REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY TERM, 1934

VOLUME CXXVI

HENRY P. STODDART
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
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1934

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

CHARLES A. GOSS, Chief Justice
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JAMES R. DEAN, Associate Justice
EDWARD E. GOOD, Associate Justice
GEORGE A. EBERLY, Associate Justice
L. B. DAY, Associate Justice
BAYARD H. PAINE, Associate Justice

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WILLARD, CARL E.
WILTSE, HOMER G.
WORTHING, WILLIAM E.
WUNNER, RUSSELL H.
YOUNG, ROBERT W.

TABLE OF CASES REPORTED

CASES CITED BY THE COURT

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED

NEBRASKA

CONSTITUTION

SESSION LAWS

1923

1931

1933

COMPILED STATUTES

1909

1922

1929

COMP. ST. SUPP. 1931

COMP. ST. SUPP. 1933

REVISED STATUTES

1913

UNITED STATES

STATUTES AT LARGE

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1934

GEORGE I. PARKER, RECEIVER, APPELLEE, V. LOUIS W. LUEHRMANN, ADMINISTRATOR, ET AL., APPELLANTS.

FILED JANUARY 26, 1934. No. 28731.

1. **Executors and Administrators:** CONTINGENT CLAIMS. "A contingent claim against an estate, mentioned in section 30-701, Comp. St. 1929, is one where the liability depends upon some future event, which may or may not happen, and which, therefore, makes it wholly uncertain whether there ever will be a liability. In the case of a contingent claim, the contingency does not relate simply to the amount which may be recovered, but to the uncertainty whether any amount will ever become due." *In re Estate of Bolton*, 121 Neb. 737.
2. **Courts.** When the receiver of an insolvent bank, duly appointed by the district court, lodges a contingent claim for double stock liability against the estate of a deceased stockholder, the filing of such claim does not vest the county court with exclusive jurisdiction over it, and deprive the receiver of the right to proceed in the district court to determine the liability of the estate of such deceased stockholder, and make the claim absolute for allowance in the county court. The administrator is a proper party defendant for that purpose. *Brownell v. Anderson*, 117 Neb. 652.
3. **Executors and Administrators.** "The trust of an administrator or executor is a continuing one, and a decree of final accounting does not destroy the relationship of such officer, but only discharges him from liability for the past." *Hazlett v. Estate of Blakely*, 70 Neb. 613; *Brownell v. Adams*, 121 Neb. 304.
4. **Banks and Banking:** LIABILITY OF STOCKHOLDERS: ENFORCEMENT. Sections 4 and 7, art. XII of the Constitution, must be construed together. They are self-operating and self-executing. Before the enforcement of individual liability of

stockholders can be had by the receiver under direction of the receivership court, it must be first judicially ascertained that the assets of the bank have been exhausted, and the amount of deficiency or indebtedness remaining to be enforced against them. Such judicial determination does not fix the liability of such stockholders, but is only a necessary step to be taken by the receivership court before an action can be brought by the receiver to judicially determine the same. *Rogers v. Selleck*, 117 Neb. 569.

5. ———: ———: JURISDICTION. "Jurisdiction of equity to enforce constitutional liability of stockholders of an insolvent banking corporation is based upon the rule obtaining in this state that equity has jurisdiction of an action by a receiver against all the stockholders of a corporation jointly to enforce their contractual or statutory liability." *Brownell v. Adams*, 121 Neb. 304.

6. ———: ———: ———. The appointment of a receiver and judicial determination of deficiency of assets by the receivership court does not vest that court with exclusive jurisdiction to try an equity suit for the purpose of determining the liability of stockholders. After authority is given by the receivership court to enforce the liability of stockholders, if none of the stockholders resides in the county where the receivership court acts, or service cannot legally be had upon one or more of them in that county, such suit may be brought by the receiver against all the stockholders in the district court of any county in this state where lawful service of summons can be had upon one or more of them.

