how did the car operate along there? A. It worked all right along there." The evidence is also without dispute that, when this automobile was driven north on Tenth street in a careful manner over the portion of the street where later the accident in suit occurred, no accident happened, and no structural or mechanical defect was developed. It was only on the return trip over the same road, made at a speed far in excess of that contemplated by the contract of hiring, that it is claimed that

the wheels locked and thereafter the brakes failed to work. There is no evidence in the record from which the conclusion may be drawn that car No. 10, when driven at the rate of 25 miles an hour, was "defective" in the sense of being dangerous to the public or to the occupants thereof. *Carroll v. Minneapolis Drive Yourself System,* 206 Wis. 287, 239 N. W. 501.

It is also to be noted that plaintiff maintains this action strictly in the capacity of a "guest." The statute defines "guest" as any passenger or person riding in a motor vehicle as a guest, or by invitation, or not for hire. Section 39-1129, Comp. St. Supp. 1933, provides: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest * * * unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator." Recovery is not sought in this case as against Lang on the basis of Griffin being under the influence of intoxicating liquor. In *Heesaker v. Bosted,* 131 Neb. 42, 267 N. W. 177, where the capacities of owner of the car and operator thereof were united in a single individual, and the defect charged was the presence of a defective boot around a defective tire, which was charged to be the cause of a blow-out which occasioned the accident, this court, in effect, adjudged the case within the protection of the guest statute so as to require proof of gross negligence to sustain recovery. In the present case, Lang is the owner and Griffin is the operator of the car, and the question here presented is whether in this case, under this statute, the evidence must establish gross negligence on part of Lang to support the judgment entered against him in this case. A careful consideration of all the evidence in the record leads inevitably to the conclusion that gross negligence is not established. But this question may not be deemed necessary to a proper disposition of the case. Even if we assume that the guest statute is inapplicable, and that the payment of the consideration of the contract of

hire of this automobile by Griffin be deemed to be made as to Lang in part in behalf of McWilliams, and thus to remove the transaction from the provisions of the statute referred to, the plaintiff would thereby become but a sharer of the permissive use obtained by virtue of the agreement entered into with Lang, subject to its limitations as well as entitled to a performance of its obligations. As we have seen, the evidence in the record as an entirety, considered in the light most favorable to plaintiff, wholly fails to establish any default on the part of Lang in the performance of this contract of hiring, in view of the limitations of the traffic ordinance necessarily implied.

It follows that the judgment entered by the district court in this case against defendant Lang is not supported by the evidence in the record, and is erroneous. Therefore, such judgment is reversed, and as to defendant Lang the action is dismissed.

REVERSED AND DISMISSED.

ALBERT KRUG ET AL., APPELLEES, V. JOHN HOPKINS, SHERIFF OF DOUGLAS COUNTY, APPELLANT.
273 N. W. 221

FILED MAY 14, 1937. No. 29908.

1. Taxation: DISTRESS WARRANTS. When a distress warrant is issued by the county treasurer to collect unpaid personal taxes, under section 77-1916, Comp. St. 1929, the sheriff proceeds in the same manner as upon an execution from justice court. Comp. St. 1929, sec. 77-1920.
2. ———: ———. Sales under distress warrants must be made by the sheriff in strict accordance with the statute (Comp. St. 1929, sec. 21-1617), and title passes to the purchaser from the sheriff, without the sanction or confirmation of a court.
3. ———: ———. There is a legal presumption that the official acts of the sheriff in selling personal property under a distress warrant are properly and rightfully done.
4. ———: ———. If the sheriff, in making a sale under a distress warrant, receives no bid which in his judgment is adequate under all the circumstances, he may either postpone the sale or make a return and secure an alias distress warrant.

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

James T. English and *Jack W. Marer,* for appellant.

Ziegler, Dunn & Becker and *D. L. Manoli, contra.*

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

PAINE, J.

The district court granted an injunction to prevent the sheriff from selling certain personal property under five alias distress warrants issued by the county treasurer for unpaid personal taxes. The trial court also directed the sheriff to accept money in payment of alleged bids at a tax sale in the amount of $845 and to issue bills of sale to such purchasers. Motion for new trial being overruled, the sheriff of Douglas county appeals. The three errors relied upon for reversal are: That the decree is erroneous, is contrary to the evidence, and contrary to law.

It is stated in the brief of the appellant, as well as in the argument, that counsel have been unable to find any decision wherein the specific questions raised have been decided by this court, and, further, that increasing sales on distress warrants make it important that the appellant, sheriff of Douglas county, may know his exact status in conducting such sales. Therefore, while we cannot set out all the facts at length as they appear in the pleadings and bill of exceptions, yet we will give very briefly the evidence upon which this decision will be based.

The county treasurer issued and delivered to the sheriff the five distress warrants, attached as exhibits, for unpaid personal taxes. The sheriff, on the day he received them, levied upon the personal property described in each, and thereafter advertised the said personal property for sale by posting five notices, in conspicuous places in the precinct, that he would sell the said personal property at 10 a. m., February 19, 1936. On said date the sale was opened at the time and place stated. Two deputy sheriffs were

present. One of them testified, on page 90 of the bill of exceptions, as follows: "Q. What did he do in connection with the sale? Did he say it was a final sale, or did he say something else? A. At the conclusion of those remarks he said—he said, 'There will be no sale here unless bids are adequate, and unless the bids are sufficient to at least take care of the taxes involved.' "

About 11 a. m. the officer adopted the usual auctioneer methods and, taking up the sale of the property represented by each distress warrant separately, he finally received five bids, as follows:

1. Penny Arcade, with building and all machines complete; Laughing Gallery building, complete; bid by Alfred Krug, $25; taxes due, $209.14. 2. Merry-Go-Round, complete, with building; "Whip" and eight cars, complete; Airplane, with planes, complete; Swanee River, complete, less boats; Fun House building and devices, complete; Stadium building, complete; Knock-out building, complete; Tumble-Bug, with cars, comptroller and motors, complete; bid by Alfred Krug, $500; taxes due, $6,714.68. 3. Bathhouse, pool, diving boards and all equipment, complete; bid by Alfred Krug, $250; taxes due, $1,011.85. 4. Caterpillar Ride, complete; bid by Abe Slusky, $10; taxes, $387.94. 5. Scooter, with 12 cars, equipment and building, complete; bid by Abe Slusky, $60; taxes, $352.62.

The deputy sheriff, conducting the same, then announced that there was no sale, as the bids were inadequate. No bidder offered or paid any money, or made any protest to this public announcement, and the officer made the following return on each writ: "I did at 10 a. m. on the 19th day of February, 1936, offer the above described personal property for sale and the bids being insufficient and as the property was inaccessible for inspection by prospective bidders on account of snow to the depth of three to four feet, and being unable to readvertise and sell within the life of this writ, the same is returned without further action. Copy of above mentioned notice herewith returned."

There also appear as exhibits in the bill of exceptions the

five alias distress warrants issued by the county treasurer under date of February 25, 1936, under which another sale was legally advertised by the sheriff for March 12, 1936, against which sale appellees prayed for restraining order, which was granted by the district court, and this brings the entire proceeding before us for examination and decision.

The decree of the trial court states that the properties were "knocked down" and sold to the highest bidders, and that bills of sale shall be given the bidders by the sheriff, who is enjoined from further selling of said properties for taxes on the alias distress warrants.

The appellees insist that the sheriff was compelled to accept the highest bid made on February 19, 1936, and that inadequacy of such bid, in reference to the taxes due thereon, or the disparity between the bid and the market value of the property, should not be considered by the sheriff, and does not invalidate the sale.

The argument in support of this contention by appellees includes the following typical paragraph: "A solution of the case at bar presents no serious difficulty once we grasp the principle underlying distress warrant sales. In the final analysis the chief purpose of such a sale is to restore property to the tax rolls. Once taxes on property have accumulated to a point where the taxpayer is neither willing nor able to pay them, it may be said that such property has ceased to have existence and for the purposes of state revenue has become wholly unproductive. The state derives no further benefit from it. A tax sale is the answer to this predicament: the property by virtue of the sale is, so to speak, revived and once more put into circulation as a source of revenue to the state."

Several citations of cases involving sales of real estate given in support of appellees' theory are not controlling when applied to sales of personal property under distress warrants.

The process of distress warrants for the collection of taxes is a summary remedy provided by statute, which was in use in all the Colonies before the Revolutionary war,

and has always been held to constitute due process of law. "A distress warant is in the nature of an execution, and therefore seems at first blush a very arbitrary process, since it issues, under most of our tax laws, without any previous judicial determination of liability. * * * 'This method of collecting taxes is as well established by custom and usage as any principle of the common law. * * * Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation.'" 2 Cooley, Taxation (3d ed.) 849.

There is, therefore, a very clear distinction between claims of the government for taxes and the claims of individuals, for all admit that the collection of taxes may be carried out by summary methods of proceeding, and it is even held that in the case of bulky articles of personal property a distress for taxes is good as against the taxpayer if made without an actual seizure of the property. Such sales under distress for taxes are limited to sales of personal property. 26 R. C. L. 383, sec. 340; *Den v. Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 15 L. Ed. 372.

A tax is a lien on property only so far as expressly made a lien by the statute, and is limited to the property owned when the tax accrued. There is an important difference between a lien for real property taxes and for personal property taxes, for the lien on real property attaches only to each particular tract for the portion of the tax assessed against it, while in the case of personal property the lien for taxes is not confined to the specific articles assessed, but attaches to every variety of the personal property of the taxpayer, even where the property would be exempt from ordinary levy and sale. 26 R. C. L. 388, sec. 347; 61 C. J. 1041; Comp. St. 1929, sec. 77-1916.

Taking up the law of Nebraska, we find the paragraph of our statute relating to the question involved was first enacted as chapter 73, Laws 1903, and took effect September 1, 1903. It is section 77-1920, Comp. St. 1929, reading in part as follows: "When any goods and chattels have

been taken on any distress warrants, they shall be returned to the owner by the officer having distrained them immediately upon payment of the taxes due with interest and costs, but upon such owner's refusal or neglect to make such payment, or to give a good and sufficient bond for the delivery of the goods and chattels, the officer distraining shall keep them at the expense of the owner and shall give notice of the time and place of their sale within five days after the taking, in the same manner as upon execution in justice court. * * * Any surplus remaining above the taxes, charges of the keeping and fees for sale, shall be returned to the owner, and the treasurer shall on demand render an account in writing of the sale and charges." Procedure upon a sale upon a second execution in justice court is set out in section 21-1621, Comp. St. 1929.

The law directs that the sheriff shall proceed in the same manner as upon execution sales. "The distinction between execution sales and judicial sales has been consistently maintained in those jurisdictions in which execution sales are not required to be reported to the court for confirmation or approval. Sales under execution are made by an officer required by law to give bond and good security for the faithful discharge of his duties. * * * The law is the officer's only guide, and his sales are perfect and complete, and the title passes to the purchaser without the sanction or confirmation of a court." 10 R. C. L. 1288, sec. 83. See, also, 23 C. J. 615; *Boynton v. Brown,* 164 S. W. (Tex. Civ. App.) 893; 51 C. J. 120; *In re Courthouse of Okmulgee County,* 58 Okla. 683, 161 Pac. 200.

It is the opinion of this court that, in conducting a sale under a distress warrant, the sheriff has entire discretion as to the details of conducting the sale, providing he follows all of the requirements of the statute.

In one of our very early cases, this court said, in an opinion by Judge Cobb: "On the other hand, in the absence of a positive statute requiring it, it has never been the custom anywhere, in cases of sales made on writs of *fi. fa.* or execution sales, as distinguished from judicial sales

proper, to report them to the court for its approval or disapproval of the manner in which such sale has been made." *Bachle v. Webb*, 11 Neb. 423, 9 N. W. 473.

This is true in the case at bar because the sheriff gets his authority by virtue of the distress warrant alone, and is guided in making his sale by the statute, section 77-1920, Comp. St. 1929, rather than by the court. In a judicial sale the sale must be reported to, examined by, and confirmed by, the court. On the other hand, when the sheriff is satisfied with the bid made at a sale under a distress warrant, he has the sole jurisdiction and power to complete the sale.

"The sheriff has a material advantage over an ordinary litigant, in the legal presumption that the official acts of a sworn officer, done in the execution of his duty, are properly and rightfully done. * * * His adversary is always handicapped by the *onus probandi*, the necessity of overcoming the presumption in favor of the sheriff, and is therefore at a serious disadvantage." Murfree, Sheriffs, sec. 925.

Discretion, when vested in an officer, does not mean absolute or arbitrary power. It must be exercised in a reasonable manner, and not maliciously, wantonly and arbitrarily to the wrong and injury of another. This rule is applicable to all officers who are called upon to perform functions in their nature quasi judicial while acting within their jurisdiction and the legal scope of their powers as fixed by law. *Taylor v. Robertson*, 16 Utah, 330, 52 Pac. 1.

It is the intention under distress warrant sales that the taxing authority receive at least the tax, penalties and costs, for the officer should not sell property levied on for a grossly inadequate or a merely nominal price, but should return the writ with a statement that the property was not sold for want of bidders, or should postpone the sale. Where a sale is adjourned, bids made prior to such adjournment are impliedly rejected. 10 R. C. L. 1311, sec. 108.

In a California case the court was asked to set aside for

gross inadequacy of price a tax sale made of moving picture equipment for $83.69 to cover taxes of $80.69. It appeared that the plaintiff had leased sound equipment of the value of $1,500 to T. Miwa for a term of years, which he installed in the Lyceum Theatre in Fresno. The lease gave him possessory right and required him to pay taxes, which he failed to do. The defense was that property could not be sold for taxes which had not been assessed to its true owner. In the opinion we find this statement: "We do not believe that the price which was bid and paid can be controlling in cases of this kind. The law contemplates that the selling price shall at least equal the tax, penalties and costs. The sale is for the benefit of the taxing body and it is expected that the price will bring it out whole. This is the first concern in tax sales, and not that the owner receive the reasonable value of his property." *RCA Photophone Co. v. Huffman,* 5 Cal. App. (2d) 401, 42 Pac. (2d) 1059.

Other cases may be cited which, although not strictly in point, tend to support this decision. *DeMoulin Loan & Investment Co. v. McLain,* 107 Neb. 858, 187 N. W. 123; *Conway v. Nolte,* 11 Mo. 52; *Shaw v. Potter,* 50 Mo. 281; *Hooper v. Castetter,* 45 Neb. 67, 63 N. W. 135; *Weber Showcase & Fixture Co. v. Kaufman,* 45 Ariz. 397, 44 Pac. (2d) 158.

In the conduct of such a sale the property must be sold openly and to the highest bidder, and the officer is responsible for seeing that opportunity be given for competitive bidding, and if for any good and sufficient cause he decides to adjourn the sale to a later definite time, it is proper, and if he does not exceed the authority conferred upon him by the distress warrant, he is fully protected in all of his doings thereunder. 27 Am. & Eng. Ency. of Law (2d ed.) 815.

Statutory proceedings governing the sale of personal property must be strictly followed by the officers. This covers the giving of the notice required by statute, the time and place and conduct of the sale, and for any good

and sufficient reason the officer may adjourn the sale from time to time, which adjournment must be for a definite time, and if for any reason the first sale failed, the officer may again seize the property and sell the same. 61 C. J. 1050.

In *Stuard v. Southern Engine & Boiler Works*, 100 Miss. 895, 57 So. 218, a tax collector sold an entire sawmill plant worth several thousands dollars for $54 taxes against it. In declaring this sale to be void, the court said: "It would have been very easy for the tax collector to have sold some part of this machinery, which would have brought this small amount of taxes, without sacrificing the whole mill plant by such a sale. * * * The disproportion is so shocking that the sale must be held to have been in excess of the power of the tax collector to sell."

"How far he might, from a regard to the defendant's interests, be required or authorized to postpone a sale where the goods would be palpably sacrificed, is another question; but as to the plaintiff in the execution, it is clear, that unless the sheriff is guilty of fraud or neglect, he is not answerable for merely proceeding to the sale of the goods as required by his writ, though they bring an inadequate price." *Lynch v. Commonwealth*, 6 Watts (Pa.) 495, 31 Am. Dec. 490.

Questions similar to those involved in this case have been before courts in *Porter v. Yakima County*, 77 Wash. 299, 137 Pac. 466; *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430; *Lantron v. Jos. Greenspon's Sons Iron & Steel Co.*, 70 S. W. (2d) (Tex. Civ. App.) 247; *Bull v. Gowing*, 87 N. H. 75, 174 Atl. 58; and in *Wilberg v. Yakima County*, 132 Wash. 219, 231 Pac. 931, 41 A. L. R. 184, there are set out six rules governing the proper manner for the sale of personal property on tax liens.

As was said in effect in *J. K. Lumber Co. v. Ash*, 104 Wash. 388, 176 Pac. 550, the law was complied with in the matter of assessment and sale and everything that it provided for was done. All the notices required were given. The proceedings appear to be as contemplated by statute,

and there is no reason for this court to read into the law requirements not there. To do so would tend to make the collection of taxes by distress warrants a matter of such difficulty as would interfere with securing public revenue and add to the requirements which the legislature has deemed sufficient to protect the property owner who has failed to pay his taxes in time.

This court will not criticize a sheriff for refusing to accept a bid for $500 made on a Merry-Go-Round complete, with building; a Whip, with eight cars, complete; an Airplane, with planes, complete; a Swanee River, complete, less boats; a Fun House building and devices, complete; a stadium building, complete; a Knock-Out building, complete; a Tumble-Bug, with cars, comptroller and motors, complete; upon which the taxes legally assessed and due thereon amounted to $6,714.68. The Constitution of Nebraska, section 4, art. VIII, provides: "Nor shall commutation for such taxes be authorized in any form whatever." And the sheriff must not accept such a ridiculously low bid as would subject him to be criticized for violating a constitutional provision against the commutation of taxes.

Our attention has not been called to any provision of our statute requiring the sheriff to make any report to any court in sales under tax distress warrants, and until such requirement is shown we will hold that the legislature has placed sole discretion in the sheriff to conduct such sales with full authority in the premises.

The decree of the trial court, enjoining sale under the alias distress warrants, and directing the sheriff to issue bill of sale to said bidders, is hereby reversed and the action dismissed.

REVERSED AND DISMISSED.

J. J. JOHNSON, APPELLEE, V. ALF. E. OLSON, APPELLANT: WAHOO MUTUAL LOAN & BUILDING ASSOCIATION ET AL., APPELLEES.
273 N. W. 201

FILED MAY 14, 1937. No. 29929.

1. Mechanics' Liens: FORECLOSURE: PARTIES. Persons acquiring liens, other than mechanics' liens, after the commencement of a suit to foreclose a mechanic's lien, are not necessary parties to the latter. A purchaser *pendente lite* need not be made a party to a mechanic's lien proceeding.
2. Mortgages: ESTOPPEL. A grantee or mortgagee is estopped to question the validity of a prior encumbrance when his mortgage or deed contains an express recital that it is given subject to encumbrances of record.

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

Beghtol, Foe & Rankin, for appellant.

Charles H. Slama, Hendricks & Kokjer and *E. S. Schiefelbein, contra.*

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

PAINE, J.

The trial court sustained separate demurrers of John E. Wilson, Mildred E. Johnson and Olof Berggren to the amended answer and cross-petition of the defendant, Alf. E. Olson, and the said Olson having elected not to plead further, his amended answer and counterclaim was dismissed, from the entry of which journal entries he hereby appeals to this court.

The plaintiff, J. J. Johnson, owned several lots in the city of Wahoo, Nebraska, and erected thereon a hospital and nurses' home. Alf. E. Olson, defendant and only appellant, was engaged in September, 1929, to do the plumbing, heating, and certain remodeling work connected therewith, and on April 26, 1930, he filed two separate mechan-

ics' liens, one against each of the properties, setting out that the labor had been performed and the materials furnished between September 19, 1929, and April 17, 1930.

J. J. Johnson, plaintiff and one of the appellees, filed a petition in the district court for Saunders county on July 11, 1930, said petition and exhibits covering some 15 pages, the prayer of said petition asking for a decree directing the defendant, Olson, to complete the installation of the plumbing and heating system in the nurses' home in accordance with the architect's specifications, and to put the 1,000-gallon oil tank under ground, and praying for an accounting between the parties, and asking judgment for $500, and that the mechanics' liens be canceled.

To this the appellant filed an answer, alleging that all of the work contracted for had been installed according to the new and independent plans, terms and agreements between the parties, and that such work installed had been accepted and used by the plaintiff without any complaint or objection, and that the equipment so installed is still properly functioning; that the plaintiff has made substantial payments upon the work, for which credit has been given, but that the amounts still due are shown in the mechanic's liens, and that the amount due on one of said liens is $296.60, and the amount due on the other mechanic's lien is $788.85, each with interest at 7 per cent., and praying for an accounting and a decree finding the amount due upon the liens, and praying that, if the amount due is not paid within 20 days, the premises be sold in satisfaction of the two mechanic's liens.

On June 13, 1933, the cause having been under advisement for some time, a decree was entered, in which the court found generally for the appellant and against the plaintiff, J. J. Johnson. The decree further finds that the plaintiff is entitled to receive a credit on the mechanic's lien of $296.60, leaving the balance due on the date of the decree on said lien, $180.50, with 7 per cent. interest from that date, and that, allowing certain credits for four drums of gas, the amount due on the second mechanic's lien is

$906.35, with interest, and each lien is declared to be a first lien upon the real estate therein described, and the decree provides that, if there is a default in the payment of said sums for 20 days, the sheriff shall sell the premises and bring the proceeds into court for the payment, first, of the costs, and, second, to be applied in satisfaction of the liens found due, with interest.

On August 28, 1933, a supplemental decree was entered by the same trial judge, correcting certain errors in the foregoing decree, and substituting the words "valid lien" for "first lien," and further finding that to make a final determination of the rights of all parties it is necessary to make parties defendant the following: Wahoo Mutual Loan & Building Association, Nebraska State Savings Bank, Emma M. Stratton, Olof Berggren, John E. Wilson, Mildred E. Johnson, and May E. Johnson; and ordering that service of summons be had upon each of them.

On April 10, 1935, an order of sale, directing the sheriff to advertise and sell said property as upon execution for the payment of the two mechanic's liens, was issued by the clerk of the district court, and a return to the order of sale was made by the sheriff, showing that he received the writ, but that a restraining order was served on him, stopping said sale, and, therefore, he returned the writ, no sale being held.

On May 13, 1935, the trial court heard the argument on the special appearances filed by Emma M. Stratton, Olof Berggren, John E. Wilson, Mildred E. Johnson, and May E. Johnson, and quashed the summons served upon the objecting defendants.

On June 4, 1935, summons was again served on said defendants, requiring them to answer before July 8, 1935, on which date they filed special appearances, which were overruled by the court on December 9, 1935.

Alf. E. Olson, appellant, having changed attorneys, and secured the firm of Beghtol, Foe & Rankin as his attorneys, a new and amended answer and cross-petition was filed on June 4, 1935, in which he alleged that the court had

entered a decree June 13, 1933, finding valid his two mechanic's liens, and that he was entitled to have the same foreclosed, and that in the same decree the court had dismissed the plaintiff's petition. Such amended answer recited that the court had modified the decree by a supplemental decree, directing that additional parties be brought into the action, and alleged that his two mechanic's liens were subject only to the claims of the Wahoo Loan & Building Association and the Nebraska State Savings Bank, and that Berggren might claim some interest by reason of a mortgage of $3,500, filed November 25, 1930, but that any claim Berggren might have was subject to the rights and mechanic's liens of the appellant; that the defendant John E. Wilson might claim some rights by reason of a mortgage of $1,500, filed January 12, 1931, but that any rights said Wilson might have were subject to the rights of this appellant; and that if Mildred E. Johnson claimed any interest in the property by reason of a deed dated May 5, 1930, and filed May 15, 1931, her interests, if any, were subject to his two mechanic's liens; and that any rights May E. Johnson might claim were also subject to his liens; and the same was true of the rights of Emma M. Stratton because of a mortgage, dated May 5, 1930, for $1,400, and filed May 12, 1930, and any rights due under that mortgage were subject to the two mechanic's liens.

In said answer and cross-petition, at paragraph 17, it is set out that the defendants, Olof Berggren, John E. Wilson, Mildred E. Johnson, May E. Johnson, and Emma M. Stratton each had actual knowledge of the mechanic's liens of the defendant, Alf. E. Olson, appellant herein, and also had actual knowledge of the bringing of this action by J. J. Johnson on July 11, 1930, and of the claims and rights of said Alf. E. Olson before any of the conveyances had been made to these defendants, and that said conveyances were all made in furtherance of a scheme and plan of the plaintiff, J J. Johnson, to defraud the defendant, Alf. E. Olson, and other creditors, and in said amended answer and cross-petition there is a prayer for an accounting between

all of the defendants, and that the rights of each may be determined and the property sold and applied on the lien.

On January 8, 1936, separate demurrers were filed by John E. Wilson, Mildred E. Johnson, and Olof Berggren, defendants, each demurring upon the ground that the amended answer and cross-petition filed June 4, 1935, fails to state a cause of action, for the reason that no cause of action has accrued in favor of Alf. E. Olson against such demurring defendants within four years next preceding service of summons, and the trial court thereupon entered separate orders, sustaining each of said demurrers, and thereupon, Alf. E. Olson having elected not to plead further, the said amended answer and counterclaim filed June 4, 1935, was dismissed.

From this review of the pleadings presented above, it is evident that this litigation has been allowed to drag out in the district court all these years since the petition was filed on July 11, 1930, and this fact in itself has introduced several questions for determination which would not otherwise be involved.

The first proposition of law relied upon for reversal is that a purchaser or a mortgagee of property who buys or loans money on it pending litigation concerning it is bound by the proceedings in that suit the same as if made a party of record.

In this case Olson filed mechanic's liens against the hospital and also against the nurses' home on April 26, 1930. A few days thereafter, on July 11, 1930, Johnson, the owner of the property, filed an action in equity, setting out the provisions of the mechanic's liens, and attaching the copies of the two liens to his petition, and asking for an accounting on said liens, the mechanic's liens having been duly filed in an equitable action brought against them some ten months before plaintiff Johnson deeded one piece of property to his attorney and brother-in-law, John E. Wilson, and deeded the other piece of property to his daughter, Mildred E. Johnson, on May 15, 1931.

Section 20-531, Comp. St. 1929, reads: "When the sum-

mons has been served or publication made the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title."

Let us examine some of the decisions on after-acquired interests in property subject to mechanic's liens.

It is held in 40 C. J. 405: "Persons acquiring liens other than mechanic's liens, after the commencement of a suit to foreclose a mechanic's lien, are not necessarily parties to the latter. And a purchaser *pendente lite* need not be made a party to the mechanic's lien proceeding."

2 Black, Judgments (2d ed.), sec. 550, says that one "who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases."

"A mechanic's lien, like that of an attachment, when confirmed or made effective by judgment, is binding upon the parties thereto. And the law, in order to give full effect to the principle by which the parties are held bound by it, equally concludes by the same proceedings all persons who are represented by the parties, and claim under them or are privy to them, and they are estopped from litigating that which is conclusive upon those with whom they stand thus related." *State v. Eads,* 15 Ia. 114, 83 Am. Dec. 399.

Again, it is said in another case: "But as to persons who acquire interests by conveyance or encumbrance after suit brought, it is not necessary to make them parties. They are bound by the decree. The rule is thus stated in Story's Equity Pleadings, sec. 194: 'But encumbrancers, who become such *pendente lite,* are not deemed necessary parties, although they are bound by the decree; for they can claim nothing except what belonged to the person under whom they assert title, since they purchase with constructive notice; and there would be no end to suits, if a mortgagor might, by new encumbrances, created *pendente lite,* re-

quire all such encumbrancers to be made parties.'" *Whitney v. Higgins,* 10 Cal. 547, 70 Am. Dec. 748.

In *Dodge v. Hall,* 47 N. E. 110 (168 Mass. 435): "Where work is done under a contract with an owner, a conveyance by him before the work is finished will not defeat the lien."

Boisot, Mechanics' Liens, sec. 318, says: "One who buys land pending a suit to foreclose a mechanic's lien thereon takes title subject to the lien, and is bound by the proceedings in the suit."

Rockel, Mechanics' Liens, sec. 150 (citations omitted) says: "The fact that work is in progress is a notice to all of the rights of the mechanic, and all conveyances made during that time are made subject to the mechanic's rights. It is immaterial whether the sale was fraudulent or *bona fide,* the property is subject to the lien that may thereafter be perfected within the time limited by statute."

Chancellor Kent, in the case of *Murray v. Ballou,* 1 Johns. Ch. (N. Y.) 566, says that the rule has existed for centuries, and is founded upon great public utility. Without it a man, upon the service of a subpœna, might alienate his land and the decrees of court might be wholly evaded.

As was said in Bloom, Mechanics' Liens, sec. 487: "When the lien has once attached, grants and encumbrances do not effect the lien." There is an old maxim, "*Qui prior est tempore, potior est jure.*" (He who is prior in time, is stronger in right.)

In *Empire Land & Canal Co. v. Engley,* 18 Colo. 388, 33 Pac. 153, it says: "A purchaser or encumbrancer of property upon which a mechanic's lien is filed is chargeable with notice thereof by virtue of the mechanics' statute itself, without the filing of a notice of *lis pendens.* The enforcement of mechanics' liens should be favored by a liberal construction of the statute."

"The object of the mechanics' lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." *Way v. Cameron,* 94 Neb. 708, 144 N. W. 172.

In *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, Sanborn, circuit judge, held that the mechanic's lien attached to the property in December, 1889, when the appellants commenced the performance of their contract. At that time the mortgage of the trust company secured no bonds because no bonds had been issued, and until the bonds were issued the trust company had no superior right or better claim upon the mortgaged property than the mortgagor had.

The deed from plaintiff to John E. Wilson, his brother-in-law, had in it the words, "subject to encumbrances," while the deed to plaintiff's daughter, Mildred E. Johnson, had in it the words, "subject to encumbrances of record." These two deeds, filed for record May 15, 1931, fully apprised the grantees by their terms of the mechanics' liens filed against each tract. Action involving these liens had been filed in the district court July 11, 1930.

These transfers to these demurring defendants were made by a litigant to a pending suit, in which his title was a matter of controversy, and they must take full notice of all the facts then pending in that case, and actual notice of a pending action is just as effective as would be the filing of a *lis pendens*.

A mortgagee or grantee is estopped to question the validity of a prior encumbrance when his mortgage or deed contains an express recital that it is given subject to encumbrances of record. *O'Connor v. Power*, 124 Neb. 594, 247 N. W. 414.

If during the pendency of an action in equity the claim to the property in controversy could be transferred from the parties to the suit so as to pass their interests to a third party who would be unaffected either by the prior proceedings or subsequent judgment in the litigation, then all transactions in our courts would, as against designing men, prove ineffective, for an unending series of alienations of the property could protract a final determination into the boundless future, which scheme would forever preclude the prevailing party from obtaining that to which his judgment entitled him.

There were many other parties involved in this title by mortgages, transfers, and liens, and when the trial court on August 28, 1933, without notice and without a hearing, entered a supplemental decree and ordered that many additional persons be made parties defendant and be brought into the case, it is our opinion that the court could not, by its own act in requiring additional parties made parties defendant, defeat the rights of the appellant, Olson, to foreclose his two mechanics' liens when the additional parties so ordered brought in were not necessary parties under the law and the order was prejudicial. *Cahn v. Lipson,* 39 Neb. 776, 58 N. W. 280.

"But plaintiff cannot bring in or the court add parties, unless plaintiff has a cause of action against defendant or some person originally made a defendant, nor can the petition be amended so as to bring in a necessary party, if the lien has already expired, and if the matter has already been submitted, and the party is not a necessary party, the trial will not be opened." 40 C. J. 409.

There is no doubt in the case at bar that appellant Olson put in a lot of material and work, and greatly enhanced the value of the hospital and the nurses' home by installing the heating plant and the plumbing. He was clearly entitled to liens, and he filed those liens to protect his rights just nine days after he had completed the work, and later these liens were brought into an equity suit for an accounting by the owner of the property. It would be inequitable from every sense to defeat a valid, legal, and equitable judgment for mechanics' liens by saying that additional unnecessary parties should be brought in who could not be served within the time limited by law, and then by sustaining their demurrers defeat all recovery.

Appellant Olson has a decree and judgment against Johnson and those who are in privity with him for the amount due on his two mechanics' liens. The trial court should not have restrained the sheriff from carrying out the valid order of sale in his hands.

In the case of *State v. Nebraska State Bank,* 124 Neb.

449, 247 N. W. 31, the court said: "In the absence of statutory prohibitions, equitable remedies, when consistent with the fundamental principles of equity, should be so administered and employed as to give complete relief to each complaint, and sufficiently varied to answer every conceivable emergency."

For the reasons set out herein, the demurrers of the defendants John E. Wilson, Mildred E. Johnson, and Olof Berggren should be overruled.

The order of the district court is reversed and the cause remanded for proceedings in accordance herewith.

REVERSED.

LOUIS NAEVE, APPELLANT, V. THOMAS E. SHEA ET AL., APPELLEES.

273 N. W. 265

FILED MAY 14, 1937. No. 29989.

1. Contracts. Where a creditor enters into an agreement with his debtor whereby it is agreed that the debtor will deposit all earnings of his business in a certain bank to be withdrawn only on checks countersigned by the creditor, that debtor will account for all earnings received less a stipulated amount for salaries, rent and necessary office expense, and that creditor shall verify all accounts once each month and receive the net earnings to apply on his indebtedness, the relation thus established is one of loan and security between a creditor and his debtor and does not, in the absence of proof of an intent to so do, constitute the creditor as an owner or partner in the business of the debtor.
2. ———. Where such relation exists, the creditor is not liable for the wrongful act of the debtor growing out of the conduct and operation of his business resulting in damage to a third person.

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

Ziegler, Dunn & Becker and *D. L. Manoli,* for appellant.

Morsman & Maxwell, Shotwell & Vance, Clausen, Hirsh

& Miller, T. A. Hollister and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and LIGHTNER, District Judge.

CARTER, J.

Plaintiff brought this action against the defendants to recover for loss sustained by reason of a fire that occurred on September 7, 1932, destroying property belonging to him. At the close of all the evidence each defendant moved for a directed verdict. The trial court sustained the motion as to the defendants National Security Fire Insurance Company and Concordia Fire Insurance Company, and dismissed the action as to them. Plaintiff thereupon moved for a directed verdict against the defendants Thomas E. Shea and Henry C. Dross, which was sustained and judgment entered against them for $10,697.60. From the order overruling his motion for a new trial against the two defendant insurance companies, plaintiff appeals.

The record discloses that the Shea-Dross Agency was a partnership composed of Thomas E. Shea and Henry C. Dross and engaged in the business of writing insurance of various kinds. It further appears that in 1930 the plaintiff applied to the Shea-Dross Agency for fire insurance on a building used as a dance hall located in Naeve's Park in Sarpy county. Due to the nature of the risk, the Shea-Dross Agency was unable to obtain the insurance from any of the companies it represented. It did, however, secure the issuance of policies of fire insurance in the amount of $8,750 through an insurance broker in New York City. The dance hall was destroyed by fire on September 7, 1932, and it was then discovered that the companies issuing the insurance on the property were nonexistent and spurious fire insurance companies.