7. **Executors and Administrators:** CONTINGENT CLAIMS: PROCEEDINGS AGAINST HEIRS. An action against heirs to recover real or personal estate which has been received by them as distributees of an estate and which is liable for any debts under provisions of the statute with reference to contingent claims (Comp. St. 1929, ch. 30, art. 7) is not an original action, but a special proceeding for the enforcement and collection of a claim allowed or established in the county court. *Horst v. McCormick Harvester Machine Co.*, 30 Neb. 558.

APPEAL from the district court for Cuming county: DE WITT C. CHASE, JUDGE. *Affirmed in part, and reversed in part.*

A. R. Oleson, for appellants.

F. C. Radke, Barlow Nye and *Fred S. Berry, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

This is a suit in equity brought by the receiver of the Farmers State Bank of Altona, Nebraska, in the district court for Cuming county, Nebraska, for the benefit of the unpaid creditors of the bank, to recover from appellants and other stockholders the constitutional liability imposed upon them. The only appellants are Louis W. Luehrmann, administrator of the estate of Herman Luehrmann, deceased, Louis W. Luehrmann, Louise Kohlmoos and Emma Luehrmann, his heirs at law.

There is no dispute in the evidence. The questions are those of law applicable to admitted facts, which are that Herman Luehrmann departed this life intestate February 6, 1928. His estate was duly administered in Cuming county, Nebraska, and final decree entered therein December 5, 1928, assigning the real estate and personal property to the above heirs. The personal property was distributed to them and individual vouchers or releases describing the personal property received by each were given, and the administrator was discharged on December 24, 1928. The value of the property received by the heirs at law from the estate exceeds in value the amount of the stockholders' liability sued for in this action. The appellants, however, refused to accept the ten shares of bank stock which were listed in the inventory of the administrator. Five shares of this stock were issued to deceased as stock dividends but never delivered to him. However, dividends thereon were allowed and received by the deceased during his lifetime, the bank retaining the stock certificates in its possession. This stock was never transferred. All indebtedness of the bank was created and accrued while Herman Luehrmann, deceased, was the owner and holder of such stock.

On January 18, 1929, the bank was closed, and a receiver was appointed by the district court for Wayne

county, Nebraska, wherein the bank was located. On June 15, 1929, after the assets were liquidated and exhausted, a decree of deficiency for more than the capital stock of the bank was entered by the receivership court. This decree provided that all such unpaid indebtedness was created and accrued while Herman Luehrmann, deceased, among others, was the owner and holder of ten shares of the capital stock of the bank of the par value of $100, and that an assessment against the capital stock of the bank and the respective owners and holders thereof was necessary, and that each was respectively liable for an amount equal to the par value of the capital stock of the bank owned by them, and George I. Parker, as receiver of the bank, was thereby authorized and empowered to proceed to collect and to enforce all unpaid stockholders' liability and to bring and maintain such action or actions in court as, in his judgment, were proper and advisable to enforce payment of such liability.

On June 12, 1930, a contingent claim was filed against the estate of Herman Luehrmann, deceased, in the county court of Cuming county, Nebraska, setting forth, in effect, that this action had been filed, but not yet tried or determined, and that the claim against the estate of Herman Luehrmann, deceased, had not yet been determined and was not absolute.

The decree of the district court, in so far as it is of importance here, provides: "Wherefore, it is ordered, considered, adjudged and decreed that the plaintiff have and recover from the estate of Herman Luehrmann, deceased, the sum of $1,000 with interest thereon at 7 per cent. per annum from February 5, 1928, the date of the commencement of this action, and that the same be and hereby is established as a lien upon the personal property of said estate distributed to his said heirs at law and upon the said real estate of which said deceased died seised, so assigned and distributed to them, to wit, the southeast quarter (SE¼) of section five (5), and the southeast quarter (SE¼) of section seven (7), all in

township twenty-four (24), range four (4), east of the 6th p. m., in Cuming county, Nebraska."

Appellants contend that the county court of Cuming county, Nebraska, had exclusive jurisdiction to allow claims against the estate of the deceased stockholder, and that the district court had no jurisdiction to enter a judgment or decree; that the decree of the district court for Wayne county, Nebraska, dated June 15, 1929, ascertained the liabilities against its stockholders, and that the determination of the stockholders' liability therein then became absolute for presentation, hearing and determination in the county court; that the appointment of a receiver by that court and its decree of June 15, 1929, vested jurisdiction in the district court for Wayne county, Nebraska, only, and the receiver could not then maintain an action to enforce liability against stockholders in any other court or county; that the court erred in not rendering a judgment of dismissal in favor of appellants, and that the decree is not supported by the evidence.

It is true that section 16, art. V of the Constitution, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; * * * and such other jurisdiction as may be given by general law." Section 27-503, Comp. St. 1929, provides: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons." Section 27-504, Comp. St. 1929, provides: "The county court shall have power: First. To hear and determine claims and set-offs in the matter of estates of deceased persons." Section 30-601, Comp. St. 1929, provides: "When letters testamentary or of administration, or of special administration shall be granted by any court of probate, or during any appeal from such order, it shall be the duty of the judge of the court to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased." Section 30-801, Comp. St.

1929, provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only."

This is not an action for the recovery of money only, and is not prohibited by section 30-801, Comp. St. 1929. While the law contemplates that all claims shall be allowed by the county court, it also contemplates that certain claims may be presented, in the first instance, in some other court. The receiver had a right, and it was his duty, to proceed in the district court by a suit in equity, such as this, against all the stockholders jointly to determine the liabilty of the estate of the deceased stockholder and other stockholders and establish a trust fund for the benefit of creditors. *Brownell v. Anderson,* 117 Neb. 652; *Brinkworth v. Hazlett,* 64 Neb. 592; *Hazlett v. Estate of Blakely,* 70 Neb. 613; *Brownell v. Adams,* 121 Neb. 304; *In re Estate of Bolton,* 121 Neb. 737; 2 Woerner, American Law of Administration (3d ed.) 1248; 11 R. C. L. 84, sec. 326; 7 R. C. L. 399, sec. 386.

The fact that the estate had been administered, final decree entered, and the property assigned and distributed to the heirs at law, and the administrator discharged, did not bar or defeat this action against the administrator of the estate. The trust of an administrator is an enduring one, and the decree upon final accounting only discharges him from liability for the past. *Brinkworth v. Hazlett, supra; Hazlett v. Estate of Blakely, supra; Brownell v. Adams, supra; In re Estate of Bolton, supra;* 2 Woerner, American Law of Administration (2d ed.) 1373, sec. 571.

The claim for stockholders' liability was contingent. *Stichter v. Cox,* 52 Neb. 532; 2 Woerner, American Law of Administration (3d ed.) 1275, sec. 394; *In re Estate of Bolton, supra;* Dame, Probate and Administration (3d ed.) 425, sec. 415; 24 C. J. 293; *In re Estate of Golden,* 120 Neb. 233; *In re Estate of Ayres,* 123 Neb. 453; 11 R. C. L. 205, sec. 229. The county court, even though

a contingent claim was filed, had no authority to pass upon it until the claim was made absolute against the estate by the decree of the district court. "A contingent claim does not become absolute, within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate." *Hazlett v. Estate of Blakely, supra.* The purpose of this action was, if possible, to place the holder of such claim on terms of approximate equality with holders of absolute claims. It could not become a claim proper to be allowed by the county court until it had passed to judgment in this action. That was the object and purpose of this action, and it could have been accomplished in no other manner. This is not an original proceeding to allow claims against the estate or to order the payment of such claims out of funds in the hands of the administrator. This is a proceeding to make a contingent claim absolute for presentation to the county court for allowance. *Craig v. Anderson,* 3 Neb. (Unof.) 638, relied upon by appellants, is not in point. See Comp. St. 1929, secs. 30-701 to 30-708; *Hazlett v. Estate of Blakely, supra; Brinkworth v. Hazlett, supra; Brownell v. Anderson, supra; Brownell v. Adams, supra; In re Estate of Bolton, supra.*