It appears from the record that, prior to 1928, the Shea-Dross Agency had become financially involved to the extent that it owed the National Security Fire Insurance Company, Concordia Fire Insurance Company and South-

ern Surety Company approximately $15,000. It was indebted to other companies to the extent of $2,000. On April 28, 1928, representatives of the three companies hereinbefore mentioned entered into an agreement with Shea and Dross which plaintiff now contends made each of the three companies part owners of the Shea-Dross Agency and consequently liable for their wrongful acts in delivering policies of spurious fire insurance companies to him. There is no question that the Shea-Dross Agency procured the insurance for plaintiff contrary to the provisions of sections 44-218 and 44-219, Comp. St. 1929. This court on a former hearing of this case held that the petition stated a cause of action against these defendants. *Naeve v. Shea,* 128 Neb. 374, 258 N. W. 666. The court in the opinion said: "The demurring insurance companies are charged as tort-feasors, operating through an agency, owned, controlled and operated by them. If they defrauded plaintiff by primary, affirmative acts of their own through their own agency, the right of plaintiff to recover does not depend on allegations showing that all defendants were engaged in a partnership or in a joint enterprise. * * * The action is not based on the parol agreement or on the written instrument or on both combined. Plaintiff is not seeking to enforce either, but both, according to the petition, are factors in the alleged wrongs by which demurrants procured for plaintiff worthless fire insurance policies in spurious, insolvent companies."

The liability of the defendants is necessarily based upon the relationship created in the agreement entered into on April 28, 1928. If the agreement made the defendant insurance companies sole owners or partners in the Shea-Dross Agency, they would be liable for the wrongful act of the Shea-Dross Agency in causing the issuance of the spurious insurance. On the other hand, if the agreement did not change the relationship of debtor and creditor previously existing between the parties the insurance companies would not be liable.

The agreement in question was partly in writing and

partly oral, according to the allegations of plaintiff's petition. That part of the agreement that was reduced to writing, and which is fully set out in the former opinion of this court, *Naeve v. Shea, supra,* provides in substance that all earned premiums of the Shea-Dross Agency should be paid into the Live Stock National Bank of Omaha subject only to the check of the Shea-Dross Agency countersigned by a representative of one of the three creditor insurance companies; that on the 15th day of each succeeding month the current accounts, salaries and expenses were to be paid and any balance remaining was to be prorated to the three insurance companies which were parties to the contract; that the office expense was to be limited to salaries of $175 each month for Shea and Dross and $65 each month for the office clerk, plus office rent of $45 a month and incidental essentials to the maintenance of the office; and that on the 15th of each month a representative of one of the companies was to verify all accounts due the agency and due to companies and brokers, including collections and cancelations as well as business written.

The written portion of the contract does not purport to convey any interest in the Shea-Dross Agency to any of the three insurance companies that were parties to it. Plaintiff contends, however, that the oral part of the agreement made the defendant insurance companies owners or partners in the Shea-Dross Agency. This contention is based upon the evidence of Thomas E. Shea who testifies to an alleged conversation between himself and L. P. Carpenter, the representative of the Concordia Fire Insurance Company, which took place immediately before the signing of the written portion of the contract hereinbefore referred to and in the presence of Henry C. Dross, Dan F. Brown and P. K. Walsh. The evidence is as follows: "Q. What did you say? A. I said, 'If Dross and I sign this agreement, it simply means we are turning the agency over to you fellows.' Q. Anybody reply to that? A. Carpenter said, 'That is exactly what it means, but we are giving you an opportunity to stay in the business and buy the agency

back.' " This evidence was denied by all the parties present at the time except Brown, who was not called as a witness. Is this evidence sufficient to sustain a finding that the defendant insurance companies were owners or partners in the Shea-Dross Agency after the signing of the contract?

It must be borne in mind that plaintiff had no knowledge whatsoever of the relationship existing between the Shea-Dross Agency and the defendant insurance companies at the time of the delivery of the spurious policies or at the time of the fire. Since the plaintiff had no knowledge of any such relation, the question of the apparent authority of the Shea-Dross Agency to bind the defendant insurance companies is not involved in this case. Restatement, Agency, sec. 194, comment a. The status of the defendant insurance companies must therefore be determined by the agreement they made with the Shea-Dross Agency.

After a consideration of that part of the contract that was in writing and the evidence adduced of that part resting in parol, we are of the opinion that it will not sustain a finding that the defendant insurance companies were owners or partners in the Shea-Dross Agency.

In the early case of *Mollwo, March & Co. v. Court of Wards,* 4 Privy Council App. 419, involving a state of facts much more favorable to the plaintiff than in the case at bar, the court said: "The agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which the Rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm." See, also, *Cox v. Hickman,* 8 House of Lords Cases, *267.

In a like case the Florida supreme court said: "The provisions in the agreement authorizing Jones & Bowen to

put a person in Hoover's store in charge and control of the business and books, and that no debt should be incurred by Hoover in the business without their consent, and limiting Hoover to an allowance of fifty dollars per month for his own expenses, and that the proceeds of sale of goods should be carefully kept and paid over each week to Jones & Bowen upon the indebtedness due them and to others, are all measures of security, and do not alter the relationship of debtor and creditor existing between the parties. The whole agreement, in all of its provisions, shows clearly that Hoover was already the debtor of Jones & Bowen, and that he was to continue to be such debtor, and in a larger sum; and that the instrument was designed to secure Jones & Bowen in the payment of that indebtedness. The law is now well settled that where a person loans or advances money or goods to another to be invested in some business or enterprise, the lender to share in the profits as or in lieu of interest on, or in repayment of such loan or advance, does not constitute a partnership; neither will it constitute a partnership as to third persons unless the acts of the parties in furtherance of the agreement between themselves amount to such a holding of themselves out as partners as that third persons are misled into a reasonable belief that a partnership exists in fact." *Dubos & Co. v. Jones, Bowen and Hoover*, 34 Fla. 539, 16 So. 392.

In *National Surety Co. v. Winslow*, 143 Minn. 66, 173 N. W. 181, the court said: "We find nothing in the contract taken as a whole to justify the conclusion of the creation of any relation between defendant and interveners, other than that of debtor and creditor, with the privilege on the part of interveners, as creditors, obviously to guard against a diversion or dissipation of the money advanced by them, to supervise and in effect direct the expenditure of the money earned by defendant under the contract, as well as the funds so advanced. And it is clear that a relation of that character, though coupled with the supervisory right mentioned, can vest in interveners no legal or equitable personal claim to the funds arising out of the transaction."

The burden of proof is upon the plaintiff to establish the allegations of his petition that the defendant insurance companies owned, operated and controlled the Shea-Dross Agency. The evidence shows that some control was exercised over the business, but, under the authorities cited, the control exercised was consistent with the relationship of debtor and creditor. It is clear that it was not intended that the defendant insurance companies were to become owners or partners in the Shea-Dross Agency. On the contrary, the evidence clearly shows that the intent was to give security to the defendant companies to induce a forbearance of suit on their claims. The contract established is one of loan and security between a debtor and its creditors. The contention of plaintiff that defendant insurance companies owned, controlled and operated the Shea-Dross Agency is not supported by evidence sufficient to sustain a judgment. The defendant insurance companies as creditors are not liable for the wrongful acts of their debtors in issuing spurious insurance policies in nonexistent and nonlicensed insurance companies.

The trial court therefore rightfully directed a verdict for the defendant insurance companies.

AFFIRMED.

RUTH QUISENBERRY, APPELLEE, V. NATIONAL FIRE INSURANCE COMPANY, APPELLANT.
273 N. W. 197

FILED MAY 14, 1937. No. 29973.

Insurance. An insurer may lawfully, by contract in the policy, limit the total amount of insurance which it grants, or in which it will participate as concurrent insurer, upon the property covered; and where on issuance of the policy it is therein definitely provided that it is a condition of the insurance that the total insurance shall not exceed a sum named, and, unknown to the insurer, there then exists, and continues until after the loss, other prior valid insurance in a greater amount than the total so permitted, the latter policy does not take effect as a policy of insurance.

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

Wells, Martin, Lane & Offutt, for appellant.

Benjamin S. Baker and *Edward Shafton, contra.*

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

BLACKLEDGE, District Judge.

Plaintiff was the owner of certain residential property in an addition known as Bensonvale adjacent to the city of Omaha. Upon the property was a dwelling-house and the Nebraska Savings & Loan Association held a mortgage on the property. Plaintiff had carried two policies of insurance on the dwelling, one in the sum of $1,800 issued by the Automobile Insurance Company and another issued by the defendant National Fire Insurance Company in the sum of $1,000. Both policies were held by the Savings & Loan Association in connection with its mortgage on the property. The expiration date of the policy in the National Fire Insurance Company was in August, 1934, and in July the Savings & Loan Association notified plaintiff of the approaching expiration and requested the privilege of renewing the policy. Plaintiff did not communicate with the Savings & Loan Association but went to the office of the agent of the Automobile Insurance Company and procured additional insurance in the amount of $1,400, thereby making the total insurance with that company $3,200. Plaintiff did not communicate or have any transaction with the defendant National Fire Insurance Company, but the officers of the Savings & Loan Association, not at the time knowing of the additional insurance, procured a new policy in the defendant National Fire Insurance Company in the sum of $1,000 supposedly to take the place of the one just expiring. This policy is the one in suit and contains this provision in a rider attached thereto: "It is a condition of this insurance that * * * permission is hereby given for other insurance, but the total amount of insurance per-

mitted, including this policy, shall in no case be in excess of the following stipulated amounts, anything in the policy or the policy form to the contrary notwithstanding: Item No. 1. $2,800." The provision quoted gives rise to this lawsuit.

It is undisputed that at the time of issuance of this policy or until after the loss neither the defendant National Fire Insurance Company nor the Nebraska Savings & Loan Association knew of the increased amount of insurance that had been procured in the Automobile Insurance Company. The plaintiff and the agent of the Automobile Insurance Company both failed to notify the Savings & Loan Association thereof. This was the situation at the time the dwelling-house was totally destroyed by fire in December, 1934. Thereupon the Savings & Loan Association was informed of the increase of insurance made by a rider to be attached to the policy of the Automobile Insurance Company and that company paid its obligation to the plaintiff and the mortgagee. The defendant National Fire Insurance Company declined to pay, and this suit resulted in which the defense, with others, is urged that the policy of this defendant contained the provision limiting the total amount of insurance that could be carried on the property to the sum of $2,800, that such provision was violated at the time of the issuance and delivery of the policy, which condition still existed at the time of the loss, and that therefore the policy in suit became void or voidable, and that the defendant is not liable thereon and was entitled at the time to a directed verdict in its favor.

There are other defenses and errors urged which have some merit, but in the view we take of the case it will be unnecessary to discuss them because the proposition above indicated controls the disposition of the case.

The plaintiff maintains that the above quoted policy provision limiting the total amount of insurance is not valid in view of the provisions of section 44-322, Comp. St. 1929, did not operate to relieve the defendant from liability inasmuch as there was no misrepresentation which

deceived the company to its injury, and that the breach of condition against greater insurance did not contribute to the loss. It may be conceded that there was no affirmative misrepresentation by anybody. In issuing this policy the defendant transacted the business with the Nebraska Savings & Loan Association and neither of them at the time, nor until after the loss, knew of the increased insurance then existing which made the total amount then in force with the Automobile Insurance Company $3,200. Some questions are raised respecting the applicability of the valued policy law, Comp. St. 1929, sec. 44-344, but these are considered only as incidental to the main issue in the case, the scope and provisions of the valued policy law having been well covered and adjudicated in this state.

The question in this case then is whether the policy provision limiting the total amount of insurance to $2,800 is under the circumstances of this case effective to relieve the defendant from liability upon its policy, it being undisputed that at the time the policy was issued and continuously until after the loss there was in force other valid insurance on the property to the amount of $3,200. It will be seen that, if the policy provision is not effective, then there was in force upon the property insurance in the two companies to the amount of $4,200, which is materially different from the total of $2,800 to which the defendant sought to limit the same by the provisions of its policy.

The appellee to sustain her position relies upon the provisions of section 44-322, Comp. St. 1929, and the case of *Newman v. National Union Fire Ins. Co.*, 122 Neb. 94, 239 N. W. 464, as a construction of the statute controlling in this case, and urges that, inasmuch as the additional insurance in no manner contributed to the loss, the statutory provisions apply in full force to the present situation. The provisions of that section of the statute are:

"No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless

such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

An examination of the *Newman* case discloses that it involves questions relative to the effect of certain foreclosure proceedings and an assignment of the policy after loss had occurred; and although there are references to procurement of other insurance without consent of the insured, the decision seems to be placed on other grounds respecting the assignment, foreclosure and transfer of title. It is at least clear that whatever happened therein that is complained of in reference to other insurance took place after the issuance of the policy in suit. We do not consider the case authority for plaintiff's contention herein. In the instant case the situation was fixed, but wholly unknown to the insurer, at the time of delivery of its policy. It is true that there is neither claim nor intimation in the case that the plaintiff caused the fire. It may be that in reference to the other insurance, as stated in plaintiff's brief, the only manner by which defendant could prove that said breach contributed to the loss would be to show that plaintiff, appellee, secured the policy in question, caused the fire and thereby defrauded the defendant; and that such would be the rule if and when that stage in the proceedings should be reached.

In considering this question there are other statutory provisions to which reference should be made. They are the valued policy law, to which reference has already been made and which is section 44-344, Comp. St. 1929, as follows:

"Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of

the insured or his assignee, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of the loss and measure of damages."

There are also in the same statute sections 44-701 and 44-702 which should be noticed. Section 44-701 provides as follows:

"It shall be unlawful for any insurance company or any agent to knowingly issue any fire insurance policy upon property within this state for an amount which, with any existing insurance, exceeds the fair value of the property or of the interest of the insured therein."

Section 44-702 is:

"It shall be unlawful for any party having an insurable interest in property located in this state to knowingly procure any fire insurance policy upon his interest in such property, for an amount in excess of the fair value of his interest in the property, or for an amount which, with any existing insurance thereon, exceeds the fair value of his interest in the property."

Section 44-703 provides the following:

"Any insurer who knowingly makes insurance on any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof, shall be fined in a sum not less than fifteen nor more than twenty-five dollars."

Under the valued policy law it has been held by this court that the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance and in case of total loss that sum is the measure of recovery. *Fadanelli v. National Security Fire Ins. Co.*, 113 Neb. 830, 205 N. W. 642.

Thus we find the insurer surrounded in one sector by the provision which upon total loss fixes the amount stated in

the policy conclusively as the amount it must pay, in another that it is made unlawful on the part of both the insurer and its agent to issue a policy for an amount which exceeds the fair value of the property or the interest of the insured therein, and in another where penalties are inflicted against any insurer and any agent who violates such provision, and in another by a provision that it is unlawful for an owner to procure insurance for an amount in excess of the value of his interest in the property, and, finally, the remaining sector, as to which it is contended that the insurer cannot contract as against over-insurance to limit the extent of the loss in which it contracts to participate or that, if it does so, then its only defense would be the ability to prove that the insured caused the fire. It seems to the writer that to so hold would broaden the application of the statute, section 44-322, in itself a wholly desirable and beneficial legislative provision, far beyond its true scope and intent. In the case of *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, 187 N. W. 787, it is observed that this section of the statute is divided into two clauses, the first one relative to matters involved in the negotiations for insurance, and the second relating to breaches of conditions in the policy after it becomes effective, and it is there said: "If, through the untrue statement of the insured, the defendant was induced to issue the policy, and thus become obligated under its contract, when it would not have done so had a truthful answer been made, it would seem clear that the defendant was deceived to its injury, and the statute above quoted would not apply."

The statutory provisions to which reference has been made should be construed in *pari materia.* It seems elementary that the insurer should have the right of contract at the outset to define and limit the amount of insurance which it will agree to carry upon any risk. This right, it seems, would necessarily include the right to likewise limit the liability upon any risk in which it agreed to participate with other concurrent insurance. This the defendant herein undertook to do, and although there was no misrepresenta-

tion knowingly made or intention to deceive, the facts as presented to the defendant did, if this policy is allowed to stand, mislead and deceive the defendant to its injury by making it participate in a total of $4,200 insurance when it had specifically contracted that it should not participate in insurance to an excess of $2,800. That the situation so presented was by mistake rather than from an active fraudulent intent does not matter. *Meyers v. German Fire Ins. Co.*, 101 Neb. 855, 166 N. W. 247; *Seal v. Farmers & Merchants Ins. Co.*, 59 Neb. 253, 80 N. W. 807.

A policy provision is valid suspending coverage on an automobile while the car is being rented or leased. *Borsky v. National Fire Ins. Co.*, 119 Neb. 178, 227 N. W. 821. The provision is also valid which suspends coverage while the insured is in default for a payment of premium. *Novak v. LaFayette Life Ins. Co.*, 106 Neb. 417, 184 N. W. 64.

Over-insurance is a matter which has been of much concern not only to the insuring public but to legislatures and to courts. It was to aid in preventing such situations that the valued policy law was enacted. The right to contract and to provide limitations in a policy against other insurance has been universally recognized. Over-insurance of property increases the moral hazard and its inevitable tendency is to increase the rates imposed for insurance upon those who do not over-insure their property. It is an evil against which the companies have a right to protect themselves, and in which the insuring public has a very substantial interest. To illustrate: A building worth, say, $3,000, is insured for $2,800, additional insurance is taken out in the amount of $1,000 contrary to the policy provisions. In case of loss, if both parties are required to pay, the insured has made a substantial profit.

Our statutory provisions were enacted for the purpose of preventing over-insurance of property. Warned by the provisions of the valued policy law, by the provisions making it illegal to either issue or receive policies in excess of the real value of the property, confronted with the necessity of paying in case of total loss whatever sum is

named in the policy, the defendant, on the very threshold of the negotiations which with subsequent transactions have led to this lawsuit, declined to enter into a contract of insurance respecting this property which involved a greater sum or value than $2,800, and a provision was inserted in this policy to the effect that it was a condition of this insurance that there should not be total insurance on the property in excess of $2,800. That provision was violated at the very time the policy came into existence, or before it came into existence, and we hold that conformity to such provision in this policy was a condition precedent to the taking effect of the policy in suit, that it never became in force as a policy of insurance, and consequently there is no liability against the defendant in this case except for a return of the premium paid.

The plaintiff has received from the Automobile Insurance Company compensation in an amount greater than that in which defendant agreed to participate, and the mortgagee to whom, as interest may appear, loss under this policy is made payable is not a party to this case.

The case is remanded for further proceedings in accordance with this opinion.

REVERSED.

JOHN H. REIFENRATH, RECEIVER, APPELLANT, V. CLARA K. DOVER ET AL., APPELLEES.
273 N. W. 205

FILED MAY 14, 1937. No. 29812.

1. **Fraudulent Conveyances.** Evidence examined and *held* not to support the contention of a daughter, who was the grantee in a deed to real estate, in an action against her by creditors of her mother, to the effect that she was a creditor of her mother, who was grantor in the deed, and to the effect that such deed was given to her in good faith in payment of the amount due to her.
2. ———. While an insolvent debtor may pay or secure one creditor to the partial or complete exclusion of other creditors,

even though he may intend so to do and even though the creditor preferred may have knowledge of such intent on the part of his debtor, such a preference is void in its entirety as to other creditors of the debtor, if such preferred creditor by the transaction by which he secures such preference and for the benefit of the debtor knowingly aids such debtor to create a barrier to access to any portion of the debtor's estate by other existing creditors of the debtor, beyond what is necessary to pay or secure the creditor so preferred.

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

Frederick M. Deutsch, for appellant.

Willis E. Reed and *M. S. McDuffee, contra.*

Heard before GOSS, C. J., DAY and CARTER, JJ., and TEWELL and YEAGER, District Judges.

TEWELL, District Judge.

This is an action in the nature of a creditor's bill wherein the relief sought is to have one conveyance of real estate by deed and four separate conveyances of personal property by bills of sale declared void as to creditors and to have all of the property conveyed subjected to the payment of two judgments held by the plaintiff, John H. Reifenrath, as receiver of the First National Bank of Madison, Nebraska. The trial court declared each of the conveyances of personal property void as to creditors, but refused to declare void the conveyance of the real property. From such decree granting only partial relief the plaintiff appeals. Neither appeal nor cross-appeal was filed by any defendant.

To an understanding of the issues involved, a somewhat detailed statement of the facts is required. One August Preuss was the first husband of the defendant Kathrina Raguse. He died testate about the month of February, 1901, and left surviving him his widow, Kathrina Preuss, now said Kathrina Raguse, and three living sons, all sons of said Kathrina Raguse, namely, Henry, Edward and William Preuss. Several months after his death a posthumous daughter of August Preuss was born to his widow.

This daughter is now the defendant Clara K. Dover. The will of August Preuss was admitted to probate in April, 1901. The decree in the probate proceedings named his posthumous daughter, his widow and said three sons as his only heirs. At the time of his death said August Preuss owned the southwest quarter of section 11, and the southeast quarter of section 10, all in township 21 north, range 2 west of the 6th P. M., in Madison county, Nebraska. Said will devised these two quarters to said widow for life, and provided that after the death of said widow the said southeast quarter should belong to said son Henry and the said southwest quarter to said son Edward. By the will the said southeast quarter was charged with the payment of $2,500 by Henry to the son William and the said southwest quarter was charged with the payment of $1,500 by Edward to said son William. No provision was made in the will for the posthumous daughter. Not one of said three sons is a party to this action. A few years after the probate of the will the widow of August Preuss was married to Fred Raguse. To this second marriage were born four children, three of whom, namely, Ella, Rose and Fritz Raguse, are parties defendant in this action. The defendant Roy N. Dover is the husband of the defendant Clara K. Dover. About the year 1917 Fred Raguse was adjudged incompetent and his wife, Kathrina Raguse, was appointed as his guardian. Said defendant has been such guardian at all times since such appointment. Said Fred Raguse is still living, but is not a party to this action. A few years prior to the year 1920 the defendant, Kathrina Raguse, acquired title to the northwest quarter of the above mentioned section 11. This quarter-section of land is the land involved in this action. It does not appear that either of the said husbands of the defendant Kathrina Raguse ever had any interest in this quarter-section. In January, 1920, the defendant Kathrina Raguse and her sons Edward and William and her said daughter Clara conveyed by deed all of their interest in the southeast quarter of said section 10 to said son Henry Preuss, who by the will of his father

had acquired a remainderman's interest in said quarter. In October, 1920, the defendant Kathrina Raguse and her sons Henry and William and her said daughter Clara conveyed all their interest in the southwest quarter of said section 11 to said son Edward, who by the will of his father had acquired a remainderman's interest in such quarter. The First National Bank of Madison became insolvent and was closed on January 20, 1933, and a receiver thereof appointed. On the next day after the bank was closed the defendant Kathrina Raguse, without her husband joining in the deed, conveyed the northwest quarter of said section 11 to the defendant Clara K. Dover. It is this conveyance that the plaintiff seeks to have declared void as to creditors. At the time of this conveyance the defendant Kathrina Raguse was indebted to said bank upon several notes signed only by herself and upon two other notes signed by herself and the defendant Roy N. Dover. On September 18, 1933, the plaintiff, as receiver of said bank, recovered a judgment upon the notes first above mentioned against the defendant Kathrina Raguse for the sum of $9,227.06 and also on that date recovered a judgment against the defendants Kathrina Raguse and Roy N. Dover upon the notes last above mentioned for the sum of $2,787.03. Three bills of sale dated October 9, 1933, and executed by the defendant Kathrina Raguse were filed for record with the county clerk of Madison county, Nebraska, on October 10, 1933. In one of these bills of sale the defendant Rose Raguse was named as grantee, in another the defendant Ella M. Raguse was named as grantee, and in the third the defendant Fritz Raguse was named as grantee. These bills of sale conveyed all of the live stock and farm implements owned by Kathrina Raguse. By a bill of sale both dated and filed for record October 10, 1933, the defendant Roy N. Dover conveyed all of his live stock and farm machinery to his wife, Clara K. Dover. The conveyances by the four bills of sale above mentioned, the plaintiff seeks to have declared void as to creditors. After an execution upon each of the two judgments above mentioned

had been returned wholly unsatisfied, this action was brought on October 18, 1933.

The evidence discloses that the northwest quarter of said section 11 at the time it was conveyed to said Clara K. Dover had a value of from $10,400 to $12,800 and that it was encumbered by a mortgage upon which there was an unpaid balance of about $3,500. The deed to Clara K. Dover stated a consideration of $6,000, and contained a recitation to the effect that the $3,500 unpaid balance upon such mortgage was a part of such consideration. At the time of the trial of this action it was the claim of the defendant Clara K. Dover that, at the time she joined with her mother and two of her brothers in the deed conveying the southeast quarter of said section 10 to her brother Henry in January, 1920, she had a verbal agreement with her mother to the effect that, in consideration of her conveying her interest in said quarter to Henry and her interest in the southwest quarter of said section 11 to Edward, she should acquire a quarter-section of land upon payment by her of $6,000 to her mother. This amount she claims she paid by agreeing to pay the unpaid balance of $3,500 upon said mortgage and by agreeing to pay her mother $2,500 in money. It is claimed by the defendant Clara K. Dover that, at the time of such conveyances to Henry and Edward, each of said grantees paid his mother the sum of $6,000. Clara K. Dover, being born after the execution of her father's will and being by statute (section 30-118, Comp. St. 1929) considered as living at the date of her father's death, and the father's will not disclosing any intent to disinherit her, claims to have inherited the same interest in her father's estate that she would have inherited if he had died intestate after she was born (section 30-226, Comp. St. 1929). For the purpose of this opinion, we conclusively assume that she did so inherit, although whether or not she did is immaterial in this action except as such inheritance furnishes a consideration for the verbal agreement she claims existed between herself and her mother. The deed to Henry and also the deed

to Edward each recited a consideration of $6,000, and the land conveyed by each deed was clear of encumbrance. No competent proof of such payments of $6,000 by Henry and Edward to their mother is shown in the record except the testimony of the defendant Kathrina Raguse. It is conceded by all that no consideration of any kind was given for any one of the bills of sale. No consideration was given for the deed to Clara K. Dover, if it was not given to pay an existing obligation to the grantee, other than the promise of Clara K. Dover to pay her mother $2,500 in money and to pay the unpaid balance of $3,500 upon said mortgage. It is the claim of Clara K. Dover that she and her three full brothers each owned an equivalent of 80 acres in the half-section formerly owned by her father, and that the agreement upon which she relies was to the effect that each of the four should be given 80 acres and be permitted to buy another 80 acres for the sum of $6,000. She also testified that at the time of the agreement and the conveyance to Henry in January, 1920, her mother mentioned the "north eighty" of the quarter involved herein as being the one to be given to her. No claim is made in the record to the effect that the agreement was of such a nature that Clara could have enforced a conveyance of the entire quarter to her by legal proceeding. Certainly the evidence does not prove the existence of such an agreement.

Many circumstances are shown in the record that are probative of the nonexistence of such an agreement as that claimed by the defendant Clara K. Dover. On August 23, 1933, after actions to recover the two judgments above mentioned had been commenced, a conference was held in the bank building to determine ways and means of the defendants Kathrina Raguse and Roy N. Dover paying the debts due from them to the bank. The defendants Clara K. Dover, Roy N. Dover and Kathrina Raguse were present at the conference with M. B. Foster, an attorney who then was employed by the defendants. By the overwhelming weight of the evidence none of the defendants mentioned the agreement upon which Clara now relies, but

instead stated that the only consideration given for the deed to her was her agreement to pay her mother $2,500 at some indefinite time in the future and her agreement to pay the unpaid balance of $3,500 on the mortgage. The sum of $2,500 was to be paid, as stated by Roy N. Dover at the conference, whenever the grantee "felt like paying it." No writing evidenced the $2,500 item. No due date for its payment was provided. No provision for interest was made. No written memorandum or circumstance to prove the obligation of Clara to pay said sum of $2,500 is shown to have existed. Neither Henry nor Edward Preuss were called as witnesses to prove their payment of $6,000 each to their mother for the said conveyances in 1920. The defendants Dover lived upon the quarter-section involved continuously after about the year 1927 to the date of trial and paid rent to the defendant Kathrina Raguse even after the conveyance now attacked as void as to creditors. Taxes on this quarter were paid by the defendant Kathrina Raguse. It was not her homestead. The grantee Clara K. Dover knew of her mother's indebtedness to the bank, knew the bank had closed, and thereafter was active in acquiring the deed to herself. After the conference above mentioned was held, M. B. Foster no longer acted as attorney for the defendants, and after other attorneys had been employed the agreement, upon which the defendant Clara K. Dover relies, for the first time at the time of the trial of this action was claimed to have been made. This court has many times declared that a conveyance by an insolvent debtor to a near relative is looked upon with suspicion when attacked by a creditor of such debtor, and that in such a case the burden of proving the *bona fides* of the transaction is upon the grantee. *Buckner v. McHugh,* 123 Neb. 396, 243 N. W. 119, and cases cited. The evidence in this case is not sufficient to show that conveyance of the real estate to Clara was not made with intent to hinder, delay or defraud the creditors of the grantor, and is not sufficient as against other creditors to show that Clara was actually a creditor of her mother.

The defendant Clara K. Dover relies upon a rule, well established in this state, to the effect that an insolvent debtor may prefer his creditors. *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414. The said grantee also relies upon the rule to the effect that a preferential transfer of property by an insolvent debtor to one of his creditors is not fraudulent as to his other creditors, even though the debtor intended to thereby defeat the collection of the claims of his other creditors, and even though the preferred creditor had knowledge of such intention on the part of the debtor, if such preferred creditor does not participate in a fraudulent purpose, but merely seeks to obtain the payment or security of his own claim. *Clarke Drug Co. v. Boardman,* 50 Neb. 687, 70 N. W. 248; *Luikart v. Tidrick, supra;* 27 C. J. 630. These rules, however, do not prevent a preference of one creditor from being fraudulent as to other creditors if such preferred creditor, by the nature of the transaction by which his preference is obtained, knowingly aids the debtor in locking up or secreting a portion of his estate for his own benefit. In such a case the preference is fraudulent as to other creditors in its entirety. *Ellis v. Musselman,* 61 Neb. 262, 85 N. W. 75. See annotation in 79 A. L. R. 132; 27 C. J. 631. The defendant Clara K. Dover by the preference she claims to have taken actively participated in aiding her mother to lock up, as it were, property of the admitted value of $2,500. That sum, by the claim of the defendants themselves, is still owed by Clara to her mother, but is evidenced by nothing but a verbal agreement, is payable whenever Clara feels like paying it, and bears no interest. Its payment is not secured by a lien on the real estate unless by operation of law. With the title in Clara, the quarter-section becomes her homestead, and subject to statutory exemptions. If her preference were valid, a court would not change the terms of the contract by which it was obtained. One of the other creditors seeking to subject this amount to the payment of his claim might easily find it hard of access, and perhaps worthless to him after all legal remedies were exhausted.

By the rules above mentioned the entire conveyance of real estate to the defendant Clara K. Dover was fradulent as to the plaintiff. This is the law even if her contention to the effect that she was a creditor of her mother, which is the status she claims to have occupied, were sustained by the evidence.

For the reasons above given, the judgment of the trial court to the extent that it fails to declare the conveyance of the real estate involved to Clara K. Dover void as to creditors is reversed, and this cause is remanded, with directions that such conveyance be declared void in its entirety as to the plaintiff herein, and with directions that the property involved be subjected to the payment of the plaintiff's judgments. Since much time has elapsed since the trial of this cause, the personal property in the hands of the various defendants may have been disposed of in such manner as to render much of it inaccessible to the plaintiff. The plaintiff will be allowed to file such pleadings and make such proof relative thereto as will enable him to secure such relief with relation to the personal property as the law may allow.

REVERSED.

PEARL SCHINDLER, APPELLEE, V. FRANK MULHAIR, APPELLANT.

273 N. W. 217

FILED MAY 14, 1937. No. 29840.

1. **Appeal.** A verdict of a jury in a law action based upon conflicting evidence will not be disturbed unless clearly wrong.
2. ———. In a case where the evidence is sufficient to sustain the verdict, this court will not disturb the judgment thereon.
3. **Jury: VERDICT: IMPEACHMENT.** No affidavit, deposition or other sworn statement of a juror will be received to impeach or explain a verdict or on what grounds it was rendered, or to show a mistake in it, or that the jurors misunderstood the charge of the court or that they mistook the law, or the result of the finding, on the ground that such matters inhere in the verdict.
4. ———: ———: ———. Affidavits or testimony of jurors

will not be received for the purpose of impeaching or avoiding their verdict in respect to matters inhering in the verdict itself.

5. **Damages.** No method of exact computation can be devised in determining compensatory damages wherein mental anguish, personal injuries and physical suffering and the amount of recovery must generally be left to the sound discretion of the jury, and a verdict rendered under such circumstances will not be reduced unless clearly excessive.

6. ———. Verdict herein found to be excessive and that it should be reduced to $3,000.

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

J. J. Harrington and *John T. Murray,* for appellant.

Barnhart, Greenamyre & Nelson and *W. L. Brennan, contra.*

Heard before DAY, PAINE and CARTER, JJ., and TEWELL, CHAPPELL and YEAGER, District Judges.

YEAGER, District Judge.

This is an action instituted by the plaintiff and appellee against the defendant and appellant to recover damages claimed to have been sustained by her on the 11th day of May, 1935, in Boyd county, Nebraska, resulting from a collision between an automobile in which she was riding, and which was being operated by her husband, and a horse which was on the public highway and which horse belonged to the defendant.

The petition sets forth substantially that on May 11, 1935, at about 11:30 p. m., Marvin Schindler, the husband of plaintiff, was driving and operating a Model A Ford coupé on a public highway, known as highway No. 12, from Lynch, Nebraska, toward his home which was east of Monowi, Nebraska; that plaintiff was riding in said automobile; that when they reached a point about three miles east of Lynch and at a point where the said highway ran along the south side of the right of way of the Chicago & Northwestern Railway Company, which right of way separated the highway from the farm of the defendant,

the automobile driven by the husband of plaintiff hit and struck a horse which the defendant negligently and wrongfully permitted to be loose, unhitched, untied, and unguarded on the said highway.

Plaintiff alleged that as a result of the collision she was thrown against the dashboard and windshield and onto the floor of the said automobile and was severely injured and bruised, and that as a result thereof, being pregnant, thereafter on the 24th day of May, 1935, had a miscarriage.

The defendant filed an answer, denying generally the allegations of plaintiff's petition. The general denial was followed by a denial that the horse in question belonged to the defendant or that it was in his possession or under his control or custody. Defendant further answered that the injuries received by plaintiff resulted from the negligence of the husband of plaintiff and the contributory negligence of plaintiff and her husband.

The plaintiff by reply denied all allegations and averments of new matter contained in the answer of the defendant.

On the issues thus joined a trial was had to a jury which resulted in a verdict and judgment in favor of plaintiff and against the defendant for the sum of $5,000. From this judgment the defendant brings this appeal.

In his brief appellant has enumerated twelve separate assignments of error on which he relies for a reversal. A decision of this case does not require a discussion of all assignments. The second assignment of error challenges the sufficiency of the evidence to sustain the verdict. No question is raised in the brief with reference to liability on the part of the person who had control and supervision of the horse which was in collision with the automobile in which plaintiff was riding. So far as the record is concerned, we are required to consider it as established that negligence was present in permitting the horse to be upon the highway at the time and place and under the circumstance shown.

The only question in this connection requiring considera-

tion is the one as to whether or not the evidence sufficiently shows that the defendant was the custodian of and had control of the horse. The evidence shows that the horse did not belong to defendant and in her brief plaintiff substantially concedes this to be true. On the question of custody and control, the husband of plaintiff has related a purported conversation with the defendant in answer to a question propounded on the trial as follows: "Q. Will you tell the jury what your conversation with him was at the time? A. I drove off the highway and up to where he was standing; I got out of my car and I says, 'Say, was that your horse I run into?' He says, 'Yes; was that you that run into that horse?' He says, 'I was wondering who run into the horse, I thought it was some truck driver from Spencer,' I believe Kelley Martin was his name; he says, 'I was just offered $125 for that mare and she was to have a colt,' and he says, 'I thought she would probably have it that night;' he says 'I turned her out and went up about 9:30 to see if she was all right; she didn't have the colt yet and I came back.'" In addition to this claimed admission that the defendant turned the mare out and knew she was on the highway, Frank Heizer and Edward Heizer, brothers of the plaintiff, testified that at about 7 p. m. they saw the defendant leading two horses toward the railroad right of way, one of which answered the description of the one which was struck by the automobile in which the plaintiff was riding. F. T. Schrunk, another witness, testified that between 7 and 8 o'clock he noticed a horse of the same description along the road in front of defendant's farm.