The decree of deficiency entered in the receivership court on June 15, 1929, judicially determined that the assets of the bank had been exhausted, the amount of the deficit, and the necessity for a stockholders' assessment. It authorized and empowered the receiver to bring the action involved here and enforce and collect the liability. Under the law, this action could not be brought until the deficit was so ascertained and judicially determined. Such decree of deficiency did not judicially determine liability against the deceased stockholder or make absolute any claim against his estate. That could be accomplished only by this action. Sections 4 and 7, art. XII of the Constitution, must be construed together, and, as such, are self-operating and self-executing. All the assets must be first

exhausted and such fact judicially determined before suit can be brought against the stockholders to judicially determine their liability. In other words, a stockholder's liability could not be established by a decree of deficiency, and this claim could become absolute only by a decree entered in this action. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank*, 50 Neb. 734; *Hastings v. Barnd*, 55 Neb. 93; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *State v. Farmers State Bank*, 113 Neb. 497; *Rogers v. Selleck*, 117 Neb. 569; *State v. Citizens State Bank*, 118 Neb. 337; *Bodie v. Pollock*, 110 Neb. 844; *Dempster v. Williams*, 118 Neb. 776; *State v. Thurston State Bank*, 125 Neb. 120.

The appointment of the receiver and the decree of June 15, 1929, by the district court for Wayne county, Nebraska, did not vest exclusive jurisdiction in that court except in the matter of insolvency and receivership proceedings. Comp. St. 1929, secs. 8-190, 8-191. This is a separate and distinct action in equity, authorized by the receivership court, which could be brought by the receiver against all the stockholders jointly in the district court of any county where one or more of them resides or is present in the county at the time of the commencement of the action and served therein as provided by law. The defendants in this action all lived in Cuming county, Nebraska, where the suit was brought, and there is no dispute that they were all properly served with summons in that county. Comp. St. 1929, sec. 20-409; *Brownell v. Adams, supra.* This liability is contractual in nature, and to hold otherwise would make it practically impossible for the receiver to ever bring suit where all the stockholders lived in a county other than that in which the receivership court was located. We deem it expedient, however, to bring such actions in the district court for the county where the receivership court is located if service of summons can be had upon one or more stockholders in that county.

The suggestion by appellants that the order of deficiency of June 15, 1929, was not binding upon the stock-

holders, we believe was not an issue in the lower court. In any event, the bank was properly in court and the receivership court had full jurisdiction over it and its affairs. The order was binding upon the banking corporation and, therefore, binding upon all its stockholders. *Hawkins v. Glenn,* 131 U. S. 319; *Brownell v. Adams, supra; Commonwealth Mutual Fire Ins. Co. v. Hayden,* 60 Neb. 636; *Bernheimer v. Converse,* 206 U. S. 516; 6 Thompson, Corporations (3d ed.) 878-885, secs. 4981-4986.

The decree of the trial court entered no judgment against the heirs at law; neither did it dismiss them out of the action. It is stipulated in the evidence that all of the indebtedness of the bank was created and accrued while Herman Luehrmann, deceased, was the owner and holder of the stock, and that the heirs at law received the same only through the probate proceedings. While there is eminent authority for the proposition that they may and should be made parties in such a proceeding as this without the necessity of resort to a remedy in the county court, all such cases that we have been able to find have been in jurisdictions where the constitutional and statutory provisions have no similarity to ours or under the equity jurisdiction of the federal courts. Under former decisions of this court, supported by equally as eminent authority, the heirs at law, Louis W. Luehrmann, Emma Luehrmann and Louise Kohlmoos, cannot be held liable in this action. They should have been dismissed at plaintiff's costs. After the claim is made absolute by this action against the administrator, such claim must be filed in the county court within one year and, after allowed and established there, the heirs at law must be pursued in a special proceeding as provided by sections 30-701 to 30-708, Comp. St. 1929.

"The 'claim,' which can furnish the basis for an action to compel a devisee to return a portion of estate assigned to him by proper probate proceedings, must be one allowed in the probate court, or 'established' by proper legal proceedings elsewhere, as a liability of the estate

involved." *Brinkworth v. Hazlett, supra.* "An action against heirs * * * to recover real or personal estate which has been received by them as distributees of any estate which is liable for any debts under the" provisions of the statute with reference to contingent claims "is not an original action, but a special proceeding for the enforcement and collection of a claim allowed or established in the county court." *Horst v. McCormick Harvester Machine Co.*, 30 Neb. 558. See Comp. St. 1929, secs. 30-701 to 30-708; *Brinkworth v. Hazlett, supra; Hazlett v. Estate of Blakely, supra; Brownell v. Anderson, supra; Brownell v. Adams, supra; In re Estate of Bolton, supra;* 3 Woerner, American Law of Administration (3d ed.) 1968, sec. 574, and 1975, sec. 577; 2 Woerner, American Law of Administration (3d ed.) 1267, sec. 392; 1 C. J. 988, 991, 1010; *Stevenson v. Valentine,* 38 Neb. 902; *Craig v. Anderson, supra;* 1 Woerner, American Law of Administration (3d ed.) 534, sec. 156.

The decree of the district court provides that plaintiff, appellee herein, have and recover from the estate of Herman Luehrmann, deceased, the sum of $1,000 with interest at 7 per cent. from February 5, 1928, the date of the commencement of this action. The record discloses that this action was commenced on March 14, 1930. The decree, in form, is against the estate of the deceased instead of against his personal representative, as such. Such decree is irregular, but not erroneous. 24 C. J. 877. The decree of the district court should have been against Louis W. Luehrmann, administrator of the estate of Herman Luehrmann, deceased, for the sum of $1,000 with interest at 7 per cent. from March 14, 1930, the date of the commencement of this action. No complaint is made in brief of counsel that the court granted a lien as provided in the decree, and we will not discuss that matter.

The undisputed evidence establishes that the estate of Herman Luehrmann, deceased, is liable for the stock liability imposed by the Constitution.

The judgment of the district court is affirmed, except that it shall be against Louis W. Luehrmann, administrator of the estate of Herman Luehrmann, deceased, for $1,000 with interest at 7 per cent. from March 14, 1930, the date of the commencement of this action, and that Louis W. Luehrmann, Emma Luehrmann and Louise Kohlmoos, heirs at law, shall be dismissed at plaintiff's costs. The cause is remanded for further proceedings to conform to this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

STANDARD OIL COMPANY, APPELLANT, V. JAMES O'HARE, APPELLEE.

FILED JANUARY 26, 1934. No. 28651.

1. **Landlord and Tenant**: LEASE: CONSTRUCTION. *Held*, that the purported lease and agency agreement set out in plaintiff's petition, having been made at the same time, with reference to the same subject, and to effectuate the same purpose, will be construed together to the same extent as though made in one instrument.
2. ———: ———: ACCEPTANCE. *Held*, that the signing of said instruments by O'Hare and Byrne, and their transmittal to the plaintiff to be approved or rejected, constituted an offer to contract upon the terms contained therein, and that said offer would not ripen into a contract unless accepted within a reasonable time.
3. **Contracts**: OFFER: ACCEPTANCE. "It is a well-established principle of the law of contracts that an offer does not ripen into a contract unless accepted; that if the offeree within a reasonable time does not accept the offer, it may be treated as if rejected. * * * What constitutes a reasonable time must * * * be a question of fact." *Kukuska v. Home Mutual Hail-Tornado Ins. Co.*, 204 Wis. 166.
4. **Landlord and Tenant**: LEASE: ACCEPTANCE. *Held*, that as the terms of the offer required the plaintiff to promise something, notice to O'Hare and Byrne of the acceptance was essential; that notice of the acceptance of the terms of the lease alone was not notice of the acceptance of the offer, and that notice of the acceptance of the terms of the agency agreement five months after the offer was not within a reasonable time.

5. **Contracts: OFFER: ACCEPTANCE.** "Communication of acceptance is essential, where offer requires promise on part of offeree." *Port Huron Machinery Co. v. Wohlers*, 221 N. W. 843 (207 Ia. 826).
6. **Injunction.** *Held*, that plaintiff never had possession of the service station under the purported lease, and cannot obtain possession thereof by an action for an injunction.
7. ———. "A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." *Hollinrake v. Neeland*, 94 Neb. 530.

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

William H. Herdman and *Cook & Cook*, for appellant.

Joseph E. Daly, contra.

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

CLEMENTS, District Judge.