As against this, defendant denied that he ever had told the husband of plaintiff that he was the owner of the mare in question or at any time had any control over her, although he admits a conversation about the mare in which his version is as follows: "A. Well, he was going to town and he passed me, and he went on to town, or some place west, and when he came back he stopped there and he asked me whose horse was that; he says, 'Was that your horse

or Pete's horse?' And I says, 'Did you kill him?' And he says, 'Yes, I killed him.' And I says, 'Well, it sure ain't my horse.' And he says, 'It is your horse, and I have plenty of witnesses to prove it is your horse.' So we quarreled and jangled a little while, and he insinuated that I ought to pay for fixing up his car; he says, 'It will only cost $30.' And I says to him, 'What for, I ain't got no interest in that car; how do you figure out that I have to fix up your car?' And he says, 'I can prove it is your horse; it was beside your field and you are responsible.' I told him he would have to bring me different authority than that. I think that was about all that was said there. Q. Did you say anything to him about making him pay for the horse, if it had been your horse? A. Yes; I told him, I says, 'If you killed that horse and I owned it, I would sue you for $150 for wilfully and maliciously killing that animal on a nice road like that; he is a crazy driver anyway.'" A number of witnesses testified the mare belonged to Peter Mulhair, brother of the defendant. Still others testify that shortly before this occurrence this mare and another one were brought back from near Creighton, Nebraska, unloaded at the farm of defendant and, at the request of Peter Mulhair, placed in his pasture and were completely in his control and possession.

The evidence was in very sharp conflict on this essential point in the case. On this conflicting evidence the jury found in favor of the plaintiff. The evidence is clearly sufficient to sustain the finding of the jury. A verdict of a jury in a law action based upon conflicting evidence will not be disturbed unless clearly wrong. It appearing that the evidence is sufficient to sustain the verdict, this court will not disturb the judgment entered thereon. *Boehler v. Kraay,* 130 Neb. 233, 264 N. W. 745; *Potach v. Hrauda, ante,* p. 288, 271 N. W. 795.

We come now to and will discuss together appellant's eighth, ninth and twelfth assignments of error since they deal with alleged misconduct of the jury and the rulings of the court in relation thereto. By affidavits of them-

selves filed in support of a motion for new trial, the attorneys set forth in substance that, after verdict in this case, they talked with certain of the jurors, and that said jurors in their deliberations considered as damages the loss of plaintiff's child through miscarriage; that she might have other miscarriages in the future; that many jurors advanced as argument in favor of a large verdict that they would not have their own wives miscarry for $10,000; and that another reason for the rendition of such a large verdict was that too many people were turning their stock out on the highway and they wanted to set an example. In the affidavits the attorneys for defendant named the particular jurors to whom they talked, and thereafter the plaintiff filed the affidavits of each of the jurors so named in which they, and each of them, specifically denied that they had made any such statements to attorneys for defendants. On the day of the hearing on the motion for new trial, defendant subpœnaed the said jurors and asked leave of court to have them testify in support of the motion for new trial. The trial court refused to permit them to become witnesses.

A statement of the trial judge in connection with the refusal to permit the jurors to testify is in the bill of exceptions and it is apparent that his reason for refusal was grounded on the proposition that the matters set forth in the affidavits inhered in the verdict and could not be proved by the jurors themselves. In an unbroken line of decisions this rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach or explain a verdict or on what grounds it was rendered, or to show a mistake in it, or that the jurors misunderstood the charge of the court, or that they mistook the law, or the result of the finding, has obtained on the ground that such matters inhere in the verdict.

Do the matters referred to in the affidavits of the attorneys for defendant inhere in the verdict? If they do, then the trial court was correct in the refusal to permit the calling of the jurors as witnesses. There are numerous de-

cisions of this court wherein it was held under particular sets of facts that the jurors could not be heard to impeach the verdict. In *Iman v. Inkster,* 90 Neb. 704, 134 N. W. 265, which was a case wherein it was urged by affidavit of juror that the jury disregarded evidence and disobeyed instructions, the court said: "The attack so made related to matters inhering in the verdict itself, and the jurors could not impeach it in that manner."

In *Welsh v. State,* 60 Neb. 101, 82 N. W. 368, which was a rape case, the court said: "By affidavits of some of the jurors it appears that while considering their verdict certain of them suggested that the accused should be convicted because Michael Begley had been found guilty, it having been shown that Begley and the defendant both ravished the prosecutrix. The testimony of the jurors in the matter just indicated, is incompetent to impeach their verdict."

In *Hamblin v. State,* 81 Neb. 148, 115 N. W. 850, on the question of what may not be impeached by the affidavits of jurors, the court quoted with approval the following from 2 Thompson, Trials, sec. 2618: "Upon the grounds of public policy, courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; * * * or that they otherwise mistook the law, or the result of their finding."

The case of *Egan v. State,* 97 Neb. 731, 151 N. W. 237, is one where it was sought to compel the foreman of the jury to testify to matters occurring in the jury room. An affidavit of attorney was filed in that case wherein it was set forth in substance that jurors had stated in the jury room that it had been known that the Egan boys had been receiving stolen property and that such statements of jurors were a consideration leading to the verdict of guilty. The court in commenting on the subject said: "The affidavit stated a number of considerations that it is claimed influenced the jury that were not entirely proper, but it does not show that the witness could testify to any state-

ments of facts made by any juror. The nearest approach to this is the allegation that the juror stated that all of the jurors knew that the Egan boys had been receiving stolen property. It does not appear that any juror stated that he knew that it was a fact and so influenced the jurors. Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and as not such matters of misconduct as can be proved by the jurors themselves."

These cases and numerous others contain illustrations of the rule as to what does inhere in the verdict. In the light of these illustrations, we conclude that the matters complained of by appellant are matters which essentially inhered in the verdict of the jury, and therefore the affidavits or testimony of the jurors were not admissible to impeach the verdict.

The remaining question relates to the amount and size of the verdict. The appellant contends that in the light of the evidence $5,000 is excessive. The evidence substantially shows, as to the injuries received by appellee, that as a result of the accident she became dazed as a result of striking her head, suffered bruises and contusions on her lower limbs, she had severe pains in her chest and abdomen, that she was ill for about ten days when she had a miscarriage, that since that time she has had fainting spells, that she has been nervous and has been unable to sleep well, that after the accident she suffered considerable pain. Her physician testified that she was in a semianemic state and would so continue for some time. He did not estimate the time it would take to recover. There is nothing in the evidence to indicate that appellee sustained any permanent injury.

It is recognized that this is a case wherein mental anguish, personal injuries and physical suffering were properly submitted and considered in determining compensatory damages, and that no method of exact computation can be devised, and that the amount of the recovery must generally be left to the sound discretion of the jury. *Flinn*

v. Fredrickson, 89 Neb. 563, 131 N. W. 934. With a recognition of the rule, in the light of the injuries sustained as disclosed by the record, it is our opinion that the judgment is excessive and should be reduced. We, however, do not believe it is so excessive as to indicate that the jury were moved by passion and prejudice.

It is therefore ordered that the appellee shall file a remittitur in this court in the sum and amount of $2,000 within 20 days, and on the filing of such remittitur within the time fixed the judgment will be affirmed for $3,000 with costs. If she fails to file remittitur, then the case will be reversed and remanded for a new trial.

AFFIRMED ON CONDITION.

BEN B. WOOD REALTY COMPANY, APPELLANT, V. BEN BROWN WOOD ET AL., APPPLLEES.

273 N. W. 493

FILED MAY 21, 1937. No. 29940.

1. **Corporations:** BURDEN OF PROOF. A corporation pleading an oral pledge of stock by a stockholder to secure a debt owing by him to the corporation has the burden of proof on that issue.
2. ———: PROOF. To prove an oral pledge of corporate stock to secure a debt owing by a stockholder to the corporation, the evidence must clearly show both parties intended to create a lien of that kind.
3. ———. An oral contract pledging corporate stock to secure a debt owing by a stockholder to the corporation is limited to the particular debt secured.
4. ———. A written assignment of corporate stock to secure a particular debt owing by a stockholder to the corporation does not include a subsequently created debt of pledgor to pledgee, in absence of a contract to that effect.
5. **Set-off.** By statute, "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Comp. St. 1929, sec. 20-816.
6. ———. Mutuality of demands is necessary to a set-off.
7. **Action:** DECLARATORY JUDGMENTS. The statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding.

8. Costs. Courts are authorized by statute to tax as costs a reasonable fee for the services of a guardian *ad litem*.
9. ———. The litigant to whom the fee for services of a guardian *ad litem* shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court.

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

George B. Thummel, for appellant.

Crofoot, Fraser, Connolly & Stryker and *Winthrop B. Lane, contra.*

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

ROSE, J.

This is a suit in equity brought in the corporate name of Ben B. Wood Realty Company, plaintiff, to foreclose alleged liens of that corporation on 249 shares of its capital stock which had been issued to Ben B. Wood, now deceased. E. B. Crofoot, administrator of the estate, is one of the defendants. The indebtedness of Ben B. Wood to plaintiff was evidenced by two unpaid promissory notes, one for $3,062, dated April 1, 1915, and the other for $6,775, dated March 28, 1930. Other defendants are the Merchants National Bank of Omaha, a creditor of Ben B. Wood in the sum of $5,021.62, and Ben Brown Wood and Truman S. Wood, decedent's minor sons, who are represented by Winthrop B. Lane, guardian *ad litem.*

The petition alleges in substance, among other things, that, in 1904, the husband of Daisy B. Wood died, leaving her, in trust as her life estate, the income from his property and dividing the estate in remainder equally among their four children, LeRoy, Margaret Wood Cranmer, Ben B., and Robert; that, in 1911, when the widow was embarrassed by debts, she and her four children, in consideration of the release of her life estate, of provision for her future support and of payment of her debts, dissolved the trust created by her husband and incorporated the Ben B.

Wood Realty Company, plaintiff, to carry out the new arrangement; that the amount of the capital stock was $100,000 and one-fourth of it was issued to each of the four children; that, for corporate purposes, in exchange for nonnegotiable receipts, the stock was deposited with Harry B. Cranmer, husband of the daughter, Margaret, as trustee under what was called a "voting agreement;" that the corporation, plaintiff, lent Ben B. Wood $3,062, as evidenced by his note, and accepted as security therefor a written assignment of his stock receipt; that he had no property except his interest in his stock and was insolvent; that the note and assignment have been kept in plaintiff's possession; that the corporation had devoted both earnings and part of its capital to the support of the widow; that Ben B. Wood, while a corporate officer, wrongfully appropriated to his own use $6,775 belonging to the corporation, gave his note therefor to restore the shortage and secured it by an oral pledge of his stock receipt. The facts are pleaded in detail and the written instruments upon which plaintiff relies are made parts of the petition. The validity of the assignment of the stock receipt and of the oral pledge to plaintiff were put in issue by various pleadings of the parties to the suit.

Upon a trial of the cause, the district court decreed a first lien on Ben B. Wood's interest in 249 shares of stock to secure payment of the 3,062-dollar note and directed plaintiff to apply in satisfaction of the debt sufficient earnings of such stock and any declared dividends thereon. Of this part of the decision no complaint is now made. The decree below, however, denied plaintiff any relief on the alleged oral pledge of the same stock receipt to secure the note for $6,775, and this ruling is challenged as erroneous in an appeal by plaintiff.

There is no material conflict in the evidence. The burden was on plaintiff to prove the oral pledge. A statute giving a corporation a lien on corporate stock to secure a debt of a stockholder has not been pointed out or found. To prove an oral pledge of stock, the evidence must clearly show

both parties intended to create a lien of that kind. 49 C. J. 904. Such a contract of pledge is limited to the particular debt secured. *Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727. A written assignment to secure one debt does not include a subsequently created debt owing by pledgor to pledgee, in absence of a contract to that effect. The debt evidenced by the second note was not in existence or contemplated when the first note was executed and when the written assignment of the stock receipt was made. Possession of the stock and of the assignment of the stock receipt was obtained by plaintiff for the purposes of a trust long before the note for the shortage was given. The substance of the testimony as to what Ben B. Wood said he could do about the shortage and restitution is as follows: Cannot do anything; company already has first note and stock; all that can be done is to give another note; sorry he took the money; intended to pay it back from his share of the estate; only way he could repay it would be through his stock, unless he could make enough to take care of it; owed plaintiff approximately $10,000 and intended to make it good from his stock.

The testimony outlined, as indicating intention, added little or nothing to the promissory note for the shortage, except the contemplated means of payment. Ben B. Wood did not sign a written pledge of stock to secure the shortage or say he intended to leave the stock in possession of the corporation as security—natural steps, if he so intended. His mother was 82 years of age and his intention to pay his shortage with funds arising from liquidation of the corporation upon expiration of the trust in her favor by her death was at least reasonable as an inference of an unexpressed intention to make a contract of pledge in which plaintiff joined. When all the evidence and surrounding circumstances are considered, the intention of Ben B. Wood to pledge his stock to secure his shortage is not clearly shown. Plaintiff did not maintain the burden of proof on this issue and the trial court did not err in so holding.

The appeal presents also the asserted right of plaintiff to set off the shortage of Ben B. Wood against his distributive share of the assets of plaintiff. That corporation has not yet fully executed the trust to support the widow for life and is not in the course of liquidation. The statute provides:

"A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Comp. St. 1929, sec. 20-816.

A rule in this branch of the law has been stated as follows:

"Mutuality of demands is necessary to entitle a defendant to a set-off, and the respective demands must be between the same persons and in the same capacity." *Bank of Crab Orchard v. Myers,* 120 Neb. 84, 231 N. W. 513.

In the present case there is no mutuality of claims. The record does not disclose any present enforceable claim of the estate of Ben B. Wood, deceased, against plaintiff. His stock is impressed with a trust for the support of his mother. There are now no dividends or assets available for a set-off. It follows that the set-off was properly disallowed.

Another issue earnestly presented on appeal is the pleaded right of plaintiff to a declaratory judgment that it is authorized by the contracts of the widow and her four children to use both income and capital for her support during her life. The district court properly declined to rule on this question. Some of the interested parties to these contracts were not made parties to this action and are not before the court. It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding. Comp. St. 1929, sec. 20-21,145; *Southern Nebraska Power Co. v. Village of Deshler,* 130 Neb. 133, 264 N. W. 462; *Smithberger v. Banning,* 130 Neb. 354, 265 N. W. 10; *Arlington Oil Co. v. Hall,* 130 Neb. 674, 266 N. W. 583.

The district court allowed and taxed against plaintiff a

fee of $150 for the services of the guardian *ad litem* and this order is also attacked as erroneous without complaint of the amount. The guardian was appointed by the court as its officer to assert and protect the rights of the minors. His services were necessary and well performed. Plaintiff subjected the minors to the burdens of litigation and most of the relief sought was properly denied. The statute provides:

"It shall be the duty of every attorney to act as the guardian of an infant defendant in any suit pending against him, when appointed for that purpose by an order of the court; he shall prepare himself to make the proper defense, to guard the rights of such defendant, and shall be entitled to such compensation as the court shall deem reasonable." Comp. St. 1929, sec. 7-113.

The litigant to whom the fee for services of a guardian *ad litem* shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court. *Shelby v. Meikle*, 62 Neb. 10, 86 N. W. 939; *Bailey v. Garrison*, 68 Neb. 779, 94 N. W. 990. The circumstances justify the fee as allowed and taxed. An additional fee of $100 will be taxed against plaintiff for services of the guardian *ad litem* in the supreme court. Error prejudicial to plaintiff has not been found in the proceedings and judgment below.

AFFIRMED.

ALFRED L. STECK, APPELLANT, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.
273 N. W. 268

FILED MAY 21, 1937. No. 29971.

1. **Eminent Domain:** DAMAGES. Landowner's claim for damage to his land by reason of cutting off ingress and egress to and from such land, caused by public power and irrigation district condemning and vacating highways leading directly from his land to his principal market, will not be defeated by a previous sale of a part of his tracts to such district for reservoir purposes.

2. ———: ———. Where a public highway, extending from farm to owner's principal market, is vacated, leaving landowner without any outlet in the direction of such market, he suffers a special damage not common to community at large.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Shuman & Overcash, for appellant.

E. H. Evans and *Beeler, Crosby & Baskins, contra.*

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

GOOD, J.

Platte Valley Public Power and Irrigation District (hereinafter called the district) instituted this proceeding in the county court of Lincoln county, to condemn for its use certain highways existing within the area over which the district proposed to construct a reservoir. From the proceedings had in the county court an appeal was taken to the district court. In this action the only question is whether Alfred L. Steck, who owns lands adjacent to the proposed reservoir, sustained damage by reason of the vacation of the highways. In the district court Steck was designated as plaintiff and the district as defendant. After plaintiff had adduced all of his evidence, the court, on motion of the district, directed a verdict in its favor. Plaintiff has appealed.

The record reflects these facts: The district desired to construct a reservoir to hold water for power and irrigation purposes, and acquired nine or ten sections of land in a basin-like area about two miles south of the town of Sutherland in Lincoln county. This area was traversed east and west and north and south by a number of highways. Steck's lands, involved in this controversy, abut on and are immediately south of the proposed reservoir. The proceeding in the county court was brought to condemn the highways and roads that would be within the reservoir proper and to assess damages, if any, to the lands of Steck and one or two other property owners, and also for com-

pensating Lincoln county for the value of the highways condemned.

It appears that the town of Sutherland is the only available market town for Steck, and that the main highway, extending south from Sutherland, runs through the proposed reservoir area and between sections 19 and 20, township 13, range 33, and on the east side of the southeast quarter of section 19 owned by Steck. Steck also owns land in the southeast quarter of section 20 and land in the south half of section 21 in same township and range. Another of the condemned highways ran between sections 20 and 21, and Steck's land in those sections abuts upon this highway. The vacated portions of these highways are north of Steck's land, and leave him no outlet to the north. Steck's means of ingress and egress to and from his land in sections 20 and 21, from the north and in the direction of his market town, is destroyed. He is left with his land abutting upon a dead-end of a highway. With reference to his land in section 19, the highway running along the east side thereof was vacated from the northeast corner of his land, thence north through the reservoir area, so that ingress and egress to and from his land from the north and in the direction of his market town are closed to him, and this land is left abutting upon the dead-end of what was the principal highway. It also appears that in going from Steck's land in section 19 to the town of Sutherland he will necessarily have to travel to the west, around the west side of the reservoir and over a crooked, winding, hilly road, with many abrupt turns, and be required to travel a distance of two or more miles farther in going to market. From his lands in sections 20 and 21, in order to get to market, he must travel to the east and around the east side of the reservoir over a highway that is not comparable to the main highway which he formerly traveled, and he is required to travel two or more miles farther in going to the market town.

A considerable time prior to the institution of this condemnation proceeding, Steck sold and conveyed to the dis-

trict a tract of land, containing 6.67 acres, out of the northwest corner of his land in section 19, and on the same day sold and conveyed to the district 152.56 acres in section 21. It appears from the record that Steck knew that the land was being purchased for a part of the reservoir site, but the injury to his remaining land and the fact that the roads might be subsequently vacated were not taken into consideration, were not discussed, and no allowance was made therefor. It also appears that the land owned by Steck in section 20 was purchased from one Robb in 1935 and some time prior to the institution of the condemnation proceedings; that prior to that time Robb had owned a quarter-section of land and had sold about 61 acres thereof to the district, and Steck later purchased the remaining 99 acres of Robb's quarter-section.

The evidence clearly shows that Steck has suffered damage to his lands by reason of the condemnation and closing of the highways above referred to, and the cause should have been submitted to the jury for determination of the damage, unless some one of the grounds given by the district for direction of a verdict is sufficient to defeat Steck's claim.

One of the district's contentions is that Steck and Robb were compensated for any damage sustained to the remaining portions of their tracts when they sold a part of their land to the district for reservoir purposes. If this contention is sound, we are at a loss to understand why Steck was made a party to the proceeding in the county court for condemnation of the highways. If he had been compensated, there was no occasion for making him a party to that proceeding. In the district's petition it alleged that it had settled with the other landowners whose rights would be affected by the closing of the highways, with the exception of Steck and one or two others, and these were made parties. By the filing of this pleading we think the district conceded that Steck was entitled to make claim for damages. That such is the effect of the pleading, see *Lindsay v. City of Omaha,* 30 Neb. 512, and particularly at page

520, 46 N. W. 627. The evidence, however, clearly shows that any damage that might be sustained by Steck by reason of the closing of the highways was not taken into consideration when he sold a part of his tracts to the district. The subject was not discussed, and the evidence clearly shows that he was not compensated for damages which might be caused subsequently by the vacation of the highways. The district's contention in this respect is without merit.

The district also contends that Steck suffers no damage or injury to his lands other than that suffered by the community in general. If this were true, it would no doubt be a bar to any recovery by Mr. Steck. But the evidence does not sustain this contention. The vacated highways came to and through lands owned by Steck in sections 20 and 21. When the portions of this highway to the north of the remaining part of Steck's land were vacated, it left the land in sections 20 and 21 abutting upon a dead-end of a highway. It effectually prevents ingress and egress to and from his farm from the north. The same is true with reference to his land in section 19. It vacated the highway that ran north from the northeast corner of the land in section 19, and deprives Steck of any outlet to the north and in the direction of his principal market. Ingress and egress to and from the north are prevented by the vacation of that highway. Therein lies the difference between the injury to Steck's land and injury to land of those in the community farther south. The authorities cited by the district in support of its contention are not in point, but the principle involved herein is fully stated in *Jones v. City of Aurora*, 97 Neb. 825, 151 N. W. 958, and in *Lowell v. Buffalo County*, 119 Neb. 776, 230 N. W. 842, same case on second appeal, 123 Neb. 194, 242 N. W. 452.

The district further contends that Steck and Robb, his immediate grantor to Steck's land in section 20, by their deeds are estopped from asserting an injury to the premises conveyed. It may be observed that no claim for damages to the lands that were conveyed to the district by Steck and

by Robb, his predecessor in title in section 20, was made. Steck's claim is only for injury and damage, caused by the vacation of the highways, to the remaining portions of his lands, and not for damage to the lands sold to the district.

The reasons given for the direction of a verdict are insufficient to defeat Steck's claim for damages. The trial court erred in directing a verdict for the district. The judgment of the district court is reversed, and the cause remanded for further proceedings consistent with this opinion.

REVERSED.

HARRY H. THOMAS v. AMY THOMAS.
273 N. W. 483

FILED MAY 21, 1937. No. 30031.

1. **Divorce**: CONTEMPT. Where, in an action for divorce, a husband has been ordered to pay alimony for the support of his wife, and, being of sufficient ability to pay the same, wilfully and contumaciously neglects or refuses to pay, having no reasonable or just grounds for his failure or refusal, such conduct constitutes a civil contempt.
2. ———: ———. The above rule is applicable to the payment of permanent, as well as temporary, alimony.
3. ———: ———. The affidavit or complaint on which the instant case is based, examined, and, for reasons set forth in *Wright v. Wright, ante,* p. 619, 272 N. W. 568, *held* insufficient.

ERROR to the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed and dismissed.*

Paul T. Miller and *Morrow & Morrow,* for plaintiff in error.

Jack L. Raymond, contra.

Heard before ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and HASTINGS and RINE, District Judges.

EBERLY, J.

In this proceeding plaintiff prosecutes error from an

order of the district court for Scotts Bluff county committing him to the county jail of that county for failure to comply with an order of that court directing the payment of alimony.

The record discloses that on May 27, 1935, a decree was entered granting the defendant, Amy Thomas, a divorce on her cross-petition, and awarding her judgment against the plaintiff, Harry H. Thomas, in the sum of $2,400, payable $50 a month, and making said judgment a lien on plaintiff's real estate. On July 9, 1936, there was filed in this cause an affidavit setting forth the entry of the judgment of alimony aforesaid, and the terms thereof, and stating "that nothing has been paid by plaintiff to this defendant during the month of March, 1936; that he has paid the February payment and is delinquent with the March payment, or four months, and will be delinquent for the July 10, 1936, payment prior to the date of hearing on this citation; that plaintiff has ignored the orders of this court entered herein on the 27th day of May, 1935, and on the 14th day of September, 1935, and that plaintiff is an able-bodied man competent to earn the sum of $200 per month."

This constituted the complaint or charge upon which plaintiff was tried on July 13, 1936, after due service upon him of an order to show cause. Hearing was had, at the conclusion of which an order was entered whereby the "court * * * finds that plaintiff is in contempt of court for failure to pay alimony as ordered by this court on the 27th day of May, 1935, and on the 14th day of September, 1935, and that he is now in arrears the sum of $250, being $50 per month for March, April, May, June and July, 1936, and that plaintiff should be confined in the county jail unless he purges himself. It is therefore ordered that plaintiff be given ten days to purge himself of contempt of this court for failure to pay alimony," and to comply with the order of this court, and upon his failure to do so it was ordered that "he be confined to the county jail of Scotts Bluff county, Nebraska, until he purges himself."

No bill of exceptions forms a part of this record, so we

are limited in our consideration of the case to the transcript, as to which, to entitle plaintiff in error to relief, error must affirmatively appear.

The first contention of plaintiff in error is that the record discloses that more than six months have elapsed since the entry of the decree of divorce, and the relation of husband and wife having absolutely terminated, the judgment for alimony may not now be enforced by contempt proceedings. In support of his contention he cites *Leeder v. State,* 55 Neb. 133, 75 N. W. 541, and *Segear v. Segear,* 23 Neb. 306, 36 N. W. 536. It appears needless to discuss the doctrines of these cases. Both were expressly overruled in *Cain v. Miller,* 109 Neb. 441, 191 N. W. 704, and the last-named case was approved in *Jensen v. Jensen,* 119 Neb. 469, 229 N. W. 770. See, also, *Umphenour v. Van Hoosen,* 121 Neb. 870, 236 N. W. 762.

We do not overlook the contention of plaintiff in error that the rule applied in the instant case is proper only when applied to failure to conform to a decree for payment of temporary alimony. In *Maryott v. State,* 124 Neb. 274, 246 N. W. 343, the case of *Cain v. Miller, supra,* is cited with approval, Good, J., saying: "The rule is applicable to the payment of permanent, as well as temporary alimony."

It follows that no relief may be awarded plaintiff in error on this contention. The judgment entered in this case is ample and sufficient foundation for the contempt proceeding.

The next question is: "Was the affidavit of July 9, 1936, sufficient to support a finding and a judgment of contempt?" In *Wright v. Wright, ante,* p. 619, 272 N. W. 568, this court approved the following statement of the rules of law applicable, viz.:

"The failure of the plaintiff in error to file a motion for a new trial in the trial court and obtain a ruling thereon does not however prevent this court from an examination of the record to determine whether the motion and affidavit filed are sufficient to confer jurisdiction on the court to make the order complained of. In a number of early cases

this court has held: 'Proceedings in contempt are in their nature criminal, and strict rules of construction applicable to criminal proceedings are to govern therein.' *Boyd v. State,* 19 Neb. 128, 26 N. W. 925; *Johnson v. Bouton,* 35 Neb. 898, 53 N. W. 995; *O'Chander v. State,* 46 Neb. 10, 64 N. W. 373. 'The affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution of a crime.' *Herdman v. State,* 54 Neb. 626, 74 N. W. 1097. In two recent cases, namely, *Maryott v. State,* 124 Neb. 274, 246 N. W. 343, and *State v. Barlow, ante,* p. 166, 271 N. W. 282, we have differentiated between 'criminal' and 'civil' contempts and held: 'The rules of procedure in proceedings for criminal contempt are inapplicable to proceedings for civil contempt.' The contempt which is attempted to be charged in this proceeding is a 'civil' contempt. 'Where, in a divorce action, a husband has been ordered to pay alimony for the support of his wife and children, and, being of sufficient ability to pay the same, wilfully and contumaciously refuses to pay, having no just or reasonable grounds for his failure or refusal, such conduct constitutes a civil contempt.' *Maryott v. State, supra.*"

In the instant case the facts charged are that plaintiff in error failed to pay as ordered by the court, ignored the court's order, and is an able-bodied man competent to earn the sum of $200 a month. The facts charged in no manner necessitate the inference that the failure to pay is wilful and contumacious. Every fact set forth would be true if, for instance, the plaintiff in error had been confined in the penitentiary serving a life sentence. The affidavit does not aver that it is in the power of plaintiff in error to comply with the order of the court, nor does it set forth that the plaintiff in error has property which he unjustly refused to apply toward the satisfaction of the judgment rendered against him. *Wright v. Wright, ante,* p. 619, 272 N. W. 568; *Hawthorne v. State,* 45 Neb. 871, 64 N. W. 359.

The affidavit in this case being fatally defective, the

order and judgment of the trial court are void and must be set aside, and the action dismissed, but without prejudice to another action.

REVERSED AND DISMISSED.

ETHEL R. FALKINBURG, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.
273 N. W. 478

FILED MAY 21, 1937. No. 29903.

1. Insurance: ACTION ON POLICY: ADMISSION OF EVIDENCE. In an action on a life insurance policy, where the defense is suicide, and the only available evidence is circumstantial, great latitude is allowed in the admission of evidence.
2. ———: ———: ———. In such a case, testimony as to the prior physical and mental health of the insured is relevant and admissible.
3. Witnesses: PRIVILEGED COMMUNICATIONS. A communication by a patient to his physician, necessary for the performance of professional services, is ordinarily privileged by the statute forbidding the disclosure of confidential communications between physician and patient.
4. ———: ———. The object of the statute forbidding the disclosure of a professional communication between patient and physician is not to disqualify the physician as a witness, but to enable the patient to secure medical services without fear of betrayal.
5. ———: ———: WAIVER. The patient may waive the privilege and permit the physician to testify.
6. ———: ———: ———. An applicant for a policy of insurance may as a part of the contract waive the statutory prohibition of his physician to testify concerning confidential communications, and the waiver binds those claiming any interest under the policy.
7. Evidence. The trial court may in its discretion admit as evidence models and diagrams prepared by a witness to illustrate his testimony. Such exhibits depend upon the verity of the supporting testimony.
8. ———. It is not prejudicial error or an abuse of discretion for the trial court to exclude as evidence models and diagrams, where they are used by the witness as a part of his testimony before the jury.

9. ———. It is within the discretion of the trial court to permit evidence of experiments to illustrate matters of testimony, but the discretion should be exercised with equal consideration for the parties.
10. ———: DEATH BY SUICIDE: PRESUMPTION. The presumption against death by suicide prevails when the cause of death is unknown, but disappears when evidence is introduced tending to show the cause of death.
11. Insurance: ACTION ON POLICY: DEFENSE OF SUICIDE: BURDEN OF PROOF. "In an action upon a policy of life insurance, the burden of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the assured died as the result of poison, self-administered with suicidal intent." *Schrader v. Modern Brotherhood of America*, 90 Neb. 683, 134 N. W. 267.
12. Appeal. An instruction, though erroneous, is not prejudicial unless it affects adversely the substantial rights of the appellant.
13. Evidence: RES GESTÆ. Statements of the insured, upon discovery immediately after being shot, relative to the circumstances are admissible as a part of the *res gestæ*.

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

Young & Williams, for appellant.

Brome & Thomas and *Harold A. Moore, contra.*

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

DAY, J.

The beneficiary of a life insurance policy recovered a judgment. The defense was suicide. The policy was issued January 11, 1934, and the insured died February 28, 1935. The policy provided: "If within two years from the date hereof the insured, whether sane or insane, should die by suicide, the liability of the company shall not exceed the amount of the premiums paid on this policy." The sole issue is whether the gunshot wound which caused death was intentionally or accidentally inflicted. The insured was alone in a bedroom of his home when shot.

The trial court excluded the testimony of two physicians who examined the insured prior to the time when he was

shot. The purpose of this testimony was to show his physical and mental condition on August 3, October 26, and December 10, 1934. The insurance company offered to prove by one, a specialist in mental and nervous diseases, that there were indications of brain tumor and mental deterioration. The other specialist found on December 10, 1934, that the insured was apprehensive, worried, easily excited, and nervous; that he was suffering from a manic-depressive psychosis, a form of melancholia, accompanied by an agitated mental state in which the patient worries much, exhibits fear and loses his sense of proportion; and that the condition was permanent and progressive.

The trial court was of the opinion that under the terms of the policy the mental condition of the insured was not an issue. That conclusion was correct in that if the insured died by suicide recovery could not be had regardless of his mental condition. But the trial court overlooked another purpose for which such testimony was admissible. There were no eyewitnesses to the shooting, so the evidence was entirely circumstantial. The insured had been a Pullman conductor for 24 years. In July, 1934, he was unable to continue his work on account of illness described as a nervous, worn-out condition. He made a few trips thereafter, but did not work after October 18, 1934. During the forenoon of February 20, 1935, he washed windows and helped his wife clean the house until noon. He was then to go to the grocery store for food. While his wife was in the bathroom, he went into a bedroom where he was shot in the region of the heart by a bullet from a revolver which he kept in a chiffonier in that room.

There is no direct evidence supporting the defendant's allegation of suicide. In such a case a noted authority states the rule thus: "Where circumstantial evidence is the only evidence available to a party, and the action must be determined upon the relative strength of probabilities and inferences, great latitude is allowed the parties in the adduction and admission of evidence." 2 Jones, Commentaries on Evidence (2d ed.) sec. 604. The more the jury

can know of the surrounding facts and circumstances, the better their judgment is likely to be. The physical and mental health of the insured is a surrounding circumstance which is relevant in this case, and the testimony on this matter was unduly restricted.

In an action on a life insurance policy which excludes liability for death by suicide, where the allegation of suicide is supported solely by circumstantial evidence, testimony as to the prior physical and mental health of the insured is relevant and admissible. The reason of the rule here announced is supported by *Bowers v. Pixley,* 111 Neb. 698, 197 N. W. 410. In that case it was held that, where there is a conflict in the evidence, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of a fact in issue is relevant evidence. *Shepherd v. Lincoln Traction Co.,* 79 Neb. 834, 113 N. W. 627, is cited and followed. The evidence is not excluded by any rule or principle of law and need not further engage our attention.

But the trial court was of the opinion that the testimony of the two physicians was privileged and therefore not admissible. A communication by a patient to his physician necessary for the performance of professional services is ordinarily privileged by the statute forbidding the disclosure of confidential communications between physician and patient. Comp. St. 1929, sec. 20-1206; *Nichols v. State,* 109 Neb. 335, 191 N. W. 333; *Friesen v. Reimer,* 124 Neb. 620, 247 N. W. 561. But the general rule is not applicable to this case for that the insured waived the privilege by a provision of the contract. The provision is: "I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information thereby acquired, and I hereby expressly authorize such physician or other person to make such disclosures."

Does a waiver by an applicant for an insurance policy remove the disqualification of a physician to testify? It is stated by one well-known authority: "The object of statutes making communications between physician and patient privileged is not absolutely to disqualify the physician from testifying, but to enable the patient to secure medical aid without betrayal of confidence. The patient may therefore waive objection, and permit the physician to testify. In other words, the privilege is the privilege of the patient, and not of the physician; and by the great weight of authority, if the patient assents, the court will compel the physician to answer." 28 R. C. L. 542, sec. 132. A competent annotator states: "Practically all the authorities—with exception of those from two jurisdictions, which are affected by the particular provisions of the statute on the point—recognize that the waiver by an applicant for an insurance policy, either in his application or in the policy itself, of the disqualification of his physician or surgeon to testify concerning confidential communications between them, is valid and binding upon those claiming any interest in the policy." 54 A. L. R. 412. A comprehensive annotation cites and discusses many cases.