The appellant, Standard Oil Company, hereinafter called the plaintiff, claiming to be in possession of certain real estate in North Bend, Nebraska, under and by virtue of a lease executed by James O'Hare and W. H. Byrne, seeks an order in injunction, restraining the appellee, James O'Hare, hereinafter called the defendant, from entering and trespassing on the demised premises, and from interfering with, obstructing, or resisting plaintiff's possession of said premises, and from interfering with, obstructing, or resisting plaintiff in operating its filling station on said premises.

The defendant claims to be the owner of said premises, denies that the plaintiff is now or ever has been in possession thereof, or that plaintiff now has or ever has had the right to the possession thereof, and denies the validity of plaintiff's purported lease.

The cause was tried as an action in equity before Honorable Frederick L. Spear of the sixth judicial district, resulting in a general finding for defendant, and a judgment dismissing the action, canceling the purported lease

and quieting defendant's title as against the plaintiff's claim. The plaintiff brings the action to this court on appeal.

It appears from the evidence that some time prior to March 14, 1930, the defendant James O'Hare and his brother-in-law, W. H. Byrne, contemplated building and operating a gasoline service station on lot 5, block 51, of the city of North Bend, Nebraska. At that time O'Hare owned 5 lots of this block, the remaining lots being owned by a party by the name of Thom. The plan of O'Hare and Byrne contemplated the purchase of the Thom lots by Byrne, and the building of the service station thereon to be owned and operated by the parties as equal partners. The intention of these parties coming to the notice of the plaintiff, Standard Oil Company, it sent a representative to interview them, and to induce them, if possible, to handle and sell Standard Oil Company products exclusively. After an extended conference held on March 14, 1930, between this representative, one John F. O'Connell, and O'Hare and Byrne, at the home of O'Hare, in North Bend, an agreement was reached. This agreement was evidenced by two written instruments, the purported lease and the so-called agency agreement set out in the plaintiff's petition. The lease was, at said time, signed and acknowledged by both O'Hare and Byrne, although Byrne was not yet the owner of any part of the property. However, he afterwards purchased the Thom lots. The agency agreement was signed by Byrne. At the time that this agreement was made, there was located on lot 5 a blacksmith shop, which the evidence shows was of the reasonable rental value of $20 a month and which, at that time, and during all the time of this litigation, was and has been rented for such sum.

Under the terms of the purported lease, the defendants leased to the plaintiff lot 5, including driveways, filling station, and appurtenances, for a period of five years, with an option on the part of plaintiff to extend the term to ten years, at an annual rental of $300, payable $25 each month. In this purported lease, the defendants bind

themselves to build on said lot a gasoline filling station, expending for such purpose not less than the sum of $3,000. No rental to be paid until service station is completed.

It will be seen that the plaintiff, by collecting $20 each month for the blacksmith shop, and applying it on the rental for the use of the service station, would only have to apply $5 of its own money on such rental. The lease provides further that the defendants shall pay all water taxes, and all general and special taxes and assessments that may be levied and assessed against said premises or property owned by them located thereon, and will pay any and all license fees, occupation taxes, and other taxes, impositions and other charges levied against or imposed upon the business conducted on the demised premises and the equipment located thereon, and to furnish, without expense to second party, heat for the demised premises, and pay for all the electricity and water consumed thereon.

At the same time and as a result of the said conversations, the agency agreement was prepared and signed by Byrne. This contract provides in effect that Byrne is to operate the service station, handle the Standard Oil Company products, sell gasoline furnished by the plaintiff at 3 cents a gallon over the wholesale price. This spread between the retail and wholesale prices being called his commission.

It is the plaintiff's theory that these two instruments have no relation to one another. That the purported lease *is* a lease giving it the right of possession of lot 5, the service station to be erected thereon, and all appurtenances thereto, for a period which, at its option, can be extended to ten years; that the agency agreement is simply an agreement to employ Byrne during the pleasure of the plaintiff, and subject to be revoked at any time it so elects. O'Hare and Byrne contend that the sole object and purpose of the parties was, on the part of the plaintiff, to secure a dealer at North Bend, and an outlet for

its products there; on their part, to handle these products on as favorable terms as possible; that both instruments are a part of one agreement; that the so-called lease was never intended to operate as a lease; that it was never intended that the possession of the premises was to pass to the plaintiff, and that the plaintiff never did have possession thereof; that, when it became evident that the plaintiff was claiming some right to the premises by virtue of the lease, they repudiated the entire agreement, refused to receive any payments under the lease, and opened and operated their service station without reference to said agreements.