The appellee argues that the waiver was not a general one and applied only to the time of the issuance of the policy and not to subsequent examination by and consultation with physicians. *Pride v. Interstate Business Men's Accident Ass'n*, 207 Ia. 167, 216 N. W. 62, is cited to support this contention. The cited case held that a patient could waive his privilege by contract in advance, but that the waiver made by an insured did not apply to future communications. The insurance company in that case called three doctors who were called to attend the insured at the time of his injury and offered to prove by each certain statements made by the insured on the night of the injury concerning the method of the injury, tending to show that it was self-inflicted. A comparison of the waiver set out in the opinion with the one herein discloses that the language is different. The language here is a waiver of

provisions of law forbidding any physician "who may hereafter attend or examine me from disclosing any knowledge or information thereby acquired." The cited case, therefore, is not controlling.

A contractual waiver of the statutory prohibition of the testimony of a physician has been considered twice by this court. In *Bryant v. Modern Woodmen of America*, 86 Neb. 372, 125 N. W. 621, the court held that the contractual waiver was valid, although the question related to the health of the insured at the time of the application. In another case, *Western Travelers Accident Ass'n v. Munson*, 73 Neb. 858, 103 N. W. 688, this court held that a patient could waive the privilege and that "It is not necessary that such waiver be made at the time of the trial, it may be included in and made a part of the contract sought to be enforced in the action in which such testimony is offered." The physician testified in that case as to the cause of death, which information came to him in his professional capacity. The contract was held to waive any prohibition against such a disclosure.

The citation of the many cases would unduly prolong this opinion. The circumstances in many differ from those in the case at bar. It should suffice to state that the waiver of the statutory prohibition in this case was so broad and unrestricted that the disclosure was proper, and the exclusion of the testimony was erroneous and prejudicial to the defendant.

Certain assignments of error relate to the testimony of ballistic experts. The court excluded the testimony of such an expert that, after scraping off old corrosion and exposing bright, fresh metal, corrosion will be uniform. This evidence was offered as tending to prove that the fired shell causing death and a misfired shell in the gun were indented the same day. This was not prejudicial since the expert testified that he could not say that they were fired the same day and that there might be as much as four months' variation.

The court also refused to admit two exhibits to illustrate

the testimony of an expert. One was a model of the gun which killed the insured, intended to demonstrate the mechanism and working of the gun. The other exhibit was a chart prepared by a witness showing the mechanical construction of the same gun. Models and diagrams made for the purpose of speaking for the witness depend upon the verity of the testimony behind them.

The rule is stated in 2 Wigmore, Evidence (2d ed.) 90, as follows: "Whenever such a document is offered as proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier." This text quotes from *State v. Knight*, 43 Me. 11, 132, as follows: "It would be very difficult for an expert of the most accurate and extensive observation, to exhibit in language with precision, so as to be understood, those delicate appearances which are appreciable only by the sense of vision. Nothing short of an exact representation to the sight can give with certainty, a perfectly correct idea to the mind."

The model and diagram illustrate the testimony of the witnesses in this case and serve as a nonverbal method of expressing the testimony of the witness. It is proper and customary for the trial court in its discretion to admit such exhibits in evidence. "It would be folly," states 2 Wigmore, Evidence (2d ed.) 89, "to deny ourselves on the witness-stand those effective media of communication commonly employed at other times as a superior substitute for words." See, also, 22 C. J. 768, and 3 Jones, Commentaries on Evidence (2d ed.) 2575. There is no apparent reason for the exclusion of the exhibits.

But in this particular case it was not an abuse of discretion for the trial judge to exclude such exhibits. It was not prejudicial to the rights of the defendant because the witnesses testified in detail as to the mechanism and operation of the gun in question and illustrated such testimony by frequent reference to the exhibits in the presence of the jury.

There was a fired shell and a misfired shell in the death

gun which was fully loaded at the time. It was the contention of the defendant that the misfired shell was the result of an attempted shot at the same time as the fired shell was discharged. Two experts testified as to experiments with the death gun, each firing ten test shells for the purpose of testifying as to the method of discharge—whether the gun was fired single action by cocking or double action by pulling the trigger.

As a part of the testimony of the defendant's expert, the test shells were introduced in evidence. The trial court excluded these exhibits. In *Lillie v. State,* 72 Neb. 228, 100 N. W. 316, it was held: "Under some circumstances it is in the discretion of the trial court to permit evidence of experiments to illustrate transactions that have been testified to; and, under the circumstances in this case, the court did not abuse its discretion in permitting such evidence." For a discussion of experimental evidence, see annotation in 8 A. L. R. 18.

In the case at bar, the evidence as to the experiments was admitted by the trial court. The test shells were used as illustrative of the testimony of the expert, but when they were offered in evidence they were excluded. These exhibits were not unlike the models and diagrams heretofore discussed in this opinion. It is clearly within the discretion of the trial judge to receive in evidence test shells used in experimentation relevant to some issue in the case. Ordinarily, the discretion of the trial judge in excluding exhibits of tests made by an expert will not be interfered with by this court on appeal unless there is an abuse of such discretion.

However, in this case the ballistic expert testifying for the plaintiff made similar experiments and testified as to such experiments as evidence upon the identical issue; that is, the method of firing the gun. In fairness to the trial judge, it appears from the record that he was mistakenly of the notion that the test shells of the defendant's expert had been introduced as evidence upon a different issue. While it is within the discretion of the trial

judge to exclude such exhibits, it would seem as a matter of fair play to be an abuse of discretion on the part of the trial judge to receive such exhibits as evidence for one party and exclude like exhibits for the other party. It would seem that the trial judge might have excluded or received both sets of test shells. Therefore, in the condition of the record, the trial court erred in excluding as exhibits the test shells fired by the expert ballistic witness who testified for the defendant.

The trial court instructed the jury: "You are instructed that the law presumes that the insured did not intentionally take his own life, and this presumption obtains until you find from a preponderance of all the evidence that the insured Orville G. Falkinburg did take his own life."

That part of the instruction—"and this presumption obtains until you find from a preponderance of all the evidence that the insured * * * did take his own life"—is criticized by the appellant. There may be some inaccuracy of expression in the instruction as a scientific statement of the law. However, an academic discussion of the law of presumptions and their effect is not required by the exigencies of this case. It would seem better for the purpose of this case to use our former opinions as yardsticks to measure the accuracy of the rule stated in the instruction. In *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, 168 N. W. 596, it was held: "The presumption against death by suicide is *prima facie* only and rebuttable. It prevails when the cause of death is unknown. It does not prevail as a presumption in the presence of facts bearing upon the question whether death is intentional or accidental." This follows the general rule that a presumption disappears in the presence of evidence. In the last cited opinion the rule is further elucidated as follows: "When evidence is adduced which is contrary to such presumption, or the presumption is met by conflicting presumptions, it disappears, although the fact upon which it rests may still remain, proper to be considered in arriving at a conclusion." Considered with these authoritative statements of the law, the

language of the instruction appears to be inaccurate. But was the instruction prejudicial?

The law in Nebraska is: "In an action upon a policy of life insurance, the burden of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the assured died as the result of poison, self-administered with suicidal intent." *Schrader v. Modern Brotherhood of America,* 90 Neb. 683, 134 N. W. 267.

While it may be inaccurate to say that the presumption against suicide obtains until you find from a preponderance of all the evidence that the insured did take his own life, nevertheless the defendant could not prevail in the case until it established by a preponderance of the evidence that the insured died by suicide. Certainly, when testimony is offered to rebut the presumption that death did not result from suicide, the presumption disappears, and the case is then to be determined upon the evidence. But before the defendant can prevail, it must establish by a preponderance of the evidence that death resulted from suicide. The instruction did not increase the quantum of proof required to establish the defense. The instruction is criticized and ought not to be given by trial judges in such form, but it is not prejudicial in this case. No judgment will be reversed by the supreme court on account of an error which does not affect a substantial right of the appellant. Comp. St. 1929, sec. 20-853.

Another assignment of error which is briefly considered, since this case must be remanded for a new trial, relates to the testimony as to the statement of the insured that the "gun went off" and that "it was an accident." These conversations with the insured took place within a few minutes of the time the shot was fired. The insured was wounded in such a way that he died eight days later. The witness who testified to this statement was a neighbor called immediately by the wife. Statements of the insured, immediately following discovery after being shot, relative to circumstances are admissible as a part of the *res gestæ. Ridenour v. Lewis,* 121 Neb. 823, 238 N. W. 745; *Roh v. Opocensky,* 126 Neb. 518, 253 N. W. 680.

The judgment is reversed for the prejudicial errors occurring at the trial and the cause is remanded.

REVERSED.

WILLIAM BARTELS ET AL., APPELLANTS, V. MINNIE SEEFUS ET AL., APPELLEES.

273 N. W. 485

FILED MAY 21, 1937. No. 30037.

1. **Homestead.** Where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still claim the benefit of the homestead laws.
2. ———: DESCENT. During the life of the owner of the fee of a homestead the exempt character of the property depends upon its occupancy as a homestead; but, upon the death of the fee-holding spouse, a new title is created which vests immediately in the survivor for life, individually and unconditionally.
3. **Partition.** Under the provisions of sections 20-2170, 20-2190, and 20-2193, Comp. St. 1929, where there is an estate for life vested in a third person in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate.
4. **Mortgages:** RELEASE OF HOMESTEAD RIGHTS. A provision in a mortgage secured by the homestead of the mortgagor, releasing and waiving all homestead rights in the property, is a release and waiver available only to the mortgagee in the foreclosure of his mortgage.
5. **Life Estates.** Ordinarily, a life tenant, who pays off a mortgage on the fee in order to preserve the estate, is entitled to reimbursement from the remaindermen for the amount paid for them, less such sum as will equal the present value of the annual instalments of interest he would have paid during his life if the encumbrance had remained so long in existence, with lawful interest on the residue from the date of payment.
6. ———. Under such circumstances, a life tenant has a lien against the interest of the remaindermen for the amount thus found to be due which he may foreclose in a court of equity, provided the payment of the mortgage was not made necessary by any default of his own.

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

Joseph E. Strawn and *Hugh A. Myers,* for appellants.

Charles W. Haller, contra.

Heard before ROSE, GOOD, EBERLY, DAY and CARTER, JJ., and HASTINGS and RINE, District Judges.

CARTER, J.

This is a suit brought by appellants for the partition of an 80-acre tract of land in Douglas county and for an accounting of the rents and profits of the property. Otto Timmermann, one of the appellees, answered and claimed that he had a life estate in the property for the reason that the property had been the homestead of his wife prior to her death, that the property was not subject to partition under the law, and asked the court that he be subrogated to the rights of a mortgagee of the property on a mortgage which he had paid off and on which the appellants and other owners of the remainder interest had failed to contribute. The trial court denied a partition of the premises, subrogated the appellee, Otto Timmermann, to the rights of the holder of the mortgage and entered a foreclosure decree for the amount due him. From this order, appellants brought the case to this court for review.

The record discloses that on March 1, 1915, Otto Timmermann and Mary Timmermann, his wife, purchased the property in question, each owning one-half and taking the title in both their names. In order to raise the necessary funds to pay for it, they borrowed $4,000 from George Schram and gave him a mortgage on the property. They lived upon the land until July 28, 1916, at which time Mary Timmermann died without issue. She left as her heirs at law two brothers and five sisters who now claim an interest in the property and ask that it be partitioned.

The evidence clearly shows that the property in question was the homestead of Otto and Mary Timmermann. They purchased the land and moved upon it with the expressed intention of making it their home. Neither of them owned any other real estate during the time they occupied the land. In *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884,

we said: "The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such." The trial court was clearly right in decreeing the homestead character of the property.

Under the statutes of this state, Otto Timmermann was entitled to take one-half of Mary Timmermann's interest in the property by virtue of having been her husband. Comp. St. 1929, sec. 30-101. In addition thereto, he was entitled to a life estate in the other half of the property herein involved by virtue of its homestead character. Comp. St. 1929, sec. 40-117. Otto Timmermann therefore owned the fee title to three-fourths of the property and a life estate in the remaining one-fourth. The heirs of Mary Timmermann were the owners of an undivided one-fourth interest, subject to the life estate of Otto Timmermann.

Appellants contend that Otto Timmermann removed from the state of Nebraska after the death of his wife and that this would affect his interests in the property. Appellants overlook the fact that the life interest of Otto Timmermann in the real estate of his deceased wife, due to its homestead character, was a fixed estate from the date of his wife's death. In *Shearon v. Goff*, 95 Neb. 417, 145 N. W. 855, we said: "During the life of the owner of the fee of a homestead the exempt character of the property depends upon its occupancy as a homestead; but upon the death of the fee-holding spouse a new title is created which vests, *eo instante*, in the survivor for life, individually and unconditionally, free from the right of the children of either spouse to a division of the income therefrom." From the date of his wife's death, Otto Timmermann was the absolute owner of a life estate in the undivided one-fourth interest hereinbefore referred to and it would remain unaffected by his subsequent removal from the state. *Cooley v. Jansen*, 54 Neb. 33, 74 N. W. 391.

The record discloses that Otto Timmermann, the owner

of the life estate, objected to and resisted the suit to partition the property. The trial court denied appellants the right to partition the property. This is in accord with the previous holdings of this court. In *Weddingfeld v. Weddingfeld,* 109 Neb. 729, 192 N. W. 227, this court, in construing the Nebraska statutes on the subject, sections 20-2170, 20-2190, 20-2193, Comp. St. 1929, held that, where there is an outstanding estate for life vested in a third person in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate. As to whether the trial court rightfully denied a partition of the premises, this case is controlling.

Subsequent to the death of Mary Timmermann, Otto Timmermann paid off the $4,000 mortgage that had existed as a lien against the whole property. Otto Timmermann now claims the right to be subrogated to the rights of the mortgagee for the purpose of enforcing contribution from the owners of the remainder interest in the undivided one-fourth share that went to the heirs of Mary Timmermann. Appellants concede that Otto Timmermann is entitled to his claimed right of subrogation, but contend that he is estopped by the provisions of the mortgage from claiming a homestead interest and the life estate springing from it. The $4,000 mortgage executed and delivered by Otto and Mary Timmermann on March 1, 1915, contained the following clause: "Together with all rights hereunto pertaining, and hereby release and waive all homestead and other statutory rights, covenanting that said premises are free from encumbrance, and that said mortgagors have a good title and a right to sell and convey the same and will warrant and defend the title against the claims of all persons." Appellants contend that the mortgagee, by the inclusion of this clause, held all the homestead rights in the property by conveyance. To this we cannot agree. The clause is nothing more than a waiver of any defense growing out of the homestead character of the property in case a foreclosure of the mortgage became necessary. There

never was a foreclosure and sale of the property under the mortgage to the mortgagee; therefore, the mortgagee never obtained any interest in the property other than that of lienor. The mortgage lien having been extinguished by payment, the mortgagee had no interest in the property thereafter. The homestead rights of Otto Timmermann were in no way affected by these transactions.

Appellants further contend that the claiming of a right of subrogation by Otto Timmermann for the purpose of enforcing contribution by the remaindermen places him in the position of a mortgagee in possession, which would require an accounting of the rents and profits. Otto Timmermann at all times after the death of Mary Timmermann was the absolute owner of the life estate, not by virtue of the mortgage, but under the statutes providing for the assignment and distribution of homestead property in this state. This being true, the homestead interest of Otto Timmermann remains unaffected by his claim to a right of subrogation. He, being at all times since the death of Mary Timmermann the absolute owner of the life estate, is not required to account for the rents and profits accruing since that time.

As we have heretofore said, the lands involved in this action were encumbered by a mortgage of $4,000 at the time of the death of Mary Timmermann. The duty of paying the interest upon that mortgage as it falls due is upon the life tenant. The duty of paying the principal amount of the mortgage is upon the owners of the fee title as of the date of the termination of the life estate. There can be no question that the life tenant can pay off the mortgage and demand contribution from the remaindermen where payment is necessary to protect his life estate. Where payment has been made by the owner of the life estate, such life tenant is entitled to be reimbursed by the remaindermen in the amount paid in their behalf, less such sum as will equal the present value of the annual instalments of interest he would have paid during his life if the mortgage had remained in existence for that period, with interest at

the legal rate on the residue from the date of payment. *Tindall v. Peterson,* 71 Neb. 160, 166, 98 N. W. 688, 99 N. W. 659.

Where the owners of the remainder interest fail to pay the amount owing to the life tenant after the life tenant has been compelled to pay off an existing mortgage to protect his interest in the property, the life tenant will be subrogated to the lien of the mortgage against the remainder interest to the extent of the amount due him, which he may foreclose, provided the payment of the mortgage was not made necessary by any default of his own. See *Downing v. Hartshorn,* 69 Neb. 364, 95 N. W. 801. In the case at bar, the mortgage was given on March 1, 1915, and it became due on March 1, 1920. Otto Timmermann paid the mortgage on March 1, 1920. It appearing that the mortgage was paid off by the life tenant at a time when it was due, and it further appearing that its payment was not made necessary by any default of the life tenant, a court of equity may properly grant a foreclosure of the lien.

The trial court denied a partition of the property, permitted the life tenant to be subrogated to the rights of the mortgagee in the mortgage that he paid off for the purpose of enforcing contribution from the remaindermen, determined the amount due in accordance with the rule hereinbefore set out in this opinion and granted a decree of foreclosure of the same against the interest of the owners of the remainder interest. In all this the trial court acted within well-established principles of law of this jurisdiction. The judgment of the trial court is correct and is

AFFIRMED.

L. P. LARSON REAL PROPERTY COMPANY, APPELLANT, V. FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, ET AL., APPELLEES.

273 N. W. 500

FILED MAY 26, 1937. No. 29962.

Estoppel. Where one in the course of negotiations and transactions respecting settlement of a mortgage debt and conveyance of land in satisfaction thereof becomes possessed of full information as to facts theretofore in controversy and he thereupon, without any further representation or influence by the adverse party, elects to and does proceed to close the transaction and deliver, and accept delivery of, final documents, for that purpose, he is thereby precluded from successfully maintaining, approximately a year later, an action to reform or set aside the conveyance as to part of the property originally involved in the controversy.

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

Robins & Yost, for appellant.

John Jacobson and *Hall, Cline & Williams, contra.*

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

BLACKLEDGE, District Judge.

This is an appeal from the district court for Dodge county and these facts are material to an understanding of the situation upon which the case must be determined.

The plaintiff here designated a company is really L. P. Larson who owns it and uses this style as a convenience in conducting his business. The First Trust Company of Lincoln is successor in interest to the Lincoln Trust Company which had become owner by purchase from Herman Diers, mortgagee, of the mortgage which is the subject of consideration. The mortgage was originally executed in the sum of $21,000, upon which $6,000 had been paid, and at the time of the transactions here under consideration the principal debt stood at $15,000. All the negotiations respecting the final settlement and the conveyance here

under attack were had between the plaintiff Larson and Mr. Robins, his attorney, on one side, and the First Trust Company, on the other.

There are some facts, however, respecting the transactions prior to the beginning of these negotiations which should be understood. The mortgage in question covered a tract of farm land of approximately 289 acres, and in addition there were certain lots numbered 11 to 16, inclusive, in block 5, in the village of Crowell, which were used as part of the farm property and upon which were situated most, if not all, of the farm buildings. It is in reference to these lots that the controversy in this case arises. There is conflict of testimony as to whether it was originally intended in the execution of the mortgage to include the lots in it. In drafting the mortgage the description of the lots had been inserted both in the description which follows the granting clause and in the habendum clause farther on in the instrument. In the original mortgage said description following the granting clause had been striken through with pen and ink marks both vertically and horizontally through the clause, but leaving it so that it could easily be read. In the recording of the mortgage that part so stricken was not recorded. At the trial Mr. Larson testified that it had not been the intention to include the lots in the mortgage. Mr. Diers, mortgagee, denied this and said that the mortgage was not deleted with his knowledge or consent. The trial court found, however, that Mr. Diers recorded the mortgage in the same condition that it is today; that is, with the description of the lots marked out in one place and left in the other.

In this situation negotiations between plaintiff and defendant respecting a final adjustment of the obligation, which Mr. Larson found himself unable to pay, began in December, 1932, when defendant wrote Mr. Larson calling his attention to the then maturity date of the loan which was March 1, 1933, and inquiring as to payment. To this Mr. Larson replied by letter about a month later and made a trip to Lincoln where there were some negotiations with

the defendant. Thereafter all negotiations on the part of the plaintiff were carried on by his attorney, Mr. Robins. There were various propositions for settlement, including the making of a deed, which continued intermittently until January, 1934. The plaintiff by Mr. Robins continued to insist that the lots were not included in the mortgage and the defendant company replying rather diplomatically, we believe, not directly stating that the lots were included in the mortgage, but insisting upon dealing on that basis, and stating that no property had been released from the mortgage, that they had taken the description in the documents that appear in the course of settlement negotiations from the abstract itself and that they only expected a deed to the property covered by the mortgage, and insisting on settlement according to its terms or that foreclosure would be instituted, and finally, in March, 1934, that it would not consent that the Larson company reserve the lots. At about this time Mr. Larson went personally and examined the record of the mortgage. He says he started reading it from the bottom up and coming to the place wherein the description of the lots was inserted looked no further, but closed the book and left the office, going to that of Mr. Robins whom he told what he had discovered in the records. Mr. Robins, accepting the report of Mr. Larson, then communicated with the defendant offering to include the lots in the deed. April 19, 1934, the trust company wrote to Mr. Robins inclosing a statement of the amount due, a deed and an option to repurchase. April 23 Mr. Robins sent the deed to the defendant. The original papers were not returned until July 17, 1934, when they were returned to Mr. Robins, who at once wrote the defendant calling attention to the condition of the mortgage in having the description of the lots striken therefrom and referring, however, to the additional description later on in the mortgage. This was the first time that Mr. Larson and his attorney had definite conclusive information as to the actual condition of the mortgage. There were among the documents to be executed a repurchase option agreement to be exe-

cuted by the company and an instrument designated as an estoppel affidavit having reference to the completion of the transaction, delivery of possession, etc., to be executed by Mr. Larson.

This was the crucial point so far as concerns the plaintiff's acts in the transaction of his business. He then knew as fully as he could know the facts and conditions respecting the mortgage and the deed in reference to the matter of including the lots in question, and it was clearly incumbent upon him to either complete the transactions as they were then proceeding or to elect to rescind the same and restore the parties to their former position. Instead of taking this last-mentioned course, Mr. Robins in his letter of July 18 called attention that the repurchase option agreement had not been sent and stated that when it was sent the Larson company would make the affidavit required. July 20, 1934, the defendant wrote to Mr. Robins sending the option agreement and asking that the estoppel affidavit be forwarded, which was done July 30, 1934. The matters stood in this situation until May 13, 1935, when the instant case was commenced asking for a reformation of the deed and the return to the plaintiff of the five lots in dispute.

Consideration of these facts which are disclosed by the record to be without dispute can lead but to one conclusion, which is, that however good a case plaintiff had up to July 17, 1934, when upon receipt of the original mortgage and the release thereof and being in full possession of all the facts, concerning which the defendant owed him no further duty, he elected to retain the documents, receive the repurchase option agreement and execute the estoppel affidavit, all of which was done, and he rested upon that conclusion of the negotiations until in May, 1935, he thereby became finally concluded as to the whole matter and as to the prosecution of this action.

The judgment and decree of the district court was right and it is

AFFIRMED.

JOHN T. BURTON, ADMINISTRATOR, APPELLEE, V. ROSS DEFENBAUGH, EXECUTOR, ET AL., APPELLANTS.
273 N. W. 489

FILED MAY 26, 1937. No. 29969.

1. Wills: CONSTRUCTION. In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will.
2. ———: ———. The content of related clauses in a will is of more importance in the matter of construction than the relative position of different clauses in the instrument.
3. ———: LEGACIES: PAYMENT. A legacy will ordinarily be regarded as payable primarily from personal property; but where that is insufficient, and in the absence of language in the will indicating a deliberate intent to exclude the real estate from such liability, the legacy will be chargeable against the real estate.
4. Statute of limitations *held* not available as a defense herein.

APPEAL from the district court for Greeley county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Davis & Vogeltanz, for appellants.

Lanigan & Lanigan, contra.

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

BLACKLEDGE, District Judge.

This is an appeal from the district court for Greeley county. The following are material facts disclosed by the record:

John Burton died in Livingston county, Illinois, on January 14, 1921, leaving a last will and testament which was duly probated in the county court there and Ross Defenbaugh was appointed executor thereof. At the time of his death testator was the owner of real estate in Greeley county, Nebraska, which was occupied and farmed by his son, John Loren Burton. Ancillary proceedings were had in the county court of Greeley county, Nebraska, and on April 7, 1921, a duly authenticated copy of the last will

and testament of John Burton, deceased, was admitted to probate in the county court of Greeley county, and John Loren Burton appointed administrator with the will annexed. Said John Loren Burton with the knowledge and consent of his father, John Burton, had made valuable improvements upon the real estate situated in Greeley county.

The last will and testament of John Burton, deceased, provided in the first paragraph for the payment of debts and funeral expenses. In the second was given to his wife a life estate in all his property. She, however, died before the testator. The third and fourth paragraphs of the will are as follows:

"Third. After the death of my said wife, Elizabeth Burton, I give, devise and bequeath to Ross Defenbaugh as executor of this my last Will and Testament, all the rest, residue and remainder of my estate, real, personal or mixed, of every kind, character, and description and whereever situated, which above mentioned real estate includes 240 acres of land more or less in Greeley county, Nebraska; 160 acres of land more or less in Box Butte county, Nebraska; 6 acres of land more or less in Livingston county, Illinois, and 50 acres of land more or less in La Salle county, Illinois; in trust, nevertheless, for the following uses and purposes: I direct that my said executor shall after one year from the date of the death of my said wife, Elizabeth Burton, convert into money, all of my real estate so devised to my said executor by this clause of my will; and I hereby authorize, empower and direct said executor to sell and convey all of said real estate in his own name as executor and without any order of court, at either public or private sale, at such time or times and on such terms and for such price or prices as he may deem for the best interest of my estate. And I further direct that the proceeds of such sale or sales of said real estate and all my personal estate shall be equally divided among my six children or their heirs as follows: John Loren Burton, Matilda Melody, Mary Pope, Susan Defenbaugh, the children of my deceased daughter, Dora Evans, and the children of my deceased daughter,

Martha Hopwood; it being my intent that after the death of my wife then all of my estate both real and personal shall be sold by my executor and the proceeds divided equally among my six children in equal shares, share and share alike, the heirs of any of my children taking the deceased parent's share. I further direct that my said executor shall distribute said proceeds as soon as possible after said sale or sales of real estate to my said children and to those of my grandchildren who have attained their respective majorities but that he shall retain as such executor the respective shares of my grandchildren who are minors until they become of legal age and as soon as each grandchild arrives at legal age my said executor shall pay to such grandchild his or her respective share and take receipt therefor and deposit same in the probate court and that said executor shall keep the money belonging to such minor grandchild safely at interest until same is distributed as hereinabove provided. I further direct that my said executor shall not be required to give bond for the proceeds of such sale or sales of real estate; but that my executor shall, as soon as may be after said sale, make report of same to the probate court wherein this will may be probated, stating said amount of money received by him and distributed to my six children or their heirs hereinabove mentioned under this clause of my will.

"Fourth. I hereby give and bequeath to my said son John Loren Burton any and all improvements he may have made on my land in Greeley county, Nebraska, where he resides, or the value of such improvements, in addition to his lawful share under this will."

The remaining two paragraphs provide for the appointment of an executor.

During the course of probate proceedings in the county court of Greeley county, a stipulation was entered into between John Loren Burton and Ross Defenbaugh in their several capacities which provided that it was not practicable or for the best interest of the estate to remove such improvements from the Greeley county land and fixing the

value thereof at $2,500 to be allowed as a claim and become a first lien on said land and paid from the proceeds thereof when sold by the executor. The stipulation and claim were duly filed and allowed in regular course without objection by any one at the time or, so far as appears, until in the present case. The final report of John Loren Burton as administrator aforesaid was regularly filed and approved in the county court of Greeley county and that court in its final decree September 22, 1921, recognized the said item of $2,500 and provided that a lien in that sum should be imposed upon the land situated in Greeley county in favor of John Loren Burton.

The property stood in this situation, the Greeley county land being occupied and farmed by John Loren Burton until he died in October, 1930. Thereafter the appellee herein, John T. Burton, as administrator of the estate of said John Loren Burton, on May 4, 1934, commenced this action in the district court for Greeley county for the purpose of determining the rights of the parties and securing definite action in reference to the payment of said $2,500 which he claimed as a lien against the premises, and such proceedings were had therein that in May, 1936, that court entered a decree determining that the proceedings had in county court constituted an ascertainment and determination of the value of said improvements which was fixed at $2,500, to the benefit of which under said proceedings and the provisions of the will said John Loren Burton was entitled, and constituted a valid lien upon the proceeds of the sale of the trust property devised to Ross Defenbaugh, executor, etc., in trust, and that the same should be paid out of the proceeds of the sale of the trust property prior to any division or distribution of any of said proceeds under paragraph three of the will. The court further found said Ross Defenbaugh guilty of negligence and a breach of his trust in neglecting and refusing to carry into effect the terms and conditions of his trust as provided in the will, that an unreasonable length of time had elapsed within which he should have done so, and directed that he perform

his trust and sell and convert into money the property devised to him in trust by the will within 90 days from the entry of the decree, and that he pay out of the proceeds of the sale of the trust property, first, the costs of this action, and, secondly, the said sum of $2,500 with interest from the date of the decree.

The contention in this court of the defendants who appeal may be summarized thus: First, that the will did not by its terms constitute, or permit the making of, the claim for the value of the improvements a lien upon the real estate, and that such purpose was not accomplished by the stipulation and proceedings had in the county court; second, that any right of action by the plaintiff to that end was barred by the statute of limitations.

Frequent reference is made to the case of *Klug v. Seegabarth,* 98 Neb. 272, 152 N. W. 385, and to *In re Estate of Strolberg,* 106 Neb. 173, 183 N. W. 97. The argument is to the effect that, because the provision respecting improvements follows the one in which general disposition is made of the property, it cannot be construed as having any effect toward making a sum representing the value of the improvements a lien upon the property. Unless the composition of the will itself indicates that importance should be given to the particular location of a clause in the will, we do not see that such location is entitled to any particular consideration. The thing that is important is the intention and purpose of the testator, and it has been frequently held by this court that it will, so far as possible, endeavor to place itself in the situation of the testator in construing a will and endeavor to carry out, so far as lawful and possible, his intent; that, as has often been said, so far as such intention can be ascertained "within the four corners of the will" the court will endeavor to effectuate it. Aside from the fact that it is mentioned in the reports of the cases above cited that the provisions of the wills there under consideration were "followed by" certain other provisions, we do not see that they controvert the position of the appellee in this case; and we are not ready to hold

that the determination of the case should turn upon the question whether the provision to be construed is followed or preceded by another provision necessarily connected therewith. We endeavor to consider the whole will and the circumstances of the person and property in connection with its making and thus determine the effect of the different clauses. In fact, it is determined in the *Strolberg* case: "A direction in the will that legacies be paid out of the personal estate, unaccompanied by language indicating a deliberate intent that the real estate should not be resorted to in case of deficiency of personal property, will not prevent the legacies from being charged upon the residuary real estate." And, further: "Effect should be given to all the provisions of a will, if, in the light of the surrounding circumstances, it can be done consistently with the recognized rules of construction as to the testator's intent." It has also been held: "In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will." *Worley v. Wimberly,* 99 Neb. 20, 154 N. W. 849; *Heyer v. Heyer,* 110 Neb. 784, 195 N. W. 109.

The will provides that the proceeds of all the property, real and personal, not necessary for the payment of debts and expenses shall be equally divided among the six children of the testator or their successors in interest, and just as definitely provides that John Loren Burton, one of the six, shall have the improvements, or the value thereof, in addition to his share as above specified. There are no provisions as to how the value of the improvements shall be ascertained and no objection is here made that the manner of ascertainment was unjust or unfair or that the amount so ascertained is unreasonable. The objectors simply object to the ascertainment at all; and urge the ground that two of the appellants who are beneficiaries under the will did not consent thereto. It may be remarked that the matter had stood in the same situation for a number of years after the ascertainment in county

court, all of which was open and of record, and they have not objected to it until in the instant case. These defendants are joint appellants and jointly answered in the district court and there is no question that one of them, Ross Defenbaugh, to whom the property was devised as trustee and who holds the legal title, did consent to it and was a party to the stipulation. Nothing appears in the record to show that the appellants or any of them would be in any wise injured by the carrying out of these provisions in the manner indicated or by the enforcement of the decree of the district court. The estate, by the payment of this sum, is not being depleted nor the shares of the defendants decreased because of this manner of handling the improvement situation. The estate has acquired the improvements as a permanent part of the corpus. They were inventoried and appraised in the administration proceedings at the sum of $6,417.02. In the stipulation for an adjustment of the same and retention as part of the real estate they were valued at $2,500. If the estate is held to pay this latter amount, it is but making recoupment for what it has obtained that did not otherwise belong to it.

It is insisted that the amount in payment for these improvements must be paid from personal property and cannot be charged against the real estate. There is some confusion in the record in reference to the personal property, appellants insisting that according to the terms of the final decree in the county court it showed there was on hand an amount in excess of the $2,500 agreed upon, and the appellee explaining that this resulted from a matter of bookkeeping only, because the administrator in making his report showed the item of $2,500 as a receipt and on the other side showed it as a claim of John Loren Burton not paid, and it thus balances, leaving but $284 in excess of expenses already incurred. The inventory in the record discloses, aside from the improvements under consideration, only the sum of $401.75 in the estate. There is no showing or claim by anybody that there was any other personal property, and to the parties concerned it could make no

difference whether payment be made from personal or real property, for they all share in like amounts in both. It is apparent that, the estate having had and retained these improvements during all the years with the benefit thereof as appurtenant to the real estate, the appellee herein would be in no position to undertake recovery of the improvements themselves and has resided there during the time upon the assumption that the provisions already made, which he here undertakes to enforce, were complete and effective. The appellants do not produce any equitable ground or reasonable justification upon which they can claim the improvements and at the same time resist payment of this obligation.

Upon the matter of the statute of limitations, it is a trust that is here involved and the trustee, who has by the district court been found guilty of neglect of duty in performing his trust, is not in any position to urge the statute of limitations. Also, there is no limit fixed in the will within which the disposition of the property should be effected, and it is not shown that the defendant trustee repudiated his trust or declined to recognize this obligation under it, until approximately the time of the commencement of this action.

The decree of the district court was right and it is

AFFIRMED.

VICTOR DANBOM, APPELLEE, V. ALFRED DANBOM ET AL.: NEBRASKA-IOWA PACKING COMPANY, APPELLANT.
273 N. W. 502

FILED MAY 26, 1937. No. 29880.

1. Trial. A defendant who answers in a case cannot assert the rights of one who does not answer, when pleadings fail to show that he has any interest in sustaining the rights of such non-answering defendant.
2. Appeal. "To review errors of law occurring upon the trial of an equity case, a motion for new trial is necessary." *Pitman v. Henkens*, 125 Neb. 621, 251 N. W. 282.

3. **Judgment.** When defendants are in default in an action to recover upon foreign judgments and to set aside an alleged fraudulent transfer of stock in a domestic corporation, in which the stock has been impounded by attachment and garnishment proceedings, and the defendants have been served by publication, the allegations of the petition against the defaulting defendants will be taken as true, and if the petition states a cause of action against them, the plaintiff will be entitled to judgment against such defendants without making proof of the allegations of the petition.
4. **Corporations:** GARNISHMENT. The stock of a domestic corporation for which a certificate has been issued and delivered to a subscriber or purchaser is, nevertheless, deemed to be in the possession of the corporation; and, as property in its possession, may be subjected to attachment and garnishment proceedings.
5. ———: ———. In a proceeding in the nature of a creditor's bill, in which an order of attachment and garnishment has been served on a domestic corporation, under sections 20-1519 and 20-1520, Comp. St. 1929, a lien is created on all of the stock of such corporation owned by the debtor defendant, and impounds all such stock in the possession or under the control of the garnishee from the time of service of such writs, though the certificates of stock are not in the actual possession of the corporation, or shown to be within the state.
6. ———: ———. When, in such case, the by-laws of the corporation provide that transfers of stock shall be made upon the books of the company, for the issuance of new stock, and that the old certificates shall be surrendered, the duty of entering a transfer upon the books of the corporation and issuing a new certificate is just as imperative where the stock is sold through judicial process as when sold by a stockholder direct. And *held*, further, that the court, upon making an order for the sale of such stock, had jurisdiction to require such action on the part of the garnishee corporation as was necessary to make a sale by the sheriff under such order effective, by entering such transfer on the books of the company and issuing new certificates, though the old certificates were not surrendered.

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

Ritchie, Swenson & Arey and *M. J. Flannigan*, for appellant.

Leon & White and *Louis E. Lipp, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

ELDRED, District Judge.

This is a proceeding in the nature of a creditor's bill. Plaintiff, Victor Danbom, had secured three judgments in the district courts of Iowa against defendant Alfred Danbom, and instituted this proceeding in the district court for Douglas county, Nebraska, against Alfred Danbom, the judgment debtor, Ancy Danbom, his wife, and Nebraska-Iowa Packing Company to recover judgment against Alfred Danbom on the Iowa judgment, and further asking that an alleged fraudulent transfer of 384 shares of the common stock in the Nebraska-Iowa Packing Company by Alfred Danbom to Ancy Danbom, his wife, be set aside, and for the sale of said stock to satisfy the judgments of the plaintiff. Defendants Alfred Danbom and Ancy Danbom are both nonresidents of Nebraska, being residents of the state of Iowa. The Nebraska-Iowa Packing Company is a Nebraska corporation with its principal place of doing business in Omaha, Douglas county, Nebraska, and the stock of said corporation alleged to have been fraudulently transferred by Alfred Danbom to Ancy Danbom, as well as ten shares of the preferred stock of said corporation, were levied on under attachment and garnishment proceedings, as provided by sections 20-1519, 20-1520, and 20-1026, Comp. St. 1929. An answer was filed on the part of the Nebraska-Iowa Packing Company, the garnishee. The only service had upon the defendants Alfred Danbom and Ancy Danbom was by publication, and neither of these defendants appeared or answered in the case. While the Nebraska-Iowa Packing Company was made a party defendant, there is no claim made in the petition that there was any participation by that company in the alleged fraudulent transaction between the defendants Alfred Danbom and Ancy Danbom; the only allegations in the petition with reference to the Nebraska-Iowa Packing Company, defendant, are hereinafter set out.

January 16, 1936, default of defendants Danbom was entered and trial was had on pleadings and evidence, with findings generally for plaintiff, and further specifically finding that there was due plaintiff on the Iowa judgments $20,439.28; and that said amount represents balances due upon judgments for loans made to the defendant Alfred Danbom by the plaintiff, which loans were made prior to April 17, 1930, and which loans were due and payable and were in default prior to April 17, 1930; further finding that prior to April 17, 1930, Alfred Danbom was the owner of 384 shares of the common stock of Nebraska-Iowa Packing Company; and that on or about the 24th day of July, 1931, defendant Alfred Danbom became the owner of 10.35 shares of the preferred stock of the Nebraska-Iowa Packing Company of a par value of $1 a share; that on or about the 17th day of April, 1930, defendant Alfred Danbom transferred said 384 shares of the common stock of said company to his wife, Ancy Danbom, defendant herein; that said transfer was in fraud of creditors, particularly the plaintiff, and was for the purpose of hindering and delaying plaintiff in the collection of his indebtedness against Alfred Danbom; and that said transfer of stock should be set aside and held for naught; that the true and legal owner of said 384 shares of common stock is the defendant Alfred Danbom, and not the defendant Ancy Danbom. There is a further finding that the Nebraska-Iowa Packing Company is a Nebraska corporation; and that its records disclose that Alfred Danbom, prior to April 17, 1930, was the owner of said 384 shares of its common stock; and that a transfer of said stock was made on the books of the company on the 17th day of April, 1930, to defendant Ancy Danbom, wife of Alfred Danbom; and that Alfred Danbom holds in his name at this time 10.35 shares of the preferred stock in said company. There is a further finding that the defendant Nebraska-Iowa Packing Company is a party to this action only for the purpose of conforming the books of said company with the order and decree of the court; and that there is nothing

due and owing from the defendant Nebraska-Iowa Packing Company to the plaintiff; and that costs of this action should not be assessed against it.

On these findings a decree was entered that the transfer of the 384 shares of the common stock in the Nebraska-Iowa Packing Company from Alfred to Ancy Danbom be, and is, set aside and held for naught, and the ownership of said shares adjudged to be in Alfred Danbom, subject to the lien and claim of the plaintiff in the sum of $20,439.28, plus the costs of this action; and the sheriff of Douglas county is ordered to offer said 384 shares of common stock in said company and the 10.35 shares of preferred stock in said company for sale in satisfaction of plaintiff's judgment as upon execution; and the defendant Nebraska-Iowa Packing Company is directed to issue a certificate of stock for said 384 shares of common stock and 10.35 shares of preferred stock of said company to the purchaser thereof at the sheriff's sale; and that the defendant Nebraska-Iowa Packing Company, upon issue of the above stock certificates to the purchaser, at the sheriff's sale, be relieved of all liability for costs herein. No motion for new trial was filed, but from this judgment and decree the defendant Nebraska-Iowa Packing Company has appealed.

The brief of appellant assigns six "errors relied on for reversal." The first error assigned is to the ruling of the court in sustaining a motion to strike a paragraph of appellant's amended answer, where it was alleged that the transfer from Alfred Danbom to Ancy Danbom, his wife, was for a valuable consideration. The paragraph stricken was not in response to any issue tendered by the petition as against the answering defendant. The answering defendant packing company's only interest was that of a garnishee. All the allegations of the petition are personal as against the defendants Danbom, and relate only to them, with the exception of the last sentence of paragraph VII, which reads: "That the said Nebraska-Iowa Packing Co. is a Nebraska corporation with its principal place of doing business in Omaha, Douglas county, Nebraska, and

that said 384 shares of common stock in said corporation are within the jurisdiction of this court and that the court should decree that service be had upon the defendants Alfred Danbom and Ancy Danbom by attaching said shares of stock as provided by law to secure service by attachment and publication and that the court should decree that said shares of stock are the property of the said Alfred Danbom and subject to the claim of the plaintiff." And a part of the prayer reading: "That the sheriff of Douglas county be ordered and directed to sell as provided by law the said 384 shares of common stock in the Nebraska-Iowa Packing Co., a corporation, in satisfaction of said judgments." The foregoing allegations with the answer of the packing company thereto present the only questions which could be of interest to the appellant. But, it is urged by assignment of error No. 4 that appellant was entitled to traverse every allegation of plaintiff's petition; and that it could not let the case go by default without putting in a defense for the defendants Danbom, which it knew was available, without subjecting itself to a suit for conversion at the hands of the stockholders, citing *Sprague v. Allied Mills,* 129 Neb. 394, 261 N. W. 892. There is a marked distinction between that case and the case at bar. There the property was placed by the wife, claiming to be the owner, in a warehouse of a storage company as her property; later the property was seized under attachment and garnishment proceedings in which her husband was the defendant. The storage company answered as garnishee that it had property belonging to defendant, setting up the list of goods stored by the wife. The wife had no notice of the proceedings until after the sale of the goods. The garnishee made no attempt whatever to defend the garnishment or to postpone the sale until it could get notice to the wife, who stored and claimed the goods. The answer of the garnishee in that case did not correctly set up the facts disclosing for whom it was holding the property, and it made no effort to notify the wife before sale. It was not suggested in that case that

any responsibility rested upon the garnishee to defend on the merits of the case as between the principal parties to the suit. The fault was in failing to make an accurate disclosure in its answer and in failing to give the wife, who stored the goods, notice of the garnishment. Here the garnishee by its answer appears to have disclosed the true condition, as shown by its record, regarding the transfer of the stock and the issue of the new certificate, and it clearly appears that Ancy Danbom had actual notice of these proceedings. While she was served by publication, she appeared and testified as a witness, by deposition included in the bill of exceptions, taken by the packing company on the 29th day of June, 1935, covering the issues involved in this case, as between the plaintiff and said defendant Ancy Danbom. The motion to strike the paragraph referred to from the amended answer of the garnishee defendant was not filed until November 1, 1935, and was ruled on November 2, 1935, long after Ancy Danbom is shown to have had actual knowledge of these proceedings. The packing company, as garnishee, occupied a neutral position, and it was only required to deal fairly with all parties to this litigation. The pleadings do not disclose that the packing company should have had any interest in attempting to establish a defense for either of the nonanswering defendants. Under the facts in this case, it was not incumbent upon the garnishee to defend the action on the merits of the plaintiff's claim against the defendants Danbom; and the trial court did not commit error in striking the paragraph of the amended answer of the garnishee defendant referred to in the motion.

The second and third assignments of error are to rulings of the court during the progress of the trial on objections to questions propounded witnesses, and an offer of proof. No motion for a new trial was filed. In an equity case, if appellant desires a review of alleged erroneous rulings of the trial court as to the reception of evidence, it is necessary that the district court's attention must have been called to the same by a motion for a new trial. *Pitman v.*

Henkens, 125 Neb. 621, 251 N. W. 282; *Hall v. Bowers,* 117 Neb. 619, 225 N. W. 49; *State v. Banking House of A. Castetter,* 118 Neb. 231, 224 N. W. 21; *State v. Citizens State Bank,* 115 Neb. 271, 212 N. W. 616.

Fourth, error is assigned that the court erred in holding that the default of the defendants Alfred and Ancy Danbom, upon whom no personal service was had, was an adjudication of all issues except as to whether the records of Nebraska-Iowa Packing Company showed stock outstanding in the names of Alfred and Ancy Danbom. Counsel has not directed our attention to the place in the record where such a holding may be found, and from an examination of the record we fail to find such a holding. The bill of exceptions shows evidence offered by plaintiff in support of his petition. While the plaintiff's counsel objected to the offer of evidence by the packing company to controvert the allegations made against the defendants Danbom, the court stated: "The defendant Nebraska-Iowa Packing Company may present its evidence and I will withhold in abeyance this ruling." The evidence was received. The journal entry of the decree recites that the trial was had upon the pleadings and "upon the evidence." However, it is not material upon what the findings and decree of the trial court may have been made, if they are supported by facts disclosed by the record. A number of authorities from other jurisdictions are cited by appellant in support of the proposition that: "Where service is by publication only, the fact that the defendants enter no appearance is not sufficient admission of the allegations of the plaintiff's petition to authorize a decree in accordance therewith; but the plaintiff's cause of action must be proved before the plaintiff is entitled to a judgment." The authorities cited are not controlling on the proposition presented. Under our statute (Comp. St. 1929, sec. 20-842) and by the decisions of this court, the contention of the appellant that plaintiff was not entitled to a decree by default as against the defendants Danbom is effectually foreclosed. In *Weir v. Woodruff,* 107 Neb. 585, 186 N. W. 988, an action to quiet title,

service was had by publication; defendants defaulted, and plaintiff asked for a decree on such default in accordance with the prayer of the petition. The request was denied by the trial court. On appeal, the court held, where the defendants are in default in such action, the allegations are to be taken as true, and if the petition states a cause of action, the plaintiff is entitled to judgment without proof of the allegations of his petition, thus affirming holding in *Slater v. Skirving*, 51 Neb. 108, 70 N. W. 493. The identical question appears to have been urged in *Weir v. Woodruff, supra*, as in the instant case; it being there urged that in an equity case proof should be required as against nonresidents served constructively, who do not appear. In the opinion it is stated:

"We are urged to adopt the general equity rule laid down in 16 Cyc. 495; it being argued that the case of *Slater v. Skirving, supra*, was a law action, while this is a suit in equity. The answer to this argument is that distinctions between actions at law and suits in equity have been abolished. Rev. St. 1913, sec. 7560 (Comp. St. 1929, sec. 20-101).

"It being essential to the orderly administration of justice that the rules of procedure be fixed and stable, we adhere to the rule heretofore established and hold that it was error for the court to refuse to enter judgment in favor of plaintiffs upon their petition."

Section 20-1308, Comp. St. 1929, cited by appellant, is not controlling under the situation here presented. That section applies to situations where it is necessary to make proof in cases coming within the exceptions stated in section 20-842, Comp. St. 1929, on allegations of value and amount of damage. On default of the defendants Alfred Danbom and Ancy Danbom, the plaintiff was entitled to have the allegations of his petition, so far as they were personal to said defendants, taken as true, and to have a default judgment entered against them.

Assignments five and six will be considered together. Number five assigns error in the entry of judgment in

favor of the plaintiff; and number six that "the court erred in directing the defendant Nebraska-Iowa Packing Company to issue certificates for 384 shares of its common stock and for 10.35 shares of its preferred stock to such person as might be a purchaser at the sheriff's sale which was ordered in the decree appealed from, without requiring that the stock certificates representing said shares and now outstanding be first surrendered to this defendant company for cancelation." The last assignment presents the paramount question involved in this litigation, and stated tersely is: Had the court power to direct the packing company to issue certificates for the stock sold by the sheriff to the purchaser, without the outstanding certificates representing those shares being surrendered?

"Stock in corporations owned by the judgment debtor, or the defendant in attachment proceedings, may be levied upon under executions or writs of attachment, and the mode of levy shall be as follows." Comp. St. 1929, sec. 20-1519.

"Stock in a corporation shall be levied upon by notifying in writing the president, vice-president, secretary, cashier, or other managing agent at the usual place of business of said corporation, that the stock has been levied upon under the writ held by the officer." Comp. St. 1929, sec. 20-1520.

And section 20-1026, Comp. St. 1929, provides that the garnishee "shall appear and answer, under oath * * * and shall disclose truly * * * in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of notice." While the record in this court is not clear as to the procedure taken in the attachment and garnishment proceedings, it is not urged by appellant that there was any irregularity therein; but it is contended that the court was without authority to make the orders complained of by this last assignment. The packing company does not have the stock certificates evidencing the stock involved in its possession, nor is it shown that such certificates are within this state.

Section 2, art. I of the by-laws of the packing company,

provides: "Transfers of stock shall be made only upon the books of the company by the holder thereof in person, or by his attorney in fact legally authorized. Before a new certificate is issued, the old certificate properly indorsed shall be surrendered." And it is contended by the appellant that to compel it to issue a duplicate certificate of stock under such circumstances, with the other certificate outstanding, would be a violation of the right of the packing company to require its stock to be surrendered before new certificates are issued. "A certificate of stock in a corporation is not the stock itself, but rather the evidence of the holder's ownership of the stock, and of his rights as a stockholder to the extent therein specified." *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 103 N. W. 685. See *Miller v. M. E. Smith Building Co.*, 118 Neb. 5, 223 N. W. 277. The statute, section 20-1519, *supra*, says: "Stocks in a corporation owned by * * * defendant in attachment proceedings, may be levied upon under * * * writs of attachment." Section 20-1520, *supra*, provides that the manner of levy shall be by notice to the company that levy has been made. The validity of the statutes authorizing such proceedings is recognized by this court in *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552, in which case it is also held: "The real actual rights and interests of a stockholder, will be reached by the garnishment upon the corporation without regard to the apparent interest of the owner." There is no requirement that the certificates of stock should be seized or in any manner sequestered. While certificates of stock are subject to transfer by indorsement, they are not negotiable instruments, and the rules governing the transfer of negotiable paper do not apply. The question of good faith ownership of the stock on account of the outstanding certificate being transferred after the attachment levy is not involved. What might be the rights of one claiming as an indorsee of stock certificates before any notice of the garnishment of the corporation, although the question is raised in the brief of counsel, likewise is not an issue in this case.

The appellant further urges that, by sale under the order of the lower court which does not have possession of the certificates, the corporation would be compelled to issue duplicate certificates and run the risk of litigation, claims for conversion, and other damages. But the fear thus expressed would seem not justified. Where a garnishee has, in good faith, made a full and accurate disclosure of the facts as to the property of the debtor in its possession or under its control, and where an order is made by the court that such property of the defendant, in the possession of the garnishee, in this case the stock of the defendant corporation, be sold by the sheriff to satisfy the indebtedness of the judgment debtor, and further that the garnishee issue certificates to purchaser at sheriff's sale for the stock sold, such order is a judgment; and where the garnishee, acting pursuant to such judgment of the court, makes transfer of the stock so sold on its records, and issues new certificates, it will be protected from liability to any holders of the outstanding certificates. *Peterson v. Kingman & Co.*, 59 Neb. 667, 81 N. W. 847; *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060, Ann. Cas. 1913D, 501.

In opinion in *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 724, 100 N. W. 133, it is said: "A stockholder's interest in a corporation and in all of its property and rights is represented by his stock. There can be no question that the levy upon the stock by the garnishment of the corporation pursuant to the statute will impound the whole interest of the stockholder in the property and rights of the corporation, and that the right to receive dividends goes with the stock." Thus, plaintiff in this case, by the service of notice of the attachment and garnishment on the packing company, acquired a lien, as of the date of such service, upon all of the interest of the stockholder then in the possession or under the control of the garnishee, packing company. The by-laws do not attempt to, and could not, place the stock without the jurisdiction of the court. The object of having transfers of stock recorded

upon the books of the company is to give the company notice of whom the stockholders are. *Herrick v. Humphrey Hardware Co., supra.* And while, ordinarily, the officers of the corporation will not look beyond the records to ascertain who are the real owners of the stock, a court of equity may do so. *Haskell v. Read,* 68 Neb. 107, 93 N. W. 997.

"It cannot be successfully contended but that the assignee of the shares of stock of a corporation is entitled to maintain an action in equity to require an obstinate corporation to enter his assignment upon the books of the corporation and issue to him a new certificate representing the same." *Everitt v. Farmers & Merchants Bank,* 82 Neb. 191, 117 N. W. 401.

In *Ball v. Towle Mfg. Co.,* 67 Ohio St. 306, 65 N. E. 1015, 93 Am. St. Rep. 682, the facts were quite analogous to the case at bar. The certificates of stock in that case were not in the possession or under the direct control of the corporation. The court states:

"There is a marked and obvious distinction between the stock of a corporation and the certificate representing such stock. The certificate of shares of stock in a corporation is not the stock itself, but is a mere evidence of the stockholder's interest in the corporate property of the corporation which issues said certificate. Cook on Stock and Stockholders, section 485. In the absence of statutory or charter requirements no certificate of stock is necessary to attest the rights of the shareholder in the corporation, and such certificate when issued to the owner of shares of stock is merely an evidence or acknowledgment of the owner's interest in the property of the corporation, but is not the property itself. In law a corporation is the trustee of the corporate property and holds the same for the benefit of the stockholders; and so long as such corporation continues to have a legal existence and to carry on the business for which it was created it alone is the proper custodian, and has possession of the corporate property. In Cook on Stock and Stockholders, section 480, the author says: 'It has been held that if a stockholder whose stock has already

been attached or sold on execution sells his certificate of stock after the levy of such attachment or execution, the vendee or transferee buys subject to such levy, even though he had no knowledge of it. The stock in contemplation of law has already been seized by the levy, and the purchaser is bound to take notice of that fact.' * * * While the certificate for said ten shares of stock was, at the time of the commencement of the proceedings in aid of execution by the Towle Manufacturing Co., and at the time of the service of notice on the bank, in the hands of Webb C. Ball, the judgment debtor, yet the actual property, the stock itself, which such certificate represented, was then in the possession of the bank, and being in the possession of the bank, by force of the provisions of section 5475, such property was bound from the time the notice was served on said bank, and by the service of said notice the Towle Manufacturing Co. acquired a valid lien thereon which it may enforce by a judicial sale of said stock." See 7 R. C. L. 197, sec. 167; 14 C. J. 719; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

It is not essential to the validity of the execution sale of shares of stock in a corporation that the sheriff have manual possession of the certificate at the time of the sale, or that he should deliver it to the purchaser. *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 65 Pac. 622; 85 Am. St. Rep. 171.

The plaintiff having by the attachment and garnishment proceedings acquired a lien on all stock of the Nebraska-Iowa Packing Company involved in this case, and such stock having been impounded by those proceedings, it was the duty of the court, on entering judgment and decree herein against the principal defendants Danbom, to make a decree for the enforcement of such lien by the sale of such stock as upon execution, to satisfy the plaintiff's judgment. Where by-laws of the corporation provide that transfers of stock shall be made upon the books of the company, and for the issuance of a new certificate, and that the old certificates shall be surrendered, the duty of

entering a transfer of said stock on the company's books and issuing a new certificate is just as imperative where the stock is sold through judicial process as where sold by the stockholder direct. The court, upon making an order for the sale of stock in this case, had jurisdiction to require such action on the part of the garnishee as was necessary to make a sale by the sheriff under such order effective, by entering the transfer on the books of the company and issuing new certificates, though the old certificates were not surrendered.

Finding no prejudicial error in the proceedings of the trial court, the judgment is

AFFIRMED.

HOME SAVINGS & LOAN ASSOCIATION, APPELLEE, V. WILLIAM L. SCHMITT, APPELLANT: WASH BROTHERS, INTERVENER, APPELLANT.
273 N. W. 497

FILED MAY 26, 1937. No. 29967.

Attachment. Trust instrument described in the opinion *held* invalid as to nonconsenting creditors and to furnish plaintiff grounds for attachment. *Held*, further, that filing his claim with the trustee and continuing to rent the building to the trustee did not make plaintiff a consenting creditor.

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

Paul L. Martin, for appellants.

R. P. Kepler and *E. R. Kratz, contra.*

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

LIGHTNER, District Judge.

This case involves validity of an attachment levied by plaintiff on a portion of the merchandise stock of the defendant Schmitt. One of the questions in the case is the

validity of an instrument bearing the name "Trust Instrument," dated January 17, 1935, by which Schmitt turned over all his property to a trustee named in such instrument. Wash Brothers, intervener, claims that it purchased the property from the trustee on the 23d of April, 1935, prior to the attachment which was levied on the 10th of May, 1935. The suit was begun in the county court, where the attachment was sustained. Defendant and intervener appealed to the district court, where the attachment was again sustained, and defendant and intervener appeal.

A fuller statement of the facts is necessary for an understanding of the controversy. On and prior to January 17, 1935, William L. Schmitt, defendant and appellant, was in failing circumstances. His total indebtedness was $4,787, $2,340 of which was owing to the J. S. Brown Mercantile Company of Denver, Colorado. On January 17, 1935, George A. Robertson, representing the Rocky Mountain Association of Credit Men, which in turn represented the principal creditor and between which creditor and said Rocky Mountain Association of Credit Men there was some connection, called on Mr. Schmitt, and after some negotiations Mr. Schmitt executed the trust instrument above referred to. This trust instrument is too long to be set out here. Its main provisions and those necessary for an understanding of this case are, first, it transfers, sells and assigns all of Mr. Schmitt's property, consisting principally of merchandise, fixtures and book accounts, to the trustee J. B. McKelvy, who was the secretary and manager of the association for the purpose of securing the payment of Mr. Schmitt's entire indebtedness, and attached to the instrument is a list of his creditors with their addresses and the amount owing to each. Mr. Schmitt gave a non-negotiable promissory note for the amount of such indebtedness, to wit, $4,787, due in one day, but McKelvy took immediate possession. The trust instrument provides that the trustee should continue to conduct the business, including the buying of new merchandise and otherwise carrying on the business as a going concern. He was required

to account for all money actually received by him. One of the principal objections of plaintiff to the instrument is the following provision therein, to wit:

"To pay the expenses incidental to the negotiation, preparation and execution of this trust and for the carrying of the same into effect, including necessary attorney's fees and a fee to the trustee equal to 15 per cent. of the value of the assets hereby transferred, assigned and sold to said trustee, which fee shall be due and owing to trustee immediately upon acceptance of this trust."

Appellee claims that this 15 per cent. provision created a new debt of $537 without consideration and in derogation of the rights of creditors. It bases this on the claim that the 15 per cent. was to be computed on the value of the assets fixed by the trustee, which was $3,580.30. Defendant and intervener contend that the 15 per cent. should be based on the sale of the stock to Wash Brothers for $1,007.14, making the fee $151.07. They do not discuss the 15 per cent. fee for value of fixtures and book accounts. The "Trust Instrument" on this point is obscure, since it does not state on what value the 15 per cent. shall be computed, but it is open to the construction that the value fixed by the trustee should be the basis for such computation. The trust instrument further provides that the balance of funds remaining on hand after the various expenses and outlays above referred to should be prorated among the creditors of grantor. The trust instrument also gives the trustee the right to sell said property or any part of it at public or private sale or he may continue the business of grantor at retail as long as he deems it advisable to do so.

The trustee continued the business until April 23, 1935, when he sold the stock to Wash Brothers, the intervener, for $1,007.14. There is no showing that the trustee while he was in possession made any accounting to any of the creditors. There is no showing how much, if any, of the book accounts was collected, no statement of the expenses incurred by the trustee in conducting the business; no statement to indicate what interest, if any, the creditors

had in the $1,007.14 received from Wash Brothers, nor what had become of the fixtures. The trustee made no attempt to follow the bulk sales law in making the sale to Wash Brothers.

While the trustee is required to account, the trust instrument does not provide when the trustee shall make account, nor is there any limit to the time during which he may continue the business.

Appellants cite many Nebraska cases holding that a chattel mortgage for the benefit of all the creditors of one in failing circumstances is valid. One of the cases cited by appellants is *Skinner v. First Nat. Bank of Pawnee City*, 59 Neb. 17, 80 N. W. 42, wherein the court say:

"The evidence on the hearing of the motion showed that the claims which the defendants intended to secure were valid claims, and that they turned over substantially all their property for the purpose of having it sold, and the proceeds applied *pro rata* among their creditors. Every circumstance indicates that it was the purpose of the defendants to pay their creditors as fast as possible, and not to hinder or delay them in the collection of their debts."

The mortgage under discussion in *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713, 79 N. W. 728, was given to secure 65 creditors. The court held that it was valid. There was no provision for carrying on the business of the mortgagor.

Most of the cases cited by appellants relate to chattel mortgages. The form or name of the instrument has in our judgment little bearing upon its validity. The general rule seems to be that an assignment for creditors which authorizes the assignee to continue the assignor's business is fraudulent as against nonconsenting creditors. In the annotation found at 23 A. L. R. 199, it is said by the annotator that the courts condemn such assignments "a. When continuing business operates unduly to hinder and delay creditors. b. When continuing business puts the assigned estate in jeopardy and creditors to the hazard of loss. c. When provisions for continuing the assignor's business hamper the action of the courts or creditors." Continuing

the business is sanctioned by the courts (a) when it is ancillary or subsidiary to closing the trust; (b) when the purpose is to continue agricultural operations, or (c) to finish partly manufactured commodities.

The following quotations from the annotation give some of the reasons assigned by the courts for such holdings:

"A conveyance in trust to secure a debt by an insolvent debtor upon an understanding by the parties to it that the trustee shall continue indefinitely the debtor's business, and, in carrying it on, shall buy and sell goods at will, with no restrictions requiring him to sell only stock on hand or to buy only whatever may be absolutely needed to make unfinished products marketable, is, as respects unsecured and objecting creditors, fraudulent in law, however free may have been the transaction from actual fraud and bad faith. *Gutta Percha Rubber Mfg. Co. v. Kansas City Fire Department Supply Co.* (1899) 149 Mo. 538, 50 S. W. 912." 23 A. L. R. 200.

"The most frequent reason given by the courts for condemning general assignments and deeds of trust by insolvent debtors for the benefit of creditors, containing provisions authorizing assignees and trustees to continue to carry on the businesses, trades, and operations of the debtors without restrictive conditions respecting time, extent, and expenditure, is that they put the property of the debtors beyond the reach of their creditors for an uncertain and indefinite period, and of necessity operate unduly to hinder and delay creditors in effectively pursuing their ordinary legal remedies to collect their debts." 23 A. L. R. 202.

"Another reason for judicial disapproval of any provision in a general assignment or deed of trust for the benefit of creditors, looking to the carrying on generally of the assignor's business, is that it subjects the corpus of the estate to the hazard of losses in an unsuccessful enterprise." 23 A. L. R. 207.

It seems to us that the trust instrument here under consideration is invalid both on account of the 15 per cent.

provision which immediately created a new debt and to that extent placed his property beyond the reach of his present creditors, and for the further reason that it subjected the property to the hazard of continuing the business, converting it into money without using it to pay his creditors, but to pay the expenses of the new business, including the purchase of merchandise to be used therein. It can hardly be successfully urged that a transaction such as here under examination which placed Mr. Schmitt's entire property in jeopardy and which immediately consumed at least 15 per cent. thereof and probably a great deal more is not fraudulent.

Appellants contend that plaintiff accepted the trust instrument by filing its claim and by continuing to rent the building to the trustee. Plaintiff's claim is for rent prior to January 17, 1935, and on the 21st day of March, 1935, it filed its claim of $150 therefor with the trustee. It is not shown that plaintiff knew anything about the provisions of the trust instrument when it filed its claim, and Mr. McKelvy's letter sent out on January 21, 1935, inviting plaintiff to file its claim does not set forth the provisions of the trust instrument, but does notify plaintiff that they will continue to operate the business for 30 or 60 days. The mere fact that plaintiff continued to rent the building to the trustee would not in our judgment constitute waiver of any of its rights.

Undoubtedly plaintiff acquiesced in the operation of the business by the trustee for the 30 or 60 days mentioned in the letter of January 21, 1935, but the trustee actually had operated it for more than 90 days before the sale to Wash Brothers. Furthermore, there is no showing that plaintiff knew any of the provisions of the trust instrument, and especially there is no showing that he knew of the 15 per cent. provision above referred to.

Appellants claim that the only alleged grounds for attachment is that defendant was about to remove his property, or a part thereof, out of the county with intent to defraud his creditors, and was about to convert his property,

or a part thereof, into money for the purpose of placing it beyond the reach of his creditors. The briefs of all parties proceed on the assumption that the trust instrument is decisive of the case. Since it authorizes a sale of the trust property by the trustee and immediate payment of the 15 per cent. to him, its effect is to convert part of Mr. Schmitt's property into money and to place it beyond the reach of his creditors. It seems therefore that there was ample evidence to sustain the finding of the district court.

Wash Brothers, intervener, claims the property, but its ownership also depends upon the validity of the trust instrument. If such instrument was invalid, then the sale to Wash Brothers was void under the bulk sales law.

Other points are made by appellants, but for the reasons above stated the judgment of the district court must be and it hereby is affirmed.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. HOSKINS STATE BANK: E. H. LUIKART, RECEIVER, APPELLANT.

273 N. W. 834

FILED JUNE 11, 1937. No. 29941.

1. **Receivers.** The power of appointment and removal of judicial receivers ordinarily rests in the sound discretion of the trial court.
2. **Banks and Banking: RECEIVERS.** The Department of Banking is ineligible to be appointed a judicial receiver because it is not a qualified legal entity.
3. **Appeal.** When a judgment discharges a judicial receiver, appoints as receiver one who is legally ineligible, and directs the former to turn over all assets to the latter, the former has a right to appeal.

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

F. C. Radke, for appellant.

William H. Wright, Attorney General, and *Robert R. Moodie, contra.*

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

GOSS, C. J.

This is an appeal from a decree removing E. H. Luikart as judicial receiver of the Hoskins State Bank and appointing the Department of Banking of the state of Nebraska as receiver in his stead.

The main suit was begun by the filing of the petition for receivership December 17, 1931, and Luikart was appointed by the district court for Wayne county judicial receiver of the bank on December 24, 1931, under the then existing provisions of section 8-192, Comp. St. 1929, he being the then secretary of the Department of Trade and Commerce. On May 9, 1933, Senate File No. 263, passed by the 1933 legislature, became effective. Laws 1933, ch. 18. It created the Department of Banking, superseding the Department of Trade and Commerce, and named its chief officer as the Superintendent of Banks. It undertook to create a system of administrative receivership and liquidation of insolvent state banks by the Department of Banking as Receiver and Liquidating Agent, not subject to judicial control by the district courts.

E. H. Luikart held the office of Superintendent of Banks under the new act until January 3, 1935, on which date B. N. Saunders succeeded him as such officer and held the office at the time of filing the present petition praying for the discharge of E. H. Luikart as judicial receiver of the Hoskins State Bank and that the Department of Banking be appointed as receiver in his place. Since January 3, 1935, Luikart has not been an employee of the banking department. He filed objections to the application of the attorney general for his removal. Simon Strate and five others intervened and filed a petition of intervention. They claim to be a depositors' committee representing all creditors and acting in an advisory capacity to the receiver and

to the court in the liquidation. They resisted the application on the ground of the unnecessary expense, alleging that the final liquidation was near at hand.

Upon consideration of the pleadings and the evidence the district court, in an order made February 25, 1936, removed E. H. Luikart as receiver and appointed the Department of Banking in his stead, directing Luikart to deliver to the department all assets, records, files and papers in his custody as such receiver. Strate and his associates filed no motion for a new trial, filed no bond of any sort and did not appeal. Luikart appealed and is the sole appellant.

It is fundamental that the power of appointment and removal of judicial receivers ordinarily rests in the sound discretion of the district court. *Cressman v. Bonham*, 129 Neb. 201, 260 N. W. 818; *Howell v. Poff*, 122 Neb. 793, 241 N. W. 548; *Duffy v. Omaha Merchants Express & Transfer Co.*, 127 Neb. 273, 255 N. W. 1; *State v. State Bank of Minatare*, 123 Neb. 109, 242 N. W. 278. So, there appearing no valid claim that the trial court abused sound judicial discretion in removing Luikart as judicial receiver, no proper ground for reversal exists in the fact that the court removed him. If and when an eligible successor is appointed it will be Luikart's duty to turn over to that successor the assets, records, files and papers in his hands as receiver.

This leads us to the next inquiry, which is whether Luikart has any right of appeal remaining in the action. Logically it follows from an acceptance of the previous point that he has no right to name his successor. But the court, in the very same paragraph of the judgment in which Luikart was removed, named as his successor the Department of Banking, and in the same order Luikart was directed to deliver to that successor all assets, records, files and papers in his custody as receiver. Luikart asserts that the Department of Banking is not such a legal entity or person as is capable of being a judicial receiver, and that he has a right of appeal to test that question. It seems

reasonable that he ought not to be compelled to deliver valuable assets to a successor lacking the qualities necessary to be a judicial receiver, but that he should have the right to withhold such delivery until an eligible successor is appointed; and, in the meantime, to test by and on appeal that question presented. He claims that the appointment of the Department of Banking as a judicial receiver is no appointment at all—that it is a nullity.

It would seem that to make valid the appointment of an entity other than a natural person as a judicial receiver, such entity must be legally qualified by statute to be so appointed. This principle was involved in *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, wherein it was said: "So far as a city is concerned, considered in the character of an artificial being, it is a creature of the legislature. It can have no rights save those bestowed upon it by its creator."