We think the evidence, the character of the instruments, and the subsequent conduct of the parties amply sustain this contention. O'Hare and Byrne testify in effect that the main object and purpose of the parties was to effectuate an agreement whereby they were to become Standard Oil dealers handling Standard Oil products exclusively; that oil companies generally fix both the wholesale and retail price of their products; that the spread between the wholesale and retail price of Standard Oil products is less than that of most other oil companies; that to induce them to handle its products the plaintiff agreed to allow them a bonus or rebate of $25 a month, and to furnish certain equipment free of charge; that to cover this up and to avoid friction with the federal trade commission, the fiction of the lease and agency agreement was devised.

The representative of the plaintiff, John F. O'Connell, who prepared both instruments, denies this, and testifies that nothing was said about bonus, and that the instruments are, in fact, what they appear to be, in form, a lease and an agreement to employ.

An examination of the terms of these instruments leads to the inevitable conclusion, either that they must be construed together to the same effect as though they are one writing, the purport of which is to permit O'Hare and Byrne to retain possession of their own service station,

while selling Standard Oil products, or that O'Hare and Byrne are incompetents, incapable of doing business, and the transaction is so grossly inequitable and unconscionable as to amount to constructive fraud, and render it unenforceable in a court of equity.

Construing the transaction, in accordance with the theory of the plaintiff, we find that O'Hare and Byrne agreed to build a service station to cost at least $3,000, on a block of their own land, which the plaintiff pleads is a valuable business location because located on the Lincoln Highway, buy the plaintiff a license to do business, pay its occupation tax, heat the building, pay for water and electricity, and pay all property taxes on real estate, service station and equipment, all for $5 a month above the sum the plaintiff would receive for rental of the blacksmith shop.

After the purported lease and agency agreement were executed by O'Hare and Byrne on March 17, they were sent to the Standard Oil Company to be signed by it, if approved. On April 1, 1930, the lease was returned to O'Hare and Byrne, executed by the plaintiff, with a letter informing them that the agency agreement would be held until the station is completed and in operation. O'Hare and Byrne then built the service station at a cost of, not $3,000, the minimum stated in the so-called lease, but at about the sum of $8,000. On August 27, 1930, the station was completed, and they were ready to open it for business. They had heard nothing further from the plaintiff in relation to the agency agreement, and had no notice or knowledge of whether or not it had been approved or signed.

The signing of the lease and agency agreement by O'Hare and Byrne and its transmittal to the plaintiff to be approved or rejected was simply an offer to contract on the terms specified. Before the offer could ripen into a contract, it would have to be accepted, and notice of its acceptance given the offerers within a reasonable time. If, as we have found, the so-called lease and agency con-

tract are to be construed as embodying one agreement, then the acceptance and approval of the lease alone was not an acceptance of the offer. The offer was made on March 17. More than five months thereafter, on August 27, when the station was completed, no notice had been given the offerers that that part of it, relating to the agency agreement, had been or would be accepted, except a vague statement that it was being held. We think the offerers had a right to consider the offer rejected.

"It is a well-established principle of the law of contracts that an offer does not ripen into a contract unless accepted; that if the offeree within a reasonable time does not accept the offer, it may be treated as if rejected. * * * What constitutes a reasonable time must * * * be a question of fact." *Kukuska v. Home Mutual Hail-Tornado Ins. Co.*, 204 Wis. 166.

"Communication of acceptance is essential, where offer requires promise on part of offeree." *Port Huron Machinery Co. v. Wohlers*, 221 N. W. 843 (207 Ia. 826).