Has the Department of Banking been clothed with the power by the legislature to be eligible for appointment by a court as a judicial receiver? In *State v. State Bank of Minatare, supra,* it was said in the argument: "No doubt the legislature has power to create an executive or administrative board with power to liquidate the affairs of insolvent state banks independently of the judiciary, but legislation of that kind has not been enacted in Nebraska." Perhaps, as a sequel to this opinion, adopted April 16, 1932, the 1933 legislature passed an act known as Senate File No. 263, greatly amending the banking laws. Among them former section 8-192, Comp. St. 1929, was amended to read as follows: "The Department of Banking is hereby designated the Receiver and Liquidating Agent of failed or insolvent banks." Laws 1933, ch. 18, sec. 52; Comp. St. Supp. 1933, sec. 8-192. The act further contains provisions to make the administrative receivership effective so far as it goes and is able to go without evoking the aid of the courts. When that occurs it is in such respect amenable to equity rules. The record shows that it has been used in many instances. The diligence of counsel and our own search disclose nothing in this act or elsewhere in the

statutes showing that the Department of Banking is a legal entity capable of being appointed a judicial receiver. Nowhere do the statutes so declare. Formerly the secretary of the Department of Trade and Commerce *as a person* was the receiver. Comp. St. 1929, sec. 8-192. When in 1933 Senate File No. 263 changed the name to the Department of Banking and its chief administrator to Superintendent of Banks, it amended the section as heretofore quoted.

Lacking the quality of being a person or of being a legal entity authorized by the statute, we are of the opinion the trial court erred in appointing the Department of Banking as the judicial receiver of the bank under consideration.

Plaintiff cites as authoritatively analagous the case of *State v. National Old Line Life Ins. Co.*, 129 Neb. 473, 261 N. W. 902, wherein the Department of Insurance was appointed as receiver for the purposes of liquidation under section 44-204, Comp. St. 1929. The section is very different. Whether it does or does not authorize a district court to appoint the state Department of Insurance as a judicial receiver was not an issue and was therefore not discussed in the opinion in that case. The controversy there was over the right of the department or the governor to discharge an attorney and was raised by his petition of intervention seeking to prevent that discharge. The interest of all parties was adverse to any move to raise the question of the eligibility of a receiver already appointed and so the issue was not raised and nowhere appears in the record or in the opinion.

The judgment of the district court, in so far as it appoints the Department of Banking receiver and orders Luikart, as receiver, to attorn to it, is

REVERSED.

IN RE ESTATE OF ABRAHAM ROSENBERY. CHARLES W. ROSENBERY ET AL., APPELLANTS, V. HELEN E. ROSENBERY ET AL., APPELLEES.

273 N. W. 805

FILED JUNE 11, 1937. No. 29993.

Wills: CONSTRUCTION: "HEIRS." "Unless excluded by unambiguous words or by clear implication from the language used in a will, the description therein of 'heirs' includes a surviving spouse as well as a surviving child or surviving children." *In re Estate of Hanson*, 118 Neb. 208, 224 N. W. 2.

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

Cranny & Moore and *Benjamin S. Baker*, for appellants.

Brown, Fitch & West and *B. N. Robertson, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and LIGHTNER, District Judge.

ROSE, J.

This is a controversy over the meaning of the words "lawful heirs" as used in the probated will of Abraham Rosenbery, deceased. The pertinent parts of the will are the second and third paragraphs, which read as follows:

"2. I hereby give, devise and bequeath to my beloved wife, Mina Rosenbery, all moneys and credits due and payable to me, or payable to my estate as life insurance, by, from or in, any and all life insurance companies, on account of or in connection with life insurance on my life, and also one-third of all the balance of my property, both real and personal, of which I may die seised, wherever situated, to have and to hold in her own right forever. These items are given in lieu of her dower or statutory interest in my property as my wife; and in case I survive her, the property that would have gone to her, if living, I hereby will, devise and bequeath to my children, hereinafter named, to be distributed as herein provided in paragraph 3.

"3. All the balance of my property of which I may die

seised, and wherever situated, I hereby will, devise and bequeath to my children, G. W. Rosenbery, C. D. Rosenbery and Mrs. E. M. Miller, share and share alike, and in case of the death of any one of them during my lifetime, the lawful heirs of such deceased child shall receive the share that would have gone to him (or her) had he (or she) survived me."

The will was executed December 8, 1926. Testator died June 28, 1935. His wife, Mina Rosenbery, died June 24, 1933. The son, G. W. Rosenbery, died February 15, 1931, leaving surviving him his widow, Helen E. Rosenbery, his adult son, Charles W. Rosenbery, and his minor daughter, Dorothy D. Rosenbery, of whom the Omaha National Bank is acting as guardian. Helen E. Rosenbery is not the mother of Charles W. Rosenbery but is the mother of Dorothy D. Rosenbery. Helen E. Rosenbery claims that she is a "lawful heir" of her deceased husband, G. W. Rosenbery, and that as such she is entitled to a share of what he would have received under his father's will had he survived his father. Charles W. Rosenbery and Dorothy D. Rosenbery asserted they are the only lawful heirs of G. W. Rosenbery, deceased. For the purpose of a partial distribution of testator's estate, B. N. Robertson, executor, and C. D. Rosenbery, administrator, petitioned the county court to define the words "lawful heirs," as used in the will. The rival parties named presented the issue of heirship by proper pleadings. The county court found "That the word 'heirs' has a fixed meaning, both in law and in fact, and that said word 'heirs' includes the widow of deceased G. W. Rosenbery," and entered a decree in her favor. Charles W. Rosenbery and Dorothy D. Rosenbery, by her guardian, appealed to the district court, where the findings and decree were the same as in the county court. Appellants in the district court appealed to the supreme court.

Appellants take the position that the widow is not an heir of her deceased husband. They argue that the Nebraska statute, adopting applicable portions of the common law of England, defines an heir to be "He who is born

or begotten in lawful wedlock and upon whom the law casts the estate in lands, tenements or hereditaments immediately upon the death of his ancestor;" that the rights of the surviving wife are limited to her statutory interests in the estate of her husband at the time of his death; that the legislature made her a distributee of the property of which her husband died seised, but not an heir. These propositions were elaborately presented by appellants at the bar and in their brief, including references to statutes, text-books and opinions of courts. There is a diversity of judicial opinion on this subject, but the present chief justice, after referring to statutes and cases, ruled as follows:

"So, under the substantive law existing in Nebraska since 1907, either spouse may be an heir of the other. Unless excluded by unambiguous words or by clear implication from the language used in a will, the description therein of 'heirs' includes a surviving spouse as well as a surviving child or surviving children." *In re Estate of Hanson,* 118 Neb. 208, 224 N. W. 2.

In the present instance, neither by "unambiguous words" nor by "clear implication from the language used" does the will exclude the surviving wife as an "heir" of her deceased husband. Both the county court and the district court applied strictly the ruling of the supreme court in the *Hanson* case on the issue of heirship and in doing so did not err.

The surviving widow applied to the district court for an order correcting its decree by allowing her one-ninth of testator's estate instead of one-twelfth as recited therein. The application was renewed here but cannot be considered, since there is no cross-appeal presenting that question.

The administrator and the executor were impartial in their attitude toward the rival litigants on the controverted issue and will not be taxed with any costs of this appeal.

AFFIRMED.

TERESA LOU CONNELY, APPELLEE, V. ROSA HESSELBERTH ET AL., APPELLEES: HENRY TEINERT ET AL., APPELLANTS.
273 N. W. 821

FILED JUNE 11, 1937. No. 30045.

1. Taxation: FORECLOSURE OF LIEN: REDEMPTION. Owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale.
2. ———: SALE FOR TAXES: NOTICE. "Personal notice required in sale of land for taxes, as provided in section 3, art. VIII of the Constitution, applies in all cases where a tax deed is sought, but is not required in sales under tax foreclosures in section 77-2039, Comp. St. 1929." *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.*, 121 Neb. 493, 237 N. W. 575.
3. ———: FORECLOSURE OF LIEN: REDEMPTION. One having no property rights to preserve or protect by redemption from a judicial sale foreclosing a valid tax sale certificate will not be permitted to redeem.
4. ———: ———: DECREE: COLLATERAL ATTACK. A decree foreclosing a tax sale certificate is not vulnerable to collateral attack for irregularities or defects in the foreclosure proceedings that do not go to the jurisdiction of the court.

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

Kirkpatrick, Good & Dougherty, for appellants.

Calvin Webster and *Coufal & Shaw, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and RINE, District Judge.

GOOD, J.

Henry and Harry Teinert, as tenants and occupants of the east half of the southwest quarter of section 4, township 9 north, range 2 west, in York county, seek to redeem that land from a judicial sale made pursuant to a decree of court, foreclosing a tax sale certificate. Their application was filed in the foreclosure action, and that accounts for the title to this appeal. Persons acquiring interest in the

land subsequent to the foreclosure sale were made parties. The application was resisted by the purchaser and her grantee. The trial court denied the applicants the right to redeem, and they have appealed.

The record discloses the following facts: The record title to the land in question has stood in the name of Charles A. Hesselberth for many years. Hesselberth departed this life leaving surviving his widow, Rosa Hesselberth, and a son, Charles O. Hesselberth. His estate has not been probated in York county. The record does not disclose whether he died testate or intestate. Apparently, Rosa Hesselberth and Charles O. Hesselberth for a number of years have rented the land to the Teinerts. The taxes for the years 1928, 1929 and 1930 became delinquent. July 5, 1932, the county treasurer of York county sold the land for the delinquent taxes to N. C. Caldwell. Caldwell paid the subsequent taxes on the land, and January 19, 1935, sold and assigned the tax sale certificate to Teresa Lou Connely, plaintiff in the foreclosure action. August 9, 1935, more than three years subsequent to the tax sale by the county treasurer, Connely commenced an action in the district court for York county to foreclose the tax sale certificate and the lien of the subsequent taxes that had been paid by her and her assignor. In this foreclosure action she made defendants Rosa Hesselberth, Charles O. Hesselberth, ———— Hesselberth (real name unknown), wife of Charles O. Hesselberth; all persons having or claiming any interest in or to the real estate described (real names unknown); the unknown heirs, devisees, legatees, personal representatives, and all persons interested in the estate of Charles A. Hesselberth, deceased (real names unknown). In the affidavit to obtain service by publication, it was stated that Rosa Hesselberth was a resident of the state of Illinois, and that the residence of Charles O. Hesselberth and of the other named defendants was unknown. Order for service by publication was made by the judge of the district court. Notice of the pendency of the action was duly published. Decree of foreclosure was entered, and,

pursuant to the decree, a sale was had in which the plaintiff Connely was purchaser. The sale was confirmed December 4, 1935, and deed issued the following day. The application to redeem was not made until April, 1936, and during the second term of court after the confirmation of sale.

Appellants invoke section 3, art. VIII of the Constitution, which provides: "The right of redemption from all sales of real estate for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. Provided, that occupants shall, in all cases, be served with personal notice before the time of redemption expires."

The notice to occupant, provided for in this section of the Constitution, was never served upon the appellants, and they were not made parties to the foreclosure action. They contend that, under the constitutional provision, they are entitled to two years from and after the order of confirmation of the judicial sale in which to redeem. They cite and rely upon a number of decisions made by this court in which it was held that the two-year period for redemption, contained in the constitutional provision, applies to judicial as well as to administrative sales. Among the cases so holding are: *Logan County v. Carnahan,* 66 Neb. 685, 92 N. W. 984; *Selby v. Pueppka,* 73 Neb. 179, 102 N. W. 263; *Wood v. Speck,* 78 Neb. 435, 110 N. W. 1001; *Butler v. Libe,* 81 Neb. 740, 116 N. W. 663; *Smith v. Carnahan,* 83 Neb. 667, 120 N. W. 212; *Barker v. Hume,* 84 Neb. 235, 120 N. W. 1131; *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493, 237 N. W. 575. In none of the above cases had there been a prior valid administrative sale and a two-year period allowed to elapse after sale before commencement of the action to foreclose.

Under the scavenger tax law, counties, cities, villages and other municipalities may institute foreclosure action to collect delinquent taxes without there having been a previous administrative sale. In such cases, this court has

consistently held that the two-year redemption period, provided by the Constitution, applies from the date of confirmation of judicial sale. In such cases, there had been no other sale. This court has also held that where there was an invalid administrative sale, wherein the sale was not for all the delinquent taxes, the two-year redemption period applied to the judicial sale in foreclosure proceeding. *Adams v. Osgood,* 42 Neb. 450, 60 N. W. 869; *Barker v. Hume, supra.*

In *Hardwick v. Snedeker,* 88 Neb. 515, 129 N. W. 986, after administrative sale an action was brought for foreclosure without waiting the two-year period for redemption. It was therein held: "An action to foreclose a tax lien is not properly brought until after a sale of the land for taxes and two years allowed for redemption, but this is not jurisdictional, and if an action so brought proceeds to decree of foreclosure and sale, and a deed is duly issued upon confirmation of such sale, the owner of the land may redeem the same within two years after such sale and confirmation, but not later."

Where there has been a valid administrative sale by the county treasurer to a private individual and he has not brought foreclosure action until more than two years after the issuance of the tax sale certificate, the owner, or other person interested, is not entitled to two years in which to redeem from the confirmation of sale under decree of foreclosure. He is entitled to only one two-year period, and that has been given from the time of the administrative sale and before the commencement of the foreclosure action. It is true, however, that in such case he is entitled to an additional period in which to redeem; that is, at any time prior to the confirmation of the sale. The correct rule is that owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale.

Appellants contend that they had a right to redeem

which could be cut off only by the giving of the notice mentioned in the quoted constitutional provision. In our opinion, this contention cannot be sustained for a number of reasons:

First. This court has held on several occasions that such notice to occupant was required only where the holder of a valid tax sale certificate sought to obtain a county treasurer's tax deed, as provided by section 77-2025, Comp. St. 1929, and has no application to a proceeding to foreclose a valid tax sale certificate. In *Hardwick v. Snedeker, supra,* it was held that a statute requiring notice to occupant is not applicable in case of sale under decree of foreclosure. In *Commercial Savings & Loan Ass'n v. Pyramid Realty Co., supra,* it was held: "Personal notice required in sale of land for taxes, as provided in section 3, art. VIII of the Constitution, applies in all cases where a tax deed is sought, but is not required in sales under tax foreclosures in section 77-2039, Comp. St. 1929."

Second. The record in this case fails to show that appellants had any interest as tenants to protect by a redemption from the sale in the foreclosure action. Whether their lease had expired; whether they had any planted or unharvested crops, is not disclosed. Before they could redeem they must, of course, have some interest to protect.

Third. It appears from the evidence in this case that one of the appellants, on behalf of both of them, has, since the foreclosure sale had in this case, leased the land again from the purchaser at the judicial sale. Under these circumstances, the appellants had no right to preserve by a redemption.

It is insisted, however, that appellants were acting for and on behalf of the owners of the land, as well as for themselves. They did so testify as witnesses, but the written application made by them does not disclose that they were acting for any one other than themselves and in their own individual rights.

It is argued that there were irregularities and defects in the foreclosure proceeding, in that the affidavit which was

made for the purpose of obtaining an order authorizing service by publication did not literally comply with the statute, and, further, that the published notice did not literally comply with the statutory requirement. We are of the opinion that whatever irregularities or defects, if any, there were in the affidavit and in the notice cannot be raised at this time, because that would be a collateral attack upon the decree in the foreclosure proceeding. No appeal was taken from that decree, and any irregularities or defects that do not go to the jurisdiction of the court could not be raised in a collateral proceeding. But, regardless of that, the appellants in this case are in no position to complain, since they were not necessary parties to the foreclosure proceeding and, as already mentioned, have no property rights to protect by a redemption.

Error prejudicial to appellants has not been pointed out. The judgment appears to be right and is

AFFIRMED.

CLENDENEN W. MITCHELL V. STATE OF NEBRASKA.
273 N. W. 806

FILED JUNE 11, 1937. No. 30084.

1. Forgery. Forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.
2. ———. Any change in the personality, number, or relations, of the parties to such an instrument which gives the instrument a different legal effect is material.
3. ———. It is forgery fraudulently to alter any part of an instrument when the alteration is capable of working injury to another. Consequently, it is forgery fraudulently to erase one signature and insert another.
4. ———. Evidence in the record examined, and *held* ample to sustain conviction.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

R. O. Reddish, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

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

EBERLY, J.

The plaintiff in error, hereinafter called defendant, was informed against for forgery by falsely and feloniously altering a promissory note belonging to one Robert O. Jones, with the intent to defraud Jones. Upon trial a verdict of guilty was returned against defendant, and from the order of the trial court overruling his motion for a new trial, he prosecutes error.

There is practically little dispute in the evidence. Defendant was secretary-treasurer of the Northwest Financial Service, Inc., hereafter referred to as the "Finance Company." This was a corporation engaged partly in the business of handling and investing money belonging to others and entrusted to the Finance Company for that purpose. Defendant was also the secretary-treasurer and managing officer of the Northwest Agricultural Credit Corporation, an inactive but existing corporation, hereinafter referred to as the "Agricultural Corporation," which was formerly engaged in the business of rediscounting live stock paper to the Federal Intermediate Credit Bank.

Fred A. Hood was president of the Finance Company from 1925 to the spring of 1933. Hood had induced R. O. Jones to place with the Finance Company the sum of $1,200 on January 31, 1928, to be invested by the company on "monthly payment contracts." This written contract further provided that these "monthly payment contracts" are "always to be subject to the approval of the party of the first part (Jones) and belong to him exclusively, and will be held in trust by the party of the second part for collection." And it was further provided by the terms of this written contract that the sum of $1,200 so entrusted to the

Finance Company might be supplemented at any time and in any amount as party of the first part (Jones) might determine, and that such additional sums should come under the same provisions as this contract. It also appears that this investment was later increased to $5,500, and, in addition, it was orally agreed that Jones' money might be loaned on automobiles, furniture, and different kinds of merchandise contracts providing for payment on the monthly basis. It appears that on June 27, 1932, defendant made and delivered to the Finance Company, as payee, a promissory note for $490 in usual form, payable in three months after date, with interest, which was signed by "Northwest Agr. Credit Corp. (Signed) by C. W. Mitchell, Secy-Treas." On the same day, by an assignment in writing purporting to be executed by the Finance Company by the defendant, this note was assigned to the "Jones Trust," and reported thereafter from time to time as an investment made in Jones' behalf. All this was done without knowledge or authority from any of the other officers of the Finance Company, or the officers of the Agricultural Corporation, and, in like manner, the defendant took and received from the Jones funds the sum of $490 which he appropriated to his own private use. This $490 investment was not in conformity with the controlling contract already referred to. Some time thereafter the situation came to the knowledge of the attorney for the Agricultural Corporation, who was also a stockholder thereof, and who immediately challenged the legality of the entire transaction involving the $490 note, as it had been carried out by defendant. Thereupon the defendant, without knowledge of, or authority from, R. O. Jones, the owner of the instrument, and without knowledge of, or authority from, any other of the officers of the Finance Company or of the Agricultural Corporation, and without the Agricultural Corporation ever receiving any part of the consideration of the $490 note, by erasures and additions, altered and changed the signature as it originally appeared on the note, viz., from "Northwest Agr. Credit Corp. (Signed) by C. W. Mitchell, Secy-

Treas." to "Northwest Agr. Credit Co. (Signed) by C. W. Mitchell, C. W. Mitchell."

It appears to be admitted that the "Northwest Agr. Credit Co." has no existence, and, as a name, is fictitious.

We are committed to the view that "The signing of a fictitious name of a person to an instrument which is the subject of a forgery, with an intention to defraud, is a false and fraudulent making of such instrument, and constitutes the offense of forgery." *Randolph v. State,* 65 Neb. 520, 91 N. W. 356.

Our statutes, in effect, provide that forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. *Cooper v. State,* 123 Neb. 605, 243 N. W. 837; *Uerling v. State,* 125 Neb. 374, 250 N. W. 243; *Roush v. State,* 34 Neb. 325, 51 N. W. 755.

Here, the instrument alleged to have been feloniously altered was a negotiable instrument. On the subject of materiality of alteration, our negotiable instruments act provides: "Any alteration which changes * * * the number or the relations of the parties, * * * or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." Comp. St. 1929, sec. 62-807. See, also, 8 C. J. 728.

Our statute quoted best expresses the common law on this subject.

"Any change in the personality, number, or relations, of the parties to an instrument which gives the instrument a different legal effect is material." 2 C. J. 1214. See, also, *Montgomery v. Crossthwait,* 90 Ala. 553, 8 So. 498; *Haskell v. Champion,* 30 Mo. 136.

"To sustain an indictment for forgery it is generally necessary that the instrument alleged to be forged should be one which would expose a particular person to legal process. Apparent legal efficiency, however, is enough. It is not necessary that such suit should have in it the elements of ultimate legal success. It is enough if the forged in-

strument be apparently sufficient to support a legal claim." 2 Wharton, Criminal Law (12th ed.) 1190, sec. 887. But, in the instant case, the forgery of the original instrument is not relied upon. The conviction must be sustained, if at all, on the fact of alteration.

The rule clearly established by the authorities, applicable to forgery as defined by our statute, is: "It is forgery fraudulently to alter any part of an instrument when the alteration is capable of working injury to another. Thus, it is forgery to alter the dates, names, or any other material parts of an instrument when the alteration gives it a new operation. Consequently, it is forgery fraudulently to * * * erase one signature or indorsement and insert another. * * * It is even forgery for a person fraudulently to alter an instrument previously forged by himself." 2 Wharton, Criminal Law (12th ed.) 1188, sec. 884.

It is quite clear that the alterations admittedly made bring the subject of our present consideration within our forgery statute. We do not overlook the defendant's contention that he is not chargeable with forgery of an instrument executed by himself. As thus broadly stated the doctrine is not maintainable. "If, for example, after he had signed, sealed, and delivered a deed, he should surreptitiously, getting it into his temporary possession, alter it to accomplish some fraud, this would be forgery. If one alters a document which he has previously forged, he commits a new offense." 2 Bishop, Criminal Law (9th ed.) 454. This language is quite descriptive of what actually occurred in the instant case. It may well be said, in passing, that there is nothing in this entire transaction as actually carried out by defendant that is consistent with honest dealing and sound business ethics. There is sufficient evidence, if believed, that clearly establishes the necessary criminal intent on part of defendant to commit the crime here charged, and amply supports the judgment. The objections to instructions given do not appear meritorious. In addition, it may be said that in this class of cases this court is bound by the rule early announced, viz.: "In criminal cases, as in

civil, the credibility of witnesses and the weight to be given their testimony are matters for the determination of the jury. It is for the jury to determine whether it is convinced beyond a reasonable doubt of the defendant's guilt, not for the reviewing court to say whether it is so convinced. A reviewing court can only inquire whether the evidence was sufficient to warrant the jury in finding the defendant guilty." *Bartlett v. State,* 115 Neb. 148, 211 N. W. 994. See, also, *O'Connor v. State,* 123 Neb. 471, 243 N. W. 650.

It follows that the judgment of the trial court is in all respects correct, and it is

AFFIRMED.

FERDINAND MEIERJURGEN, APPELLEE, V. CITY OF LINCOLN, APPELLANT.
273 N. W. 804

FILED JUNE 11, 1937. No. 30123.

Evidence examined and found to support finding of trial court.

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

Loren H. Laughlin and *George A. Piper,* for appellant.

Lloyd E. Chapman, contra.

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

DAY, J.

Meierjurgen seeks compensation for total disability arising from an injury he claims to have received while employed by the city of Lincoln in its parks. The city appeals from a judgment under the compensation law. The only question presented is one of fact, whether or not the disability results from an injury to the workman.

Meierjurgen claims the injury occurred on September 9,

1935, at which time he was helping to load a truck and move some benches from one park to another. He says that in lifting one of the benches he strained his back. He states that he complained immediately to his fellow workmen, who deny that any complaint was made at that time. The employee worked for two or three days, when he complained to his superior and was taken to a doctor for the city. He received medical attention from this physician for a period of three or four weeks during which time he became worse. Another physician then cared for him. After X-ray pictures were taken he was hospitalized for about ten days. While he was in the hospital a body cast was put on which he wore for about six weeks, when it was taken off because it hurt him so much. Afterwards a body brace was worn for some months. This could be taken off for a half day at a time to relieve him. He was later put in Bryan Memorial Hospital by the city's physician, where heat was applied. As a part of the treatment all this time serum was injected in his arm at intervals. The city assumed the obligation of all medical expenses from September 9, 1935, to July 2, 1936, and, in addition, paid the amount required by the law during that time as compensation.

It is not questioned that the plaintiff is in a serious physical condition and that he is unable to work as he was prior to September 9, 1935. The only difference of opinion is among the expert witnesses as to the cause of the disability. An expert witness testified for the plaintiff that his present physical condition was due to the injury which he received on September 9, 1935. An expert witness testifying for the city is of the opinion that the condition as disclosed by the X-ray pictures was not so caused, though it may have been aggravated by an injury. Another expert witness for the city is of the positive opinion that the injury claimed by plaintiff was not and could not be the cause of the condition or of the disability.

There are other surrounding circumstances which must be considered in connection with the testimony of the ex-

perts. There is no claim that the plaintiff is a malingerer. He had not been ill or injured for many years. He worked two or three days after the injury and has been unable to work since. Upon a consideration of all the evidence in the record, of which only a brief outline has been given here, we are of the opinion that the evidence supports the finding of the trial judge.

In view of this finding, it is not necessary to consider the effect of chapter 57, Laws 1935, which provides among other things that the judgment of a district court in a compensation case may not be set aside or modified unless it appears "that the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record." The court does not find it necessary to modify or set aside the judgment in this case.

AFFIRMED.

EVA IRENE GRIMES, APPELLEE, V. J. L. BAKER, APPELLANT.
273 N. W. 789

FILED JUNE 11, 1937. No. 30000.

Contracts. An agreement without consideration is *nudum pactum* and unenforceable.

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

Gaines, McLaughlin & Gaines, for appellant.

Clarence T. Spier and *Arthur C. Bailey, contra.*

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

PAINE, J.

Plaintiff brought suit in the district court to recover damages sustained by reason of defendant's failure and refusal to fulfil a verbal statement to save plaintiff harmless from

any loss she might suffer by reason of her purchase of shares of stock of the Universal Gypsum & Lime Company, of Chicago, Illinois, recommended by him.

Defendant alleged in his answer that he acted purely as the agent of the plaintiff in the purchase of said stock from George E. Sipple, its owner, and that the agreement alleged by plaintiff to repurchase the stock was barred by the statute of limitations, and void under the statute of frauds, and was *nudum pactum*. The jury returned a verdict for $1,379.23, from which the defendant appeals.

The plaintiff alleged that defendant was a substantial stockholder and director in said company, with full and complete knowledge with respect to the financial status of said corporation; that in 1926 defendant solicited plaintiff to purchase stock of said company, and verbally agreed with plaintiff that defendant would repurchase said stock and would save her harmless from any loss which she might sustain through such investment; that such solicitation and negotiations were carried on between the defendant and the mother of the plaintiff, who was acting for and on behalf of the plaintiff; that the plaintiff, relying upon defendant's agreement, paid $1,530 for the stock so purchased through defendant; that the said company later went into bankruptcy, and was merged with another company under the name of National Gypsum Company, and the stock becoming practically worthless, the plaintiff on February 15, 1935, demanded that defendant repurchase her stock. Upon defendant's refusal, this action was brought, asking for verdict and judgment for the amount of her outlay, less the present value of the stock into which the original shares of stock had been merged.

The jury deducted $241, being the value of the new shares substituted, and added 6 per cent. interest from the date of the demand to the date of the verdict, and thus arrived at the verdict of $1,379.23, for which amount judgment was entered.

Among the errors relied upon for reversal by the defendant are that the court erred in overruling defendant's

motion for a directed verdict at the close of the evidence, and in holding that defendant was under any contractual obligation to plaintiff. Defendant especially insists that the court erred in holding that the statement made by the defendant constituted a binding contract, and insists there was no consideration whatever for the alleged agreement, which is *nudum pactum* and unenforceable, and being oral it was void under the statute of frauds, and, finally, that the court erred in holding that the claim was not barred by the statute of limitations.

It appears that the defendant, in conversation with plaintiff's mother at Fremont, recommended this stock as a good investment, and later the mother came to Omaha and, while taking lunch with defendant at the Omaha Athletic Club, the conversation occurred upon which the suit is founded.

The appellee insists that four times this court has rendered opinions which support a recovery by the plaintiff in this case, and it is necessary to examine these opinions.

In the case of *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419, 181 N. W. 169, it is stated that the plaintiff purchased certain shares of stock, and that the agent of the defendant company in making the sale of such stock made an oral contract and agreement with the plaintiff whereby the defendant company agreed, if said stock was presented to it at any time within a period of four years, to repurchase such stock with interest at 7 per cent. on demand. It was held that the sale of the stock and the repurchase agreement were one and the same transaction, and that such a contract made by a corporation is not *ultra vires*, and that the defendant company could not be heard to say that the sale was valid so far as the purchase of the stock was concerned, and void so far as its repurchase was concerned, as it was a single transaction and constituted but one contract.

In *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436, plaintiff purchased ten shares of the capital stock of a corporation, and claims that the defendant, to induce her to

buy the stock, orally agreed to repurchase the same. The defendant testified that in these negotiations he acted solely as the agent of the corporation whose stock he was selling.

In *Stratbucker v. Bankers Realty Investment Co.*, 107 Neb. 194, 185 N. W. 271, plaintiff purchased shares of stock in the defendant company upon the promise made by its agent at the time of purchase that the defendant company would repurchase such stock at any time after the expiration of one year upon plaintiff giving 30 days' notice to the defendant company. He further made representations that said defendant company had a fund of $100,000, duly deposited in a bank, for the express purpose of meeting such demands of those who bought stock.

In *Grotte v. Rachman*, 114 Neb. 284, 207 N. W. 204, the plaintiff owned stock in the Burgess Nash Company, and the defendant Rachman was an agent engaged in the sale of the stock of Stroud & Company, and he induced plaintiff to switch her Burgess Nash stock for the stock which he was selling of the same face value. As part of the transaction the defendants agreed that they would, at any time that plaintiff needed money, repurchase such Stroud & Company stock at its face value with 7 per cent. interest.

It will be seen from this brief statement of the facts in these four Nebraska cases that no one of them is quite in point with the case at bar.

In the instant case, when the mother of the plaintiff disclosed that her daughter had a little money for which she was seeking investment, what was more natural than that the defendant would recommend to her as an investment stock in the Universal Gypsum & Lime Company of Chicago, in which his stock holdings were substantial? He stated that he had received not only regular dividends, but that there had been stock dividends issued, and that there was a plan for buying up small gypsum companies and forming a larger company. He was so certain of the intrinsic value of this Universal Gypsum & Lime Company stock that he made the statement while they were lunching at the Omaha Athletic Club that he would take it off the

daughter's hands at any time she desired to sell it. He consented, at the mother's request, to go into the open market and arrange for the purchase of stock for them. The defendant did not sell stock of the company itself, as a promoter or agent would have done, to increase the assets of the company, nor did he arrange to sell stock which he owned. He did not receive one cent of commission, nor benefit in any way through the purchase of these few shares of stock in the open market in this large corporation. No complaint of any kind was made to the defendant for more than five years after the purchase was made.

Several of the cases cited by appellee, and other Nebraska cases, are discussed in 12 Neb. Law Bulletin, 200, and it is indicated that the original sale affords a good consideration for the option to return the stock to the original seller and receive the money paid under such an agreement, but nowhere is it stated that a third party, who has no financial interest therein, can be so held. See recent annotations on this question in 88 A. L. R. 842 and 101 A. L. R. 154.

In our opinion, the statement of the defendant that he would repurchase the stock was naked of any obligation, and, being a *nudum pactum,* is not enforceable. Judgment reversed and action dismissed.

REVERSED AND DISMISSED.

CONTINENTAL COMPANY OF LINCOLN, APPELLEE, V. HARVEY RATHBONE ET AL., APPELLANTS.
273 N. W. 820

FILED JUNE 11, 1937. No. 30051.

Mortgages: FORECLOSURE: MORATORIUM. In a hearing on an application for a moratory stay under section 20-21,159, Comp. St. Supp. 1935, the burden of proof is upon the party resisting the application to show that he falls within the exception, "unless upon hearing on said application, good cause is shown to the contrary," contained in that statute.

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

Chambers & Holland and *John H. Keriakedes,* for appellants.

Beghtol, Foe & Rankin, contra.

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

CARTER, J.

This is an appeal from an order confirming the sale of the mortgaged property in a foreclosure action and from the denial of defendants' application for a moratory stay.

The record shows that, after default, foreclosure was commenced against the property involved in this action. The property was sold on April 21, 1936, for $10,000. The trial court sustained defendants' objections to confirmation and ordered a new sale. The property was again sold on August 25, 1936, for $15,000. Defendants objected to the confirmation of the sale and again applied for a moratory stay. The trial court overruled defendants' application for a moratory stay and confirmed the sale. It is from this action of the trial court that this appeal was taken.

Appellee in its brief attempts to question the constitutionality of section 20-21,159, Comp. St. Supp. 1935, commonly called the Moratorium Act. The question was not raised in the district court and consequently cannot be raised in this court for the first time on appeal. *Howarth v. Becker,* 128 Neb. 580, 259 N. W. 505; *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792.

Appellants contend that the trial court erred in not allowing a moratory stay. Appellee offered no evidence of the value of the property. Neither did appellee produce any evidence showing that appellants had no interest in the property over and above appellee's first lien. While this court has repeatedly held that, where it appears from the evidence that the amount of the mortgage lien on the property under foreclosure exceeds its value, the moratory stay will be denied, yet, we have also held that the burden of proof is upon the party resisting the application for a moratory stay to establish that fact. *Howarth v. Becker,*

supra. The undisputed evidence of the appellants is that the value of the property exceeds the amount of appellee's lien. Appellee offered no evidence whatever on this subject. Under such circumstances, the trial court should have allowed the moratory stay. A trial court cannot deny an application for a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1935, unless it affirmatively appears that "good cause is shown to the contrary" as by the act provided. Good cause to the contrary not having been established by evidence, the trial court erred in overruling the application of appellants for a moratory stay.

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4. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee security of investment, and on application for a certificate for operation of motor-bus transportation the public interest is to be most considered. *Furstenberg v. Omaha & C. B. Street R. Co* 562
5. A pedestrian injured by being struck by an automobile while crossing a street between intersections *held* guilty of more than slight contributory negligence. *Doan v. Hoppe* 641
6. As respects liability of bailor of automobile, contract of bailment required that it be construed as including regulations of city ordinances. *McWilliams v. Griffin* 753
7. Evidence *held* insufficient to sustain judgment against bailor of automobile for hire for injuries received by guest. *McWilliams v. Griffin* 753

Bankruptcy.

1. A bankrupt is discharged from a judgment rendered on a claim provable under the bankruptcy act, where rendered prior to the discharge in bankruptcy. *Luikart v. Bredthauer* 62
2. A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense, abatement

or counterclaim to which they would have been liable in the hands of the bankrupt. *Ricketts v. Reichenbach*.... 466

Banks and Banking.

The department of banking is ineligible to be appointed a judicial receiver, since it is not a qualified legal entity. *State, ex rel. Sorensen, v. Hoskins State Bank*.... 878

Bill of Exceptions.

Order for additional 40 days' time for service of bill of exceptions may be made after first 40 days have expired. *Markel v. Glassmeyer*..... 716

Bills and Notes.

1. In action on note, the burden is on defendant to establish defense of want of consideration. *Plaza Hotel Co. v. Hotel Stratton*..... 396
2. In action on note, plaintiff need not prove that a valid consideration moved to maker, but showing a loss, disadvantage, or imposition of a legal obligation upon the payee is sufficient. *Plaza Hotel Co. v. Hotel Stratton* 396

Carriers.

Street car company *held* not liable for injury to passenger from slipping upon a banana peel upon step of street car, in absence of evidence as to who placed peel upon step, that operator of car knew of its presence, or that it had been there for sufficient length of time that notice might be imputed to the company. *Belder v. Omaha & C. B. Street R. Co*..... 415

Clerks of Courts.

Clerk of court who disbursed proceeds of judgment *held* not liable to attorney, or his assignee, for attorney's fee, in absence of showing that attorney was actually vested in law with a valid claim and lien on the judgment. *Snyder v. Smith*..... 504

Constitutional Law. SEE STATES, 1-5. STATUTES.

1. In construing a constitutional amendment to ascertain the intent of the people in adopting it, courts must find such intent in the language of the amendment. *Swanson v. State*..... 82
2. The self-imposed limitations on the power to amend the Constitution should not be so construed as to defeat the plainly expressed will of the people, where requirements are substantially observed. *Swanson v. State*..... 82
3. The constitutional provision prescribing procedure for giving and publishing of notice in submitting a proposed

constitutional amendment to the electors need only be substantially complied with to effect a valid submission or adoption of the proposal. *Swanson v. State* 82
4. The result of the vote upon a proposed constitutional amendment is to be determined by the state canvassing board, and, if carried, the amendment becomes operative on date of governor's proclamation to that effect. *Swanson v. State* 82
5. The proposed amendment to the constitutional provision naming state officers *held* to have been properly submitted and adopted and to have become effective on date of governor's proclamation. *Swanson v. State* 82
6. No title to an act providing for submission of a proposed constitutional amendment is required. *Swanson v. State* 82
7. A constitutional amendment must be construed with other provisions so as to harmonize the whole instrument. *Swanson v. State* 82
8. The legislature may not impose judicial power on executive officers nor delegate to them legislative power. *Laverty v. Cochran* 118
9. Judicial power is authority to hear and determine controversies as to rights and to render judgment binding on disputants on such determination. *Laverty v. Cochran* 118
10. Authority to hear and determine controversies between public officers, the state, counties, cities, and other subdivisions of the state and the state bonding board, is a judicial power. *Laverty v. Cochran* 118

Contempt.

1. A contempt action is *sui generis*, but in the nature of a criminal proceeding. *State, ex rel. Wright, v. Barlow* 166
2. A prosecution for criminal contempt is governed by and in accordance with strict rules applicable to criminal prosecutions. *State, ex rel. Wright, v. Barlow* 166
3. The constitutional provision giving accused the right to meet opposing witnesses face to face *held* not to apply to criminal contempt proceedings and not to prevent use of depositions. *State, ex rel. Wright, v. Barlow* 166
4. To sustain conviction of criminal contempt, the evidence must show guilt of defendant beyond a reasonable doubt. *State, ex rel. Wright, v. Barlow* 166
5. Where issues in an original action in the supreme court for criminal contempt were referred to a referee, the referee properly refused the state permission to amend the information by adding a new count thereto. *State, ex rel. Wright, v. Barlow* 166

6. Evidence *held* insufficient to sustain conviction of contempt of court. *Yearsley v. State* 286
7. The supreme court will not examine alleged errors in error proceeding to review judgment for contempt, where it does not appear that motion for new trial was presented to trial court, but in such case the court will only examine the record to determine if the pleadings conferred jurisdiction on trial court. *Wright v. Wright* 619
8. Although the strict rules applicable to criminal cases do not apply in an action for civil contempt of court, the affidavit must contain allegations which constitute the offense complained of if admitted or proved. *Wright v. Wright* 619

Continuance.

Overruling of motion for continuance *held* not error. *Doescher v. Robinson* 299

Contracts.

1. The validity of a contract is governed by the law at the time it was made, subject to limitations subsequently made under police power of state. *Vonburg v. Farmers Irrigation District* 12
2. A court should not make a new contract for parties by construction, but should confine itself to interpretation of the one which they have made for themselves. *Johnson v. Loewen* 389
3. Contract *held* not to convey an interest in lands. *Johnson v. Loewen* 389
4. The consideration sufficient to support a promise may be a detriment suffered by the promisee as well as a benefit accruing to the promisor. *Crawford State Bank v. McEwen* 399
5. In the absence of fraud or duress, a mature person of ordinary intelligence is conclusively presumed to have read a contract executed by him and to know the contents thereof. *Ahrens v. American Smelting & Refining Co.* 460
6. Provisions of a contract will be considered abandoned where each party performs acts inconsistent with its existence and acquiesces in such acts by the other. *Hahn v. General American Life Ins. Co* 509
7. A promise which induces action or forbearance on part of promisee is binding if injustice can be avoided only by enforcement of the promise. *Fluckey v. Anderson* 664
8. A contract is made with reference to, and subject to, existing law, and every law including city ordinances

affecting such contract is read into and becomes a part of the contract. *McWilliams v. Griffin* 753

Corporations.

1. A receiver may be appointed for a solvent corporation where there is gross mismanagement or other situation calling for equitable relief. *Fisher v. National Mtg. Loan Co* 185
2. Evidence *held* insufficient to require appointment of receiver for a solvent corporation. *Fisher v. National Mtg. Loan Co* 185
3. Where directors of corporation refuse a stockholder's demand that they take action to recover property converted by an officer, such stockholder may sue without requesting other stockholders to sue, where such request would be useless. *Fisher v. National Mtg. Loan Co* 185
4. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders. *Fisher v. National Mtg. Loan Co* 185
5. An officer or director of a corporation cannot without authority divert corporate property to payment of or securing a debt to himself. *Fisher v. National Mtg. Loan Co* 185
6. A lien on property of a corporation can only be created by an agreement between the corporation and claimant or by some fixed rule of law. *Fisher v. National Mtg. Loan Co* 185
7. An officer or director of a corporation cannot acquire a lien on its property as a consequence of his own breach of duty. *Fisher v. National Mtg. Loan Co* 185
8. The Home Owners Loan Corporation does not have powers of the executive, judicial, or legislative branches of government, was granted no immunity from civil process, and is therefore subject to the same liabilities as other corporations. *Central Market v. King* 380
9. In suit to foreclose lien on corporate stock, the corporation had the burden to prove an oral pledge of the stock. *Wood Realty Co. v. Wood* 817
10. In suit to foreclose lien on corporate stock, evidence to prove an oral pledge of the stock must clearly show both parties intended to create a lien. *Wood Realty Co. v. Wood* 817
11. An oral contract pledging corporate stock to secure a debt owing by a stockholder to the corporation is limited to the particular debt secured. *Wood Realty Co. v. Wood* 817
12. A written assignment of corporate stock to secure a

particular debt owing by a stockholder to the corporation does not include a subsequently created debt of stockholder to corporation, in absence of a contract to that effect. *Wood Realty Co. v. Wood* 817
13. Where stock of a corporation was sold at judicial sale, *held* that the court could require entry of transfer of the stock on the books of the corporation. *Danbom v. Danbom* 858
14. Statement of seller *held* not to create liability to repurchase stock. *Grimes v. Baker* 898

Costs.

1. A court is authorized by statute to tax as costs a reasonable fee for services of a guardian *ad litem*. *Wood Realty Co. v. Wood* 817
2. The litigant to whom the fee for services of a guardian *ad litem* shall be taxed as costs depends on circumstances of each case and discretion of court. *Wood Realty Co. v. Wood* 817

Counties.

1. The emergency relief act (section 77-1820, Comp. St. Supp. 1935) *held* not to limit counties' responsibility for indigent persons to the fund raised thereunder. *State, ex rel. Boxberger, v. Burns* 31
2. A county board cannot issue warrants in excess of 85 per cent. of the tax levied for the current year unless there is money in the proper fund for their payment. *State, ex rel. Boxberger, v. Burns* 31
3. The powers of a county are limited to those prescribed by statute, and a county board can discharge statutory obligations only by the statutory means provided by the legislature. *State, ex rel. Boxberger, v. Burns* 31
4. Where funds are available, a county must relieve persons entitled to relief under statute. *State, ex rel. Boxberger, v. Burns* 31

Courts.

1. The court first acquiring jurisdiction of an action retains jurisdiction until final determination of the controversy. *Chicago & N. W. R. Co. v. Bauman* 67
2. Rule of practice promulgated by the supreme court in abrogation of a former rule is not retroactive. *Heineman v. Wilson* 159
3. A foreign judgment cannot be sustained as a matter of comity between this state and a foreign state where contrary to the law of this state. *In re Estate of Schram* 268
4. Determination of validity of a contested assignment of

adjudicated claims against decedent's estate is not within the county court's exclusive jurisdiction to settle estates. *In re Estate of King* 372
5. Powers conferred upon an appellate court should be construed as intended to include only powers consistent with the discharge of its inherent judicial functions. *Furstenberg v. Omaha & C. B. Street R. Co.* 562
6. The first of two courts having concurrent jurisdiction to take cognizance of a case has the right to retain it to the exclusion of the other; and where property is *in gremio legis*, if it be a court of rightful jurisdiction, no other court can wrest from it the jurisdiction first obtained. *Lincoln Joint Stock Land Bank v. Fuller* 677
7. Where one of two courts having concurrent jurisdiction takes cognizance of a case and thereafter loses jurisdiction over the *res*, the other is no longer deprived of its right to assume jurisdiction over it. *Lincoln Joint Stock Land Bank v. Fuller* 677

Criminal Law.

1. Motion to strike alias names of defendant from an information charging obtaining merchandise by false pretenses by using a false name *held* properly overruled where the motion preceded taking of evidence. *Mason v. State* 7
2. While defendant in a criminal prosecution is allowed wide latitude in cross-examination of state's witnesses, the extent of such cross-examination is within the court's discretion. *Mason v. State* 7
3. Although evidence of offenses other than the one charged is generally inadmissible, such evidence may be competent where necessary to show intent or guilty knowledge of accused. *Mason v. State* 7
4. A defendant may not predicate error on an instruction more favorable to him than is required by the law applicable to the offense charged. *Stump v. State* 49

Damages.

1. Where facts alleged show that plaintiff is entitled to damages of some sort, the pleader's mistake as to rule by which damages should be measured is not a fatal defect. *Dill v. Farmers Co-operative Co.* 256
2. Amount of recovery for mental anguish, personal injuries, and physical suffering must generally be left to the jury's discretion, and a verdict therefor will not be reduced unless clearly excessive. *Schindler v. Mulhair* 809

3. Verdict for personal injuries *held* excessive. *Schindler v. Mulhair* 809

Deeds.

1. Under a deed conveying a life estate with remainder over to life tenant's wife and her children, the number of remaindermen became fixed at termination of the life estate and the interest of each could then be determined. *Strawhacker v. Strawhacker* 614
2. Where a deed conveying a life estate with remainder over to a class does not provide for defeasance in case of death of one of the class during continuance of the life estate, the vested interest of one so dying does not lapse but descends to his heirs. *Strawhacker v. Strawhacker* 614
3. Under a deed conveying land to a husband for life and at his death to his present wife and her children, where the wife had one child at time of delivery of the deed, the life estate immediately vested in the husband and the remainder vested in the wife and child, subject to being opened to let in children subsequently born to the wife during continuance of the life estate, and their interests vested at time of birth. *Strawhacker v. Strawhacker* 614
4. Duress is a species of fraud and the ground on which a deed is voidable for duress is the same as in case of fraud. *Scott v. Swank* 720
5. In a suit to cancel a deed on grounds of duress by grantee and mental incompetency of grantor, the court may resort to evidential circumstances about which there can be no reasonable controversy, where testimony of experts and nonexperts is in direct conflict. *Scott v. Swank* 720
6. Where mental weakness has been taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside. *Scott v. Swank* 720
7. Equity will scrutinize a transaction in which ground appears for holding that influence has been acquired over a person of weak mind and has been abused. *Scott v. Swank* 720
8. Circumstances under which a deed was made, condition of grantor at time, and injustice to him and his heirs if deed is upheld, may be such as to cast on grantee the burden of showing that deed is untainted with undue influence, imposition, or fraud, but is the intelligent and deliberate act of grantor. *Scott v. Swank* 720
9. Deed to grantor's second wife *held* voidable at suit of

adopted daughter on grounds of grantor's mental incompetency and grantee's duress. *Scott v. Swank* 720

Depositions.

Exclusion of deposition not filed a day before trial as required by statute *held* not error. *Doescher v. Robinson* 299

Descent and Distribution. SEE EXECUTORS AND ADMINISTRATORS, 1.

Dismissal.

Where plaintiff refuses to again try his case after new trial has been granted, the court may properly dismiss the action for want of prosecution. *Egan v. Standard Oil Co* 518

Divorce.

1. Former husband's failure to make payments for support of minor children required by decree of divorce *held* not to justify committing husband to jail for contempt, where due to inability to procure means to make payment. *Scott v. State* 39
2. Public policy of the state, as declared by legislative enactment, is to discourage divorce cases. *State, ex rel. Hunter, v. Crocker* 214
3. Affidavit for contempt for failure to pay alimony *held* insufficient. *Wright v. Wright* 619
   Thomas v. Thomas 827
4. Accusation of adultery by wife in husband's petition for divorce, where made in good faith, is not basis for divorce by wife on ground of cruelty. *Clough v. Clough* 748
5. Amount of alimony and adjustment of property rights depend on situation of parties and facts in the particular case. *Clough v. Clough* 748
6. Adjustment of property rights and award of alimony approved. *Clough v. Clough* 748
7. Wilful and contumacious neglect or refusal to pay alimony for support of wife *held* to constitute civil contempt. *Thomas v. Thomas* 827

Drains.

Levies of valid assessments by a drainage district for special drainage benefits accruing to land *held* not voidable because an older drainage district previously levied and collected assessments on the same land for special drainage benefits. *Schobert-Zimmerman Drainage District v. Soll* 629

Electricity.

Where a mere licensee entered upon a rural right of way

occupied by electric light wires and was injured by sagging wire, *held* he was not entitled to recover damages for negligence, if licensor did not wilfully or wantonly inflict injury upon him. *Griffis v. Village of Brady* 498

Eminent Domain.

1. The petition in a proceeding to condemn land for an irrigation ditch, to confer jurisdiction, must describe lands to be crossed, size of ditch, canal or works to be constructed, quantity of land to be taken and names of interested parties. *Platte Valley Public Power and Irrigation District v. Feltz* 227
2. An appeal by landowner from award of appraisers did not waive objections to jurisdiction of county court. *Platte Valley Public Power and Irrigation District v. Feltz* 227
3. Proceedings in condemnation under a petition which fails to set out jurisdictional facts are null and void. *Platte Valley Public Power and Irrigation District v. Feltz* 227
4. Owner of ranch land along river *held* entitled to recover value of riparian land taken in construction of dam, and for consequential damages to such governmental sections as were included in portions of land actually taken. *McGinley v. Platte Valley Public Power and Irrigation District* 292
5. Measure of damages for injury to leasehold resulting from change in grade of a public street, stated. *Fair-Way Oil Co. v. State* 707
6. Landowner's claim for damage to his land by reason of cutting off ingress and egress to and from such land, caused by public power and irrigation district condemning and vacating a highway leading from his land to market, will not be defeated by previous sale of part of land to the district for reservoir purposes. *Steck v. Platte Valley Public Power and Irrigation District* 822
7. A landowner who by vacation of a public highway is left without outlet in direction of market suffers special damage. *Steck v. Platte Valley Public Power and Irrigation District* 822

Estoppel.

1. As between two innocent persons, the one making it possible for a third person to commit a wrongful act

resulting in loss should bear such loss. *First Trust Co. v. Danielson* 141
2. Estoppel by conduct *held* not established. *Wiltse v. Bolton* 354
3. A public utility operating under a nonexclusive franchise is not estopped from appearing in a hearing before the railway commission upon application by another for a certificate of convenience and necessity to operate in the same field. *Furstenberg v. Omaha & C. B. Street R. Co.* 562
4. A person who gives one reason for his conduct and decision as to a matter involved in controversy cannot after commencement of litigation defend upon another and different ground. *Serven v. Metropolitan Life Ins. Co.* 637
5. Where a party gives a reason for his conduct and decision in a controversy, he cannot, after commencement of litigation, change his ground. *From v. General American Life Ins. Co.* 731
6. One who with knowledge of the facts conveys land in satisfaction of a mortgage cannot successfully maintain a suit to reform or set aside the conveyance. *Larson Real Property Co. v. First Trust Co.* 847

Evidence.

1. Cogent reasons and circumstances which strengthen expert opinion as to a scientific fact in issue may determine the issue. *McGuire v. Kansas City Bridge Co.* 1
2. Statements by an adverse party relevant to a material fact in issue and inconsistent with facts alleged or testified to by him are not hearsay. *McDaniel v. Farlow* 273
3. Admissions against interest are admissible whether they constitute part of the *res gestæ* or not. *McDaniel v. Farlow* 273
4. Admissions against interest are admissible without laying a foundation. *McDaniel v. Farlow* 273
5. Evidence of a contemporaneous oral agreement is inadmissible to vary the terms of a written lease. *Weidenfeld v. Olson* 303
6. Evidence of a contemporaneous oral agreement is not admissible where a written contract is complete and unambiguous. *Weidenfeld v. Olson* 303
7. Foundation for introduction in evidence of statute of a sister state *held* sufficient. *Triplett v. Lundeen* 434
8. Volume of Missouri statutes *held* properly admitted in evidence. *Triplett v. Lundeen* 434
9. In an action on a note by payee's trustee in bankruptcy,

oral testimony and written instruments are admissible to show that the note was given for accommodation of the payee, without consideration. *Ricketts v. Reichenbach* 466

10. A statement made by a party to an action as to a fact in issue unfavorable to the conclusion contended for by such party is admissible in evidence as an admission against interest. *Falkinburg v. Inter-State Business Men's Accident Co*..... 670
11. A statement, to be admissible as *res gestæ*, must have been spontaneous, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation. *Markel v. Glassmeyer* 716
12. In action for disability benefits of life policy, a witness who was well acquainted with insured farmer's ability to perform farm work *held* competent to testify with reference thereto. *From v. General American Life Ins. Co.* 731
13. The trial court may in its discretion admit as evidence models and diagrams prepared by a witness to illustrate his testimony, depending on the verity of supporting testimony. *Falkinburg v. Prudential Ins. Co*..... 831
14. Admission of evidence of experiments to illustrate testimony is within the discretion of the trial court, but such discretion should be exercised with equal consideration for the parties. *Falkinburg v. Prudential Ins. Co*..... 831
15. The presumption against death by suicide prevails when the cause of death is unknown, but disappears when evidence is introduced tending to show the cause of death. *Falkinburg v. Prudential Ins. Co*..... 831
16. In action on life insurance policy, statements of insured, who was discovered immediately after he was shot, relative to the circumstances, *held* admissible as part of the *res gestæ*. *Falkinburg v. Prudential Ins. Co*..... 831

Execution.

1. An execution sale must be conducted substantially in the manner prescribed by the notice and in accordance with the decree. *Farmers Security Bank v. Wood*..... 175
2. The court should refuse to confirm an execution sale where it is evident that the sale was not conducted substantially in the manner prescribed by the notice and in accordance with the decree. *Farmers Security Bank v. Wood*..... 175

Executors and Administrators. SEE MORTGAGES, 18.

1. The law of the place where decedent's realty is situated

governs rights of parties therein and modes of its transfer or distribution. *In re Estate of Schram* 268
2. A domicillary administrator appointed in a foreign state is not entitled to collect proceeds of sale of decedent's realty, situated in Nebraska, for use in paying widow's allowance. *In re Estate of Schram* 268
3. Where administrator sells realty to pay debts, the character of the property is changed from realty to personalty only so far as may be necessary to accomplish that purpose. *In re Estate of Schram* 268
4. Where executor fails to make distribution in compliance with decree, distributee, after demand and after having obtained consent of county court, may sue on executor's bond. *Brownfield v. Edwards* 325
5. A final decree of distribution has the force of a personal judgment, and distributees have a right to levy of execution on executor's property. *Brownfield v. Edwards* 325
6. Right of distributee to sue on the executor's bond is an alternative right to right to levy execution. *Brownfield v. Edwards* 325
7. An executor cannot be personally charged with reimbursement of money paid out pursuant to an order of court, in absence of fraud. *Brownfield v. Edwards* 325
8. Where an order of distribution was reversed on appeal and a new decree entered, distributee *held* entitled to distribution under the new decree. *Brownfield v. Edwards* 325
9. Where the county court finds that distributee's share of an estate is in the hands of one other than the executor, the distributee may recover such share from such person. *Brownfield v. Edwards* 325
10. All parties interested in distribution of estate, whether present or not, are bound by final decree of distribution. *Brownfield v. Edwards* 325
11. A final decree of distribution cannot be collaterally attacked. *Brownfield v. Edwards* 325
12. An appeal from a judgment of the county court in an estate matter *held* not to remove to the district court subject-matter outside of such jurisdiction. *In re Estate of King* 372

False Imprisonment.

1. False imprisonment is the unlawful restraint of a person without his consent either with or without process of law. *Doescher v. Robinson* 299
2. No definite rule exists for ascertainment of exact amount

recoverable for false imprisonment. *Doescher v. Robinson* 299
3. The amount recoverable for false imprisonment is such sum as will fairly compensate plaintiff for pecuniary damage found by the jury to have been caused by defendant's wrongful acts. *Doescher v. Robinson* 299
4. Damages of $1,000 for false imprisonment *held* not excessive. *Doescher v. Robinson* 299
5. Where there is conflict of testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury. *Doescher v. Robinson* 299

Fixtures.

A tenant who erects sheds and fencing upon leased premises under an agreement with his landlord that they are not to become fixtures may remove them at termination of his tenancy. *Penn Mutual Life Ins. Co. v. Kimble* 408

Forgery.

1. Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. *Mitchell v. State* 891
2. Any change in the personality, number, or relations of parties to a negotiable instrument which gives it a different legal effect is material alteration. *Mitchell v. State* 891
3. It is forgery fraudulently to alter any part of an instrument when the alteration is capable of working injury to another, and hence it is forgery fraudulently to erase one signature and insert another. *Mitchell v. State* 891

Fraud.

1. Whether vendor's statement that he is owner of and has the right to sell property is statement of fact or expression of opinion depends on circumstances surrounding the transaction. *Lindholm v. Resnick* 682
2. Statement of vendor regarding title to property *held* expression of opinion. *Lindholm v. Resnick* 682
3. The fact that purchaser demanded a bond indemnifying against loss from failure of title of property indicated that she did not rely upon vendor's statement that he owned the property and precluded recovery in an action for fraud. *Lindholm v. Resnick* 682
4. Vendor's representation of value of land, where purchaser examined the land, *held* mere opinion, and not actionable fraud. *Kucera v. Pellan* 739

5. Vendor's representation as to character and condition of soil of farm *held* mere expression of opinion. *Kucera v. Pellan* 739

Fraudulent Conveyances.

1. Fraudulent intent is a question of fact. *Malone v. Bell* 478
2. Husband's transfer of property to wife, preventing his creditors from enforcing payment of claims, is presumptively fraudulent as to them, and burden is on wife to prove otherwise. *Malone v. Bell* 478
3. A *bona fide* debt due from husband to wife is a sufficient consideration to support conveyance of property as security for the debt. *Malone v. Bell* 478
4. An insolvent debtor may prefer one creditor, including his wife, to exclusion of others. *Malone v. Bell* 478
5. To set aside a conveyance for a valuable consideration from one member of a family to another as a fraudulent transfer, fraudulent intent must be participated in by both parties to the transaction. *Malone v. Bell* 478
6. Equity does not relieve rival litigants who were parties to a conveyance made to delay creditors in collection of grantor's debts, but leaves them in the position in which they placed themselves. *Rogers v. Rebbe* 594
7. Conveyances from father to sons *held* fraudulent as to grantor's creditors. *Hladky v. Eckstein* 632
8. Although an insolvent debtor may pay or secure one creditor to exclusion of other creditors, notwithstanding intent to create a preference, such preference is void in its entirety as to other creditors if preferred creditor thereby knowingly aids debtor in depriving creditors access to property beyond what is necessary to pay or secure the creditor preferred. *Reifenrath v. Dover* 801
9. Evidence, in suit by creditor to set aside a deed from debtor to her daughter as fraudulent, *held* not to sustain decree that deed was made in good faith in payment of debt. *Reifenrath v. Dover* 801

Garnishment.

1. The Home Owners Loan Corporation created by the federal government is subject to service of garnishee process. *Central Market v. King* 380
2. Stock of a domestic corporation for which a certificate has been issued and delivered to a purchaser is deemed to be in possession of the corporation and subject to garnishment. *Danbom v. Danbom* 858
3. In a suit in the nature of a creditor's bill wherein an order of attachment and garnishment was served on a

domestic corporation, a lien was created on all stock of the corporation owned by the debtor defendant, and all such stock under control of the corporation was impounded from time of service of writ, although the certificates of stock were not in actual possession of the corporation or shown to be within the state. *Danbom v. Danbom* 858

Guaranty.

1. One who signs and delivers a guaranty without any pecuniary benefit to himself is not liable to the obligee beyond the strict terms of his contract. *Furst v. Kruger* 54
2. A guarantor is not liable on his contract, where the beneficiary violates his own obligations and deprives the guarantor of the means of preventing loss protected by the guaranty. *Furst v. Kruger* 54
3. A guarantor is not discharged by failure to notify him of his principal's default, unless such neglect is unreasonable. *Furst v. Kruger* 54
4. In an action on a guaranty of payment for goods sold, beneficiary's failure to give guarantor prompt notice of default in payment *held* a good defense. *Furst v. Kruger* 54

Guardian and Ward. SEE LIMITATION OF ACTIONS, 2.

A guardian is discharged within the purview of section 20-210, Comp. St. 1929, when the ward attains her majority. *Medow v. Riggert* 429

Homestead.

1. A claim of homestead of part of premises sold on execution *held* no bar to confirmation of sale, where no objection to the sale was made for that reason, and where portion claimed as homestead was not sold. *Luikart v. Miles* 106
2. Where title to homestead is in the husband, he may claim a homestead in the property after divorce. *Federal Credit Co. v. Reynolds* 495
3. A notice signed by husband and wife to a sheriff who has levied execution on separate property of the wife for her individual debt that they claim a homestead in the property is sufficient to require the sheriff to take the statutory steps for ascertainment of the homestead. *Bliss v. White* 651
4. After service on sheriff of notice of homestead in property levied on, the sheriff has no judicial discretion to determine that the property is not a homestead without taking statutory steps for ascertainment of home-

stead, and if a sale is made without such steps being taken, the sale is void. *Bliss v. White* 651
5. The homestead character of land on which husband and wife have resided continues after death of wife, and surviving husband may claim benefit of homestead laws although he has no children or dependents residing with him. *Bartels v. Seefus* 841
6. Although during life of owner of fee of homestead exempt character of property depends on its occupancy as a homestead, on death of fee-holding spouse a new title is created which vests immediately in the survivor for life. *Bartels v. Seefus* 841

Homicide.

Evidence *held* to sustain conviction of manslaughter. *Stump v. State* 49

Husband and Wife.

1. Decree awarding wife support and maintenance *held* not to preclude husband from obtaining divorce for cruelty at subsequent term. *Sutherland v. Sutherland* 558
2. Where husband sued for divorce subsequent to decree awarding maintenance to wife, testimony concerning events antedating original decree could not be considered. *Sutherland v. Sutherland* 558
3. Generally, there is no implied obligation on husband's part to pay a wife for services rendered outside of ordinary household duties. *Brodsky v. Brodsky* 659

Insurance.

1. A literal interpretation of the term "total disability" in an accident policy as meaning utter mental and physical helplessness as a condition of liability will not be adopted where it would result in an unjust forfeiture of the insurance. *McCleneghan v. London Guarantee & Accident Co* 131
Serven v. Metropolitan Life Ins. Co 637
2. The term "total disability" in an accident policy means such disability as renders insured unable to perform substantial and material acts of his occupation in the usual way. *McCleneghan v. London Guarantee & Accident Co* 131
3. Where a literal enforcement of a total disability clause in an accident policy would result in an unjust forfeiture of the insurance, it should be liberally construed to mean such disability as renders insured unable to perform substantial and material acts of his occupation in the usual way. *McCleneghan v. London Guarantee & Accident Co* 131

4. The fact that insured practiced medicine for six months after an accident before discovering that he had a diaphragmatic hernia as a result of the accident *held* not to relieve insurer from liability although liability was conditioned upon total and continuous disability from date of accident. *McCleneghan v. London Guarantee & Accident Co*..... 131
5. Failure to give notice of accident within 20 days as required by the policy *held* not to relieve insurer from liability where injury was latent. *McCleneghan v. London Guarantee & Accident Co*..... 131
6. Failure of insured to state in application for accident insurance that he had been treated for acidosis *held* not to invalidate the insurance, where acidosis did not contribute to the injury. *McCleneghan v. London Guarantee & Accident Co*..... 131
7. Insured's attorneys *held* entitled to a reasonable fee in the supreme court, where judgment for insured is affirmed. *McCleneghan v. London Guarantee & Accident Co.* 131
8. In case of doubt, an insurance contract will be liberally construed in favor of insured. *Woods v. Central States Life Ins. Co*..... 261
9. Provision of disability policy entitling insured to total disability benefits because of bodily injury or disease if wholly prevented from performing any work for profit or from following any gainful occupation means inability to do all material acts necessary to prosecution of insured's business in his customary and usual manner. *Woods v. Central States Life Ins. Co*..... 261
10. Election of insured to and holding of office of county treasurer *held* not to constitute performance of work or following of an occupation for profit within total disability provision of insurance contract. *Woods v. Central States Life Ins. Co*..... 261
11. Policy construed and *held* that due proof of disability while the policy was in full force and effect was a condition precedent to waiver of payment of premiums thereunder. *McAndrews v. Prudential Ins. Co*..... 332
12. Policy requiring due proof of disability as prerequisite to waiver of payment of premiums does not, in absence of specifications of manner in which proof shall be made, require any particular form of proof. *McAndrews v. Prudential Ins. Co*..... 332
13. An insurance policy should be construed as other contracts. *Howie v. Cosmopolitan Old Line Life Ins. Co*..... 367

14. Forfeitures under an insurance policy will be enforced only where the contract requires. *Howie v. Cosmopolitan Old Line Life Ins. Co.* 367
15. The term "forfeiture" need not be used in a policy, but language meaning the same as a forfeiture will be so interpreted to preclude recovery. *Howie v. Cosmopolitan Old Line Life Ins. Co.* 367
16. A policy will be enforced as made, in absence of uncertainty, if contract is legal and not against public policy. *Howie v. Cosmopolitan Old Line Life Ins. Co.* 367
17. Where contract between reinsurer and statutory liquidating agent of insolvent insurance company provides that life policy shall remain in force unless insured shall elect, by filing claim, to accept stipulated cash settlement, claim does not constitute an election unless filed under provisions and with knowledge of terms of contract. *Hahn v. General American Life Ins. Co.* 509
18. A tax on gross premiums of nonresident insurance company *held* not a tax on property but an excise tax. *State, ex rel. Smrha, v. General American Life Ins. Co.* 520
19. Evidence *held* to justify judgment for disability benefits. *Serven v. Metropolitan Life Ins. Co.* 637
20. An unsuccessful attempt of insured to return to his usual work *held* not to conclusively negative a continuous total disability. *Serven v. Metropolitan Life Ins. Co.* 637
21. Where insurer sets up defense of suicide in action on policy, the presumption against suicide does not have the force of evidence in favor of plaintiff, but vanishes upon introduction of evidence of cause of death. *Falkinburg v. Inter-State Business Men's Accident Co.* 670
22. A party recovering judgment against a surety company on an official bond is entitled to a reasonable attorney's fee to be taxed as costs. *Ericsson v. Streitz* 692
23. The words "occupation" and "total and permanent disability," in life policy providing for disability benefits, construed. *From v. General American Life Ins. Co.* 731
24. Provision in life policy for payment of disability benefits when insured had become totally and permanently disabled from original cause occurring or contracted after first annual premium had been paid *held* to cover disability caused by disease first manifesting itself after payment of such premium. *From v. General American Life Ins. Co.* 731
25. An insurer may contract to limit the amount of insurance which it will carry or in which it will participate

as concurrent insurer. *Quisenberry v. National Fire Ins. Co.* 793
26. A fire policy providing that it is condition of insurance that total insurance shall not exceed a sum named *held* not to take effect where, without knowledge of insurer, there exists other insurance in greater amount than total sum provided by policy. *Quisenberry v. National Fire Ins. Co.* 793
27. In action on a life policy, burden is on defendant to prove defense of suicide. *Falkinburg v. Prudential Ins. Co.* 831
28. In an action on a life policy where the defense is suicide and the only available evidence is circumstantial, great latitude is allowed in admission of evidence. *Falkinburg v. Prudential Ins. Co.* 831
29. In an action on a life policy where the defense was suicide, testimony as to prior physical and mental health of insured *held* admissible. *Falkinburg v. Prudential Ins. Co* 831

Interest.

Devisee, in action against county judge and surety to recover devise, *held* entitled to recover interest and costs of suit. *Ericsson v. Streitz* 692

Intoxicating Liquors.

1. State and city may adopt consistent regulations to protect minors from sale of intoxicating liquors. *Bodkin v. State* 535
2. A city ordinance prohibiting sale of intoxicating liquor to minors is not void as being inconsistent with a state statute prohibiting the sale of intoxicating liquor to minors, knowing them to be such. *Bodkin v. State* 535

Judges.

1. County commissioners have no authority to settle account of a county judge for funds held by him in his official capacity for benefit of absent devisee. *Ericsson v. Streitz* 692
2. A county judge is liable on his official bond for trust funds he lost by reason of insolvency of bank, notwithstanding he acted in good faith and without negligence in selection of a depositary. *Ericsson v. Streitz* 692
3. County judge *held* to have received distributive share of devisee in his official capacity. *Ericsson v. Streitz* 692
4. Statute requiring proof of identity of claimant to satisfaction of county judge applies only where money is held by judge, and does not apply to devisee's action

brought against a former county judge on his bond to recover devisee's distributive share, which such judge had received but failed to pay to his successor. *Ericsson v. Streitz* 692

Judgment.

1. The validity of water-right contracts involved in pending action, except the provision for nonproration of water, *held* to have been decided in prior case. *Vonburg v. Farmers Irrigation District* 12
2. Validity of a water-right contract, which had been judicially determined in a prior action to which the irrigation company and owner of contract were parties, could not be questioned in a subsequent action between owner of contract and the company's successor. *Vonburg v. Farmers Irrigation District* 12
3. A judgment is rendered when the court announces its decision. *Luikart v. Bredthauer* 62
4. Entry of a judgment is not an integral part of the judgment, although the entry is required before the judgment is available for certain purposes. *Luikart v. Bredthauer* 62
5. Judgment notwithstanding the verdict can be rendered only upon the pleadings without consideration of evidence. *LeBron Electrical Works v. Pizinger* 164
6. When defendant concedes at the trial a portion of the relief demanded against him, such concession does not prevent entering of judgment in favor of plaintiff. *Fisher v. National Mtg. Loan Co.* 185
7. A judgment becomes dormant and ceases to be a lien on real estate in five years from date thereof unless an execution is issued thereon within such period. *Glissmann v. Happy Hollow Club* 223
8. A dormant judgment loses priority over a judgment which has been revived. *Glissmann v. Happy Hollow Club* 223
9. A revived judgment is a lien on realty of judgment debtor from date of order of revivor. *Glissmann v. Happy Hollow Club* 223
10. Where no jurisdiction is acquired over defendant, a judgment rendered against him is void. *Hassett v. Durbin* 315
11. A void judgment is no judgment and does not bind the person against whom it is rendered, and may be impeached in any action, direct or collateral. *Hassett v. Durbin* 315
12. Failure to appoint a guardian *ad litem* for incompetent is at most only erroneous and appropriate remedy is by

direct appeal and not by an original action to vacate the judgment. *Penn Mutual Life Ins. Co. v. Sweeney* 624
13. Finding in proceeding to probate estate of devisee that he was presumed to be dead, *held* not *res judicata* as to devisee's right to devise decreed to him in prior proceeding. *Ericsson v. Streitz* 692
14. In an action on a foreign judgment and to set aside transfer of stock by judgment debtor, wherein stock was impounded by garnishment and nonresident defendants were served by publication, allegations of petition against defaulting defendants will be taken as true, entitling plaintiff to judgment against them without proof if the petition states a cause of action. *Danbom v. Danbom* 858

Landlord and Tenant.

1. Question of whether the relation of landlord and tenant existed between trust company and defendants at commencement of action *held* for jury. *Bodie v. Epler* 442
2. Where portion of leased premises is reserved for use in common of all tenants, the landlord is liable for personal injuries to a tenant for negligent failure to keep reserved portion in reasonably safe condition only for the use intended. *Markussen v. Mengedoht* 472
3. A tenant cannot dispute his landlord's title. *Penn Mutual Life Ins. Co. v. Sweeney* 624

Libel and Slander.

1. Where an innuendo is necessary to make clear the meaning of alleged slanderous statements, such statements are not slanderous *per se*. *Hudson v. Schmid* 583
2. A statement, allegedly slanderous in charging a crime, is not slanderous *per se* unless the language is capable of being understood by hearers as a charge of crime. *Hudson v. Schmid* 583
3. Words to be slanderous *per se* must not only convey expression of an actionable wrong, but also the nature of such wrong. *Hudson v. Schmid* 583
4. Where published words are ambiguous or are *prima facie* innocent, but capable of defamatory meaning, recovery therefor may not be had in absence of allegation and proof of defamatory meaning of the words and of special damages. *Hudson v. Schmid* 583

Life Estates.

1. Generally, a life tenant who pays off a mortgage on the fee in order to preserve the estate is entitled to reimbursement from remaindermen for amount paid for

them, less such sum as will equal present value of annual instalments of interest he would have paid during his life if the encumbrance had remained in existence, with interest on residue from date of payment. *Bartels v. Seefus* 841

2. A life tenant who pays off mortgage on fee has a lien against interest of remaindermen for amount due, which may be foreclosed. *Bartels v. Seefus* 841

Limitation of Actions.

1. Generally, an action for criminal contempt is not barred by lapse of time. *State, ex rel. Wright, v. Barlow* 166
2. The period of limitation as to sureties on a guardian's bond begins to run from date of guardian's discharge. *Medow v. Riggert* 429
3. Statutes of limitation relating to actions on mortgages and on contracts *held* not inimical. *Steeves v. Nispel* 597
4. Action accrues on official bond of county judge when he fails, on expiration of his term, to pay to his successor any money in his possession due to an heir or other person which has not been paid to the person entitled thereto. *Ericsson v. Streitz* 692
5. Where county judge as recipient of distributive share of devisee failed to pay such share either to his successor or to the devisee, liability of judge and surety on his official bond was original, and action on bond against both judge and surety to recover distributive share could be brought within ten years after accrual of cause of action. *Ericsson v. Streitz* 692
6. Action for value of improvements on realty held by executor-trustee *held* not barred by statute of limitations. *Burton v. Defenbaugh* 851

Mandamus.

Mandamus will not lie to compel a county to expend money for poor relief in excess of constitutional limit on amount of taxes it can assess. *State, ex rel. Boxberger, v. Burns* 31

Master and Servant.

1. In a compensation case, the burden is on claimant to prove by preponderance of evidence that he suffered a compensable injury arising out of and in the course of his employment. *McGuire v. Kansas City Bridge Co* 1
2. Evidence *held* insufficient to prove that a workman who received compensation for a total disability caused by an injury in 1920 suffered a total disability resulting from a fall in 1934. *McGuire v. Kansas City Bridge Co.* 1

3. Employment of a carpenter by a farmer to construct a machine shed on his farm *held* not in the course of the employer's occupation, within the workmen's compensation act. *Guse v. Wessels* 41
4. To avoid liability under the compensation law, it must be shown that the employment was both casual and not in the usual course of employer's business. *Guse v. Wessels* 41
5. Employee electing not to come under the compensation act cannot recover compensation for an injury. *White v. National Window Cleaning Co* 155
6. Act of employee in electing not to come under the compensation act *held* binding on his dependents. *White v. National Window Cleaning Co* 155
7. Election of employee not to come under the compensation act *held* not restricted to immediate employer. *White v. National Window Cleaning Co* 155
8. Generally exposure to cold resulting in injury is not compensable if it is the same as that to which the general public is exposed. *Laudenklos v. Department of Roads and Irrigation* 234
9. Freezing of hand resulting from employee's exposure to cold *held* compensable. *Laudenklos v. Department of Roads and Irrigation* 234
10. Injury from strain due to employee's physical condition *held* compensable, notwithstanding strain might not have caused serious injury to normal person. *Dymak v. Haskins Bros. & Co* 308
11. The extent of claimant's injury is determined by his condition at time of examination or trial. *Dymak v. Haskins Bros. & Co* 308
12. Claimant whose temporary total disability was followed by permanent partial disability *held* not entitled to compensation for life. *Dymak v. Haskins Bros. & Co* 308
13. Allowance of compensation to physician employed by claimant approved. *Dymak v. Haskins Bros. & Co* 308
14. Evidence *held* to establish injury resulting from accident arising out of and in course of employment. *Dymak v. Haskins Bros. & Co* 308
15. Injury to ranch hand assaulted by foreman while eating dinner furnished as part of his wages *held* compensable as a service growing out of and incidental to his employment. *Miller v. Reisch Co* 338
16. Accidental injury to employee while upon the master's premises and subject to the master's directions *held* to occur in course of employment. *Miller v. Reisch Co* 338

17. In an action for wrongful death under the federal employers' liability act, plaintiff must plead and prove negligence; and a verdict based only upon conjecture, surmise, or speculation will be vacated. *Bernhardt v. Chicago, B. & Q. R. Co.* 346
18. A servant in accepting employment assumes all ordinary risks incident thereto or the conditions under which work is performed which are known to him or would be apparent to persons of his experience, intelligence or understanding exercising ordinary care. *Ahrens v. American Smelting & Refining Co.* 460
19. Where a smelting plant is equipped with safety appliances, an employer who orders an employee to wear a respirator and instructs him of danger of contracting the disease of plumbism will not be held liable to employee contracting the disease in course of employment. *Ahrens v. American Smelting & Refining Co.* 460
20. "Independent contractor" defined. *Prescher v. Baker Ice Machine Co.* 648
21. A person who contracted to unload a car of coal, employed his own assistants and directed the work, *held* to be an "independent contractor" within the workmen's compensation law. *Prescher v. Baker Ice Machine Co.* 648
22. A contractee cannot be held liable for personal injuries arising wholly from negligence of the contractor's employee who is only an invitee upon the contractee's premises. *Dabelstein v. City of Omaha* 710
23. The duty of a contractee to keep premises safe for the contractor's servant who enters thereupon as an invitee extends only to existing dangers of which invitee is not reasonably aware. *Dabelstein v. City of Omaha* 710
24. Evidence *held* to establish claimant's disability resulted from injury received in course of employment. *Meierjurgen v. City of Lincoln* 896

Mechanics' Liens.

1. Persons acquiring liens other than mechanics' liens after commencement of suit to foreclose a mechanic's lien are not necessary parties to such suit. *Johnson v. Olson* 778
2. A purchaser *pendente lite* need not be made a party to a mechanic's lien foreclosure suit. *Johnson v. Olson* 778

Mortgages.

1. Where a mortgagee and collecting trustee for holders of bonds secured by mortgage receives and retains proceeds of mortgaged property in excess of amount of

bonds then owned and held by them, such bonds will be treated in equity as paid. *First Trust Co. v. Danielson*.... 141
2. Purchase of land subject to mortgage *held* not to obligate purchaser to pay secured bonds canceled in equity as paid. *First Trust Co. v. Danielson*..... 141
3. In suit to foreclose mortgage securing bonds, defendant pleading payment as affirmative defense has burden of proving payment. *First Trust Co. v. Danielson*..... 141
4. Payment of negotiable bonds secured by mortgage without obtaining possession of them may be at the risk of debtor. *First Trust Co. v. Danielson*..... 141
5. A court may set aside a moratorium and confirm a foreclosure sale where the security is inadequate. *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co*..... 149
6. Moratory stays may be reexamined, and for good cause may be modified or vacated. *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co*..... 149
American Trust Co. v. Brubaker..... 290
7. Where amount of mortgage and tax liens on property under foreclosure exceeds its value, moratory stay will be denied. *First Trust Co. v. Rathbone*..... 211
8. Mere inadequacy of price will not preclude confirmation of a foreclosure sale. *First Trust Co. v. Rathbone*..... 211
9. An order confirming a mortgage foreclosure sale will not be set aside on appeal for inadequacy of price, where the record does not show that a resale would produce more money. *First Trust Co. v. Rathbone*..... 211
10. Where bonds provided that trustee named might receive payment for bondholders, the trustee's authority was extinguished by receipt of payment of principal and interest in full, and trustee could not thereafter maintain an action to recover additional interest from makers on the ground that they delayed him in distributing payments to bondholders. *First Trust Co. v. Waller*..... 239
11. Mere inadequacy of price will not preclude confirmation of foreclosure sale. *Lincoln Nat. Life Ins. Co. v. Richards* 282
12. Moratory stay must be denied where it appears that amount of mortgage lien exceeds actual market value of land. *Lincoln Nat. Life Ins. Co. v. Richards*..... 282
13. Where mortgagor had no valuable interest in land mortgaged, application for moratory stay was properly denied. *Lincoln Nat. Life Ins. Co. v. Richards*..... 282
14. Failure to comply with a moratory stay is sufficient cause for vacating the stay. *American Trust Co. v. Brubaker* 290
15. Where sale price of lands under foreclosure exceeds

their value and the sale is in other respects correct, the court should confirm sale. *American Trust Co. v. Brubaker* 290
16. Evidence that payments on mortgage debt were delinquent and that mortgagee had to pay delinquent taxes *held* to sustain decree of foreclosure. *Conservative Savings & Loan Ass'n v. Mancuso* 379
17. A moratory stay will be denied where amount of liens on land exceeds the value of land. *Keller v. Griffith* 393
John Hancock Mutual Life Ins. Co. v. Cover 427
18. A suit to foreclose a mortgage executed by deceased in his lifetime is not barred by failure to present it to the probate court for allowance as a claim against the estate. *Crawford State Bank v. McEwen* 399
19. Mortgaged property is primary fund for payment of decree of foreclosure and not a mere surety. *Crawford State Bank v. McEwen* 399
20. Evidence *held* insufficient to impeach certificate of acknowledgment of mortgage. *Crawford State Bank v. McEwen* 399
21. A mortgagee takes title encumbered with all equitable rights of one in possession of mortgaged premises. *Penn Mutual Life Ins. Co. v. Kimble* 408
22. Mere inadequacy of price will not preclude confirmation of a foreclosure sale unless it is so great as to evidence fraud. *John Hancock Mutual Life Ins. Co. v. Cover* 427
23. In a mortgage foreclosure suit, appointment of a receiver for defendant's homestead interest is error. *Federal Credit Co. v. Reynolds* 495
24. Statute requiring plaintiff in foreclosure suit to state whether any proceedings had been had at law for recovery of the debt applies alone to formal mortgages, and not to liens arising out of equities between the parties. *Luikart v. Bank of Benkelman* 501
25. In a suit at law on a note secured by mortgage, defendant is not entitled to a moratory stay when mortgage lien equals or exceeds value of mortgaged premises. *Slosburg v. Hunter* 529
26. A mortgagee who releases a mortgage on all lands described therein to a grantee of the mortgagor without the mortgagor's consent cannot hold the mortgagor personally liable for the debt secured, where the value of lands released exceeds the amount of the debt. *Petters v. Storm* 542
27. In a mortgage foreclosure proceeding, a court having jurisdiction over the subject-matter, under its broad

equity powers, may determine rights of all persons properly before it and claiming any interest. *Department of Banking v. Stenger* 576
28. In a mortgage foreclosure proceeding, the court has discretion to allow third persons to intervene in order to litigate title to the decree under a contract of assignment arising since rendition of the decree. *Department of Banking v. Stenger* 576
29. Actual knowledge of existence of a mortgage is as binding as constructive notice by recordation of the instrument. *Steeves v. Nispel* 597
30. A new agreement upon sufficient consideration extending time of payment of a note and mortgage to a day certain has the effect, in equity, of modifying the original condition of the mortgage to the same extent as if terms of new agreement were incorporated into the condition. *Steeves v. Nispel* 597
31. In determining period of limitation in an action to foreclose a real estate mortgage given for security of a note, statutes relating to actions on mortgages and to actions on contracts must be construed together. *Steeves v. Nispel* 597
32. Defendant in a foreclosure suit is not entitled to a moratory stay where mortgage lien equals or exceeds value of premises, and where the premises sold for full amount of mortgage lien, interest and costs. *State Life Ins. Co. v. Lee* 628
33. Where land sold for its value at foreclosure sale and there was no showing that it would bring more at another sale, confirmation of sale *held* proper. *Lincoln Joint Stock Land Bank v. Fuller* 677
34. A court of equity will decree a deed given to secure moneys advanced to be a mortgage. *Shagool v. Young* 745
35. A grantee or mortgagee is estopped to question the validity of a prior encumbrance when his deed or mortgage contains an express recital that it is given subject to encumbrances of record. *Johnson v. Olson* 778
36. Provision of mortgage releasing and waiving homestead rights of mortgagor in the property is available only to mortgagee. *Bartels v. Seefus* 841
37. To defeat mortgagor's application for a moratorium, holder of mortgage has the burden to show good cause why application should not be granted. *Continental Co. v. Rathbone* 902

Municipal Corporations.

1. Where authority to levy taxes is clearly conferred on a

municipality, it has power to supply details necessary for exercise of the authority. *Chicago & N. W. R. Co. v. Bauman* 67
2. Proceedings of the taxing authorities of Omaha *held* in accord with the tax provisions of chapter 14, Laws 1905. *Chicago & N. W. R. Co. v. Bauman* 67
3. In testing the validity of a city ordinance challenged as inconsistent with a state statute, the word "inconsistent" means contradictory in sense that the two legislative provisions cannot coexist. *Bodkin v. State* 535

Negligence. SEE AUTOMOBILES, 1-3, 5, 6.
1. Where different minds may reasonably draw diverse conclusions from the same facts as to whether they establish negligence or contributory negligence, such issues must be submitted to the jury. *Major v. Harrison* 363
2. One may not recover damages for injury based on negligence of another, unless such negligence is the proximate cause of the injury. *Triplett v. Lundeen* 434
3. In an action for injuries from negligence, an instruction that plaintiff could recover if his injuries were caused by defendant's negligence *held* sufficient relative to proximate cause. *Triplett v. Lundeen* 434
4. How an injury was sustained is a question of fact that may be established by circumstantial evidence. *Markussen v. Mengedoht* 472
5. Where facts and circumstances are established from which the manner of sustaining injury can be logically inferred, an issue is presented for the jury. *Markussen v. Mengedoht* 472
6. In a negligence case, the words "proximate cause" need not be used in instructions if they contain language conveying the same meaning. *Anderson v. Byrd* 588

New Trial.
1. Newly discovered evidence justifying a new trial must be of so controlling a nature as to probably change the result of the former trial. *Penn Mutual Life Ins. Co. v. Lindquist* 220
2. No affidavit, deposition or other sworn statement of juror will be received to impeach or explain a verdict, show on what grounds rendered, or mistake therein, or that the jurors misunderstood the charge or mistook the law or result of the finding, as such matters inhere in the verdict. *Schindler v. Mulhair* 809
3. Affidavits or testimony of jurors will not be received to impeach or avoid their verdict in respect to matters inhering in the verdict. *Schindler v. Mulhair* 809

Notice.

Possession of realty is constructive notice to all of whatever claim the possessor asserts, whether legal or equitable. *Penn Mutual Life Ins. Co. v. Kimble* 408

Officers.

1. A constitutional officer can be removed only by impeachment as provided by the Constitution. *Laverty v. Cochran* 118
2. The bond required of a public officer by the Constitution is a contractual obligation that such officer will faithfully discharge the duties of his office. *Laverty v. Cochran* 118
3. The legislature is without power to nullify the mandatory provision of the Constitution requiring all constitutional state officers to give a bond for faithful performance of official duties. *Laverty v. Cochran* 118

Partition.

1. Where partition proceedings are amicable and for the benefit of all parties in interest, the court may allow a reasonable attorney's fee to be paid by the parties in proportion to their interest in the property involved. *Mabry v. Mudd* 610
2. A remainderman cannot maintain an action for partition of property over objection of holder of life estate therein. *Bartels v. Seefus* 841

Partnership.

Agreement between creditor and debtor *held* to establish relationship of loan and security and not to constitute creditor as partner in debtor's business, and hence creditor was not liable thereunder for wrongful act of debtor growing out of operation of business resulting in damage to third person. *Naeve v. Shea* 787

Paupers.

1. Whether a poor person is entitled to relief is a question to be determined by the county board. *State, ex rel. Boxberger, v. Burns* 31
2. Governmental units are not liable for support of poor persons unless they are made a public charge by statute. *State, ex rel. Boxberger, v. Burns* 31
3. The legislature has power to impose on counties the burden of relief of poor persons and to prescribe the method of administering relief, unless such power is limited by the Constitution. *State, ex rel. Boxberger, v. Burns* 31

Pleading.

1. Where allegations in answer and counterclaim are tried and submitted as though denied by a proper pleading, defendant cannot after judgment assert that such averments are admitted by the pleadings. *LeBron Electrical Works v. Pizinger* 164
2. Petition alleging breach of contract and resulting damage *held* not demurrable. *Dill v. Farmers Co-operative Co.* 256
3. A general denial in an answer puts in issue only such pleaded facts as plaintiff must prove in order to recover. *Luikart v. Bank of Benkelman* 501
4. In a suit to set aside a conveyance from husband to wife, refusal to permit defendant to file an amended answer setting up adequate consideration and the statute of limitations *held* error. *Butke v. Nachschoen* 514
5. A general demurrer admits the truth of all facts well pleaded. *Slosburg v. Hunter* 529
6. A reply must be made to material new matter in an answer or it will be taken as true. *Penn Mutual Life Ins. Co. v. Sweeney* 624
7. Amendment of petition during trial to correct mistake in date of official bond sued upon *held* within discretion of court. *Ericsson v. Streitz* 692
8. A defendant who answers cannot assert rights of non-answering defendant, where pleadings fail to show that he has any interest in sustaining the rights of non-answering defendant. *Danbom v. Danbom* 858

Public Lands.

1. The words "needful buildings" as used in the constitutional provision authorizing congress "to exercise exclusive legislation" over all places purchased for erection of forts, etc., mean buildings on lands ceded by a state to the United States and over which the federal government acquires exclusive jurisdiction. *Tagge v. Gulzow* 276
2. The federal government does not have exclusive jurisdiction over the lands and occupants of a farmstead project. *Tagge v. Gulzow* 276
3. The general land office of the United States may not transfer lands which are not public property. *Wiltse v. Bolton* 354

Receivers.

The power of appointment and removal of judicial receivers generally rests in the discretion of the court. *State, ex rel. Sorensen, v. Hoskins State Bank* 878

Removal of Causes.

A removable cause is removed on filing of petition for removal with a sufficient bond, and the state court is thereafter without jurisdiction. *Chicago & N. W. R. Co. v. Bauman* 67

Replevin.

1. In a replevin action, defendant may under a general denial prove any fact constituting a defense. *Securities Investment Corporation v. Krejci* 146
2. In a replevin action to foreclose a mortgage on chattels purchased by defendant, defendant under a general denial may prove damages resulting from breach of warranty as an offset to show that plaintiff's debt to him equals his debt to plaintiff. *Securities Investment Corporation v. Krejci* 146

Schools and School Districts.

Parents of children of school age occupying lands in a farmstead project are residents of the public school district in which those lands are situated and such children are entitled to free common school privileges in the district. *Tagge v. Gulzow* 276
Rolland v. School District 281

Set-off.

1. Corporation *held* not entitled to set off indebtedness of stockholder against his distributive share of corporation's assets where stock of the stockholder was impressed with a trust. *Wood Realty Co. v. Wood* 817
2. Mutuality of demands is necessary to a set-off. *Wood Realty Co. v. Wood* 817

State Railway Commission.

1. Grant or denial of a certificate of convenience and necessity by the railway commission requires exercise of administrative and legislative functions and not of judicial powers. *Furstenberg v. Omaha & C. B. Street R. Co* 562
2. Courts should review administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Furstenberg v. Omaha & C. B. Street R. Co* 562
3. On appeal to the supreme court from an administrative or legislative order of the railway commission, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made. *Furstenberg v. Omaha & C. B. Street R. Co* 562

States.

1. Amendment to Constitution *held* to deprive the commissioner of public lands and buildings of his status as a constitutional officer. *Swanson v. State* 82
2. Amendment to Constitution *held* not to abolish the office of commissioner of public lands and buildings as a state executive office. *Swanson v. State* 82
3. Constitutional amendment *held* not to repeal existing statutes imposing duties and obligations upon the commissioner of public lands and buildings. *Swanson v. State* 82
4. Constitutional amendment *held* not to affect lawful discharge of official duties imposed by law upon the office of commissioner of public lands and buildings. *Swanson v. State* 82
5. Appropriations for support and maintenance of the office of commissioner of public lands and buildings *held* not affected by adoption of constitutional amendment abolishing the office as a constitutional office. *Swanson v. State* 82
6. The board of the state bonding fund is purely an administrative board. *Laverty v. Cochran* 118

Statute of Frauds.

1. An oral agreement to give a lien on realty in the nature of a mortgage is within the statute of frauds. *Penn Mutual Life Ins. Co. v. Kimble* 408
2. Where goods, money, or services are furnished to a third person, at request and on credit of promisor, the undertaking is original and the promisor will be liable, although the promise is not in writing. *Elson v. Nelson* 532

Statute of Limitations.

Ordinarily, the owner of the equity of redemption has authority to bind the property by payment on mortgage debt, and such payment before the statute has run is binding on the property and tolls the statute as against subsequent mortgagees with notice of prior mortgage. *Steeves v. Nispel* 597

Statutes. SEE CONSTITUTIONAL LAW.

1. A statute expressly imposing care of poor persons on the county generally is mandatory. *State, ex rel. Boxberger, v. Burns* 31
2. Whether a statute is directory or mandatory must be determined from the legislative intent, ascertained from consideration of the statute in connection with related statutes. *State, ex rel. Boxberger, v. Burns* 31

3. In construing a statute, courts will consider preexisting law and other acts relating to the same subject, since the legislature must be presumed to have had in mind all prior legislation on the subject. *Chicago & N. W. R. Co. v. Bauman* 67
4. Construction of a statute by officers, acquiesced in by the legislature by continued noninterference, will be approved, unless unconstitutional or clearly wrong. *Chicago & N. W. R. Co. v. Bauman* 67
5. Although a statute may be invalid or unconstitutional in part, valid parts will be sustained where they can be separated from the part which is void, if valid parts are capable of being executed independently of invalid part. *Laverty v. Cochran* 118
6. Provision of statute expressing legislative intent as to separability of various parts of a statute is merely an aid to judicial interpretation. *Laverty v. Cochran* 118
7. Where sections constituting an inducement to passage of a statute are unconstitutional, the entire act must fall, notwithstanding a saving clause. *Laverty v. Cochran* 118
8. Where the connection between invalid parts and other parts of a statute is such as to warrant belief that the legislature would not have passed the act without the invalid parts, the entire act falls. *Laverty v. Cochran* 118
9. Where a statute adopted from another state has been construed by the courts of that state, the same construction should ordinarily be given in the adopting state in absence of indication of a contrary intention by the legislature. *Medow v. Riggert* 429
10. Reluctance of courts to construe a statute so as to permit it to operate harshly in particular cases must yield to plain and unequivocal indications of legislative intent. *Medow v. Riggert* 429
11. It is the duty of courts to harmonize state and municipal legislation if possible. *Bodkin v. State* 535
12. Repeals by implication are not favored, and construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by evident intent of the legislature. *Steeves v. Nispel* 597

Subrogation.

1. A junior mortgagee paying a superior lien to protect his own lien may be subrogated to rights of prior encumbrancer. *Crawford State Bank v. McEwen* 399
2. When right to subrogation arises, equity makes the as-

signment and the right does not depend on willingness of the creditor to transfer the security. *Crawford State Bank v. McEwen* 399

Taxation.

1. Redemption from tax lien foreclosure by city cannot be made by paying amount of bid, but may be made only by paying full amount of taxes due with interest. *City of Plattsmouth v. Hazzard* 284
2. A decree foreclosing a tax sale certificate to enforce payment of assessments for special drainage benefits accruing to two tracts of land may order sale of one tract first, if both are owned by the same defendant, and direct payment of any surplus proceeds of sale on the assessment lien on the other tract. *Schobert-Zimmerman Drainage District v. Soll* 629
3. The sheriff must proceed under a distress warrant for collection of unpaid personal taxes in the same manner as upon execution from justice court. *Krug v. Hopkins* 768
4. Sales under distress warrants must be made in strict accordance with the statute, and title passes to purchaser without confirmation by a court. *Krug v. Hopkins* 768
5. Official acts of sheriff in selling personalty under distress warrant are presumed to be properly done. *Krug v. Hopkins* 768
6. Where the sheriff, in making a sale under a distress warrant, receives no adequate bid, he should postpone the sale or make a return and secure an alias distress warrant. *Krug v. Hopkins* 768
7. One having no property rights to preserve by redemption from a judicial sale foreclosing a valid tax sale certificate will not be permitted to redeem. *Connely v. Hesselberth* 886
8. A decree foreclosing a tax sale certificate cannot be collaterally attacked for irregularities in foreclosure proceedings that do not go to jurisdiction of the court. *Connely v. Hesselberth* 886
9. Persons interested in realty sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from right of redemption on confirmation of sale. *Connely v. Hesselberth* 886
10. Personal notice required in tax sales applies where a tax deed is sought, but not to sales under foreclosures of tax liens under section 77-2039, Comp. St. 1929. *Connely v. Hesselberth* 886

Trade-names.

1. A person acquiring a trade-name in a particular locality is entitled to protection from unfair competition by a competitor using a name of similar import which will probably deceive the public. *Riggs Optical Co. v. Riggs* 26
2. Equity will enjoin illegal use of a trade-name. *Riggs Optical Co. v. Riggs* 26

Trial. SEE APPEAL. CRIMINAL LAW.

1. Credibility of witnesses and weight to be given their testimony are questions for the jury. *Davis v. Bixby* 25
2. The court is not required to instruct the jury that they may disregard testimony of any witness believed to have wilfully testified falsely unless there is evidence tending to prove that the witness so testified. *Heineman v. Wilson* 159
3. Omission from instruction stating the issues of the words "the plaintiff alleges" *held* incapable of inference that the court stated the allegations as facts proved. *Heineman v. Wilson* 159
4. The court should instruct on issues presented by pleadings and evidence without request. *Tenborg v. Dillie* 203
5. Instructions are to be considered as a whole. *Reinhardt v. Menssen* 207
6. Where a bill in equity for an accounting was demurrable as such, the court properly transferred the cause to the law docket. *First Trust Co. v. Waller* 239
7. Where established facts give equal support to two inconsistent inferences, judgment must go against the party having the burden of proof. *Bernhardt v. Chicago, B. & Q. R. Co* 346
8. Extending lines across page of instruction to separate specific claims of negligence *held* not error where no sentences, phrases, or words were pointed out or emphasized. *Major v. Harrison* 363
9. It is not error for the court in giving an instruction to assume as true facts that are established by evidence without controversy. *Major v. Harrison* 363
10. Instructions must be considered as a whole. *Triplett v. Lundeen* 434
11. An action at law must be submitted to a jury where the evidence is conflicting on a material issue of fact. *Rundall v. Grace* 490
12. The jury may take into account the result of their observations at *locus in quo* and make it, in connection

with other evidence, the basis of their verdict. *Rundall v. Grace* 490
13. Where the evidence on a material issue is conflicting, the court should submit issues of fact to the jury. *Anderson v. Byrd* 588
14. The trial judge without request must instruct on the law applicable to the issues, if supported by evidence. *Anderson v. Byrd* 588

Trusts.
1. Judgment for plaintiff in law action against defendants as trustees of an express trust should run against defendants in their trust capacity. *In re Estate of Gibbons* 538
2. Trustees of an express trust owe a duty to preserve trust property against unjust claims and must employ counsel to defend against action for recovery thereof against trustees as such. *In re Estate of Gibbons* 538
3. Attorney employed by one of two trustees of an express trust to defend actions against trustees on unjust claims *held* entitled to reasonable compensation for legal services from the trustees. *In re Estate of Gibbons* 538
4. A resulting trust does not necessarily arise in favor of a person furnishing the consideration, in whole or in part, for purchase of property taken in name of another, where the parties were sufficiently close as to give rise to the presumption that a gift was intended. *Brodsky v. Brodsky* 659

Vendor and Purchaser. SEE FRAUD.
The measure of damages for failure to perform a land purchase contract is the difference between the agreed price and the market value of the property at time of breach. *Crafts v. Sawtelle* 592

Waters. SEE JUDGMENT, 1, 2.
1. Under chapter 68, Laws 1889, a water right for purposes of irrigation need not have been attached to any particular tract of land. *Vonburg v. Farmers Irrigation District* 12
2. Under the irrigation act of 1889, the extent of appropriation of water was measured by the appropriation claimed within limits of capacity of the diversion works. *Vonburg v. Farmers Irrigation District* 12
3. Property rights in water for irrigation consist not alone in amount of, but also in priority of, appropriation. *Vonburg v. Farmers Irrigation District* 12
4. Under a contract transferring an irrigation canal in

which a specified quantity of water was reserved, the transferors *held* to have a vested right to use of amount of water reserved, and were not required in time of water scarcity to prorate water with patrons of subsequent owner of canal. *Vonburg v. Farmers Irrigation District* 12

5. Water-right contracts *held* to reserve to transferors of irrigation canal right to use of water within a 40-mile limit from place of diversion. *Vonburg v. Farmers Irrigation District* 12
6. Where owner of two tracts of land possessed a water right for irrigation appurtenant to one of the tracts, the owner of the irrigation works *held* barred from asserting its nonconsent to transfer of water to other tract, where it had knowingly permitted water to be supplied to such other tract for more than 10 years. *Vonburg v. Farmers Irrigation District* 12
7. An irrigation district may make reasonable rules and regulations with reference to days on which it will deliver water to its contract patrons. *Vonburg v. Farmers Irrigation District* 12
8. The owner of a water-right contract for irrigation *held* entitled to no more than one second-foot of water for each 70 acres of land to be irrigated, and not more than three acre-feet of water during each irrigation season. *Vonburg v. Farmers Irrigation District* 12
9. Land to be riparian must have the stream flowing over it or along its borders. *McGinley v. Platte Valley Public Power and Irrigation District* 292
10. Evidence *held* to establish that land in controversy was formed by accretion. *Wiltse v. Bolton* 354
11. Where public lands bordering the Missouri river were cut off by erosion, the government lost title thereto. *Wiltse v. Bolton* 354
12. The department of roads and irrigation is neither a necessary nor a proper party to a proceeding on appeal to secure reversal, modification, or vacation of a decision or order made by it. *Cozad Ditch Co. v. Central Nebraska Public Power and Irrigation District* 547
13. Effect of amendment to application for appropriation of waters from rivers, made after remand to department of roads and irrigation as permitted by judgment of supreme court on appeal from orders of the department, was to continue for all purposes original proceeding in full force and effect, including jurisdiction of parties and subject-matter of litigation as modified

to conform to limitations imposed by the amendment. *Cozad Ditch Co. v. Central Nebraska Public Power and Irrigation District* 547

14. Intervention, in proceeding on application for appropriation of waters from rivers, after reversal of orders of the department of roads and irrigation and remand to the department for further proceedings, did not operate to change nature of action or permit raising of new issues. *Cozad Ditch Co. v. Central Nebraska Public Power and Irrigation District* 547
15. Review of decisions of the department of roads and irrigation in the supreme court is limited to appeal. *Cozad Ditch Co. v. Central Nebraska Public Power and Irrigation District* 547

Wills.

1. Statutory provisions as to manner of executing wills are generally held to be mandatory and subject to strict construction. *In re Estate of Cagle* 47
2. Where contestants objected to probate of a will on the ground that it was procured by undue influence of a particular beneficiary, an instruction that contestants had the burden of proving that the will was the result of undue influence exerted upon the testatrix by such beneficiary *held* proper. *In re Estate of Enright* 111
3. Evidence *held* insufficient to establish invalidity of a will either on the ground of testamentary incapacity or undue influence. *In re Estate of Enright* 111
4. Where the language in a will is clear and unambiguous, there is no room for construction, and the executor has the duty to carry into effect plain provisions of the will. *In re Estate of Nelson* 376
5. The court in construing a will must ascertain the testator's intent as disclosed by the language of the will and then give effect thereto, if not contrary to law. *In re Estate of Hunter* 454
6. The testator's intention must be ascertained, if at all, from the language of the will as related to attendant circumstances. *In re Estate of Hunter* 454
7. A provision of a will which directs sale of realty for payment of legacies operates as an equitable conversion effective at testator's death. *In re Estate of Hunter* 454
8. A legacy to be paid only from a particular fund is a specific legacy. *In re Estate of Hunter* 454
9. Where the class composed of specific devises and legacies must be resorted to to pay debts and expenses of ad-

ministration, all in that class will abate proportionately. *In re Estate of Hunter* 454
10. In construction of a will, the testator's intention must govern, and such intention is to be ascertained from a liberal interpretation and comprehensive view of all provisions of the will. *Burton v. Defenbaugh* 851
11. The content of related clauses in a will is of more importance in construction of the will than the relative position of different clauses therein. *Burton v. Defenbaugh* 851
12. Where personalty is insufficient to pay a legacy, the legacy will be chargeable against the realty unless expressly exempted. *Burton v. Defenbaugh* 851
13. The word "heirs" includes a surviving spouse as well as a surviving child. *In re Estate of Rosenbery* 883

Witnesses. SEE EVIDENCE, 2, 12, 13, 14.
1. The privilege of a witness to refuse to give answer that would tend to incriminate him or expose him to public ignominy must be timely made or it is waived. *State, ex rel. Wright, v. Barlow* 166
2. One charged with criminal contempt can be required to testify the same as any other competent witness. *State, ex rel. Wright, v. Barlow* 166
3. A party surprised by testimony of his witness may impeach such witness upon proper foundation by showing that the witness made inconsistent statements to other persons at another time; but such impeaching testimony can be considered only as it affects the witness' credibility. *Bernhardt v. Chicago, B. & Q. R. Co.* 346
4. Generally, a professional communication by a patient to his physician is privileged. *Falkinburg v. Prudential Ins. Co.* 831
5. The object of the statute forbidding disclosure of professional communications between patient and physician is to enable the patient to secure medical services without fear of betrayal, and not to disqualify the physician as a witness. *Falkinburg v. Prudential Ins. Co.* 831
6. The patient may waive the statutory privilege forbidding disclosure of professional communications between patient and physician. *Falkinburg v. Prudential Ins. Co.* 831
7. An applicant for insurance may waive the statutory privilege under which his physician is prohibited from testifying concerning confidential communications, and the waiver binds those claiming any interest under the policy. *Falkinburg v. Prudential Ins. Co.* 831