"It must be kept in mind that there is a distinction in regard to communication of acceptance between offers which ask that the offeree shall do something, as in the instant case, and offers which ask that the offeree shall promise something. In offers of the latter kind, communication of the acceptance is always essential." *Port Huron Machinery Co. v. Wohlers*, 207 Ia. 826. See, also, *Omaha Loan & Trust Co. v. Goodman*, 62 Neb. 197.

On August 27, the service station being completed, O'Hare and Byrne, no notice of acceptance of that part of the agreement relating to the agency having been received, bought a stock, opened the service station, and commenced its operation. On September 23 a duplicate copy of the agency agreement was transmitted to W. H. Byrne, with a letter in which the plaintiff expressed sorrow that it had not been sent sooner. The premises were then in possession of the defendants; they had been doing business for nearly a month. We think the acceptance of the offer came too late.

It is true that the initial stock was bought of the plaintiff and that O'Hare and Byrne, during nearly or quite all the time they operated the service station before the inception of this litigation, continued to purchase Standard Oil products on practically the same terms set out in the agency agreement, but there is no evidence that these terms were different than the terms usually given independent dealers using such products.

On September 30 the plaintiff sent a check to O'Hare and Byrne for a month's rent, which was refused. Regularly each month thereafter the plaintiff sent a similar check for the same purpose, which was as regularly refused. From this time there seems to have been a constant dispute between the parties, plaintiff claiming that the defendants were in possession of the service station as its agent under the lease, the defendants denying this and repudiating the lease. A mass of evidence was taken at the trial regarding this dispute and regarding communication and meetings between the parties in an attempt to adjust it. We do not think it necessary to review this evidence.

There was also evidence of various statements of counsel for plaintiff, that plaintiff at the inception of the agreement between the parties had no knowledge that the blacksmith shop was on the premises, and that plaintiff claimed no rental therefrom, but no offer to have the lease reformed to exclude the blacksmith shop has been made by it, and at the trial of the case, when evidence was offered that the blacksmith shop was not to be included in the agreement, the offer was met by objections that it was an attempt to change and vary the terms of a written instrument by parol.

We find from the foregoing: That the execution of the purported lease and agency agreement and their transmittal to the plaintiff for approval and rejection was an offer to contract on the terms contained therein; that said instruments should be construed together to the same extent as though they were contained in one writing.

That an acceptance of the terms of the lease alone, and notice to O'Hare and Byrne of such acceptance, was not an acceptance of the offer.

That notice to O'Hare and Byrne five months after the offer was made, and a month after the service station was opened, of the acceptance of the terms of the agency agreement was not within a reasonable time, and O'Hare and Byrne, at the time of the opening of the station, had the right to assume that the offer was rejected.

That the plaintiff never had possession of the service station under the purported lease, and that this action brought to protect a possession which never existed must fail.

"A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." *Hollinrake v. Neeland,* 94 Neb. 530.

It follows that the finding and judgment of the trial court is correct.

AFFIRMED.

ROSE, J., dissenting.

The premises in controversy were leased in writing for the specific use and single purpose of a filling station where petroleum products of plaintiff were to be kept and sold. It was so understood by the parties to the lease. Plaintiff tendered each month the stipulated monthly rental of $25 and never claimed or received any income from the blacksmith shop. The income therefrom was paid to and accepted by lessors. Without fraud of any kind the parties to the lease contracted for a monthly rental of $25, which was lawful compensation for the use of the leased premises and the improvements the lessors agreed to make. The consideration stated was within the contracting power of the parties. The lease was formally drawn, executed, acknowledged, delivered

and registered. Through the agency of lessors the petroleum products of plaintiff were in fact kept and sold for a time on the leased premises—what was contemplated by the parties. As I view the evidence, all parties to the lease understood and performed it at first with plaintiff constructively in possession of the demised premises. Defendant dispossessed plaintiff, and thus violated his duty as agent under the lease, interfered with his employer's present and future business, and destroyed contractual and property rights of his principal. To prevent the continuance of such wrongs injunction is the proper remedy, as formerly held in this identical case. *Standard Oil Co. v. O'Hare,* 122 Neb. 89. That the former decision is sound and supported by precedent, see *Shell Petroleum Corporation v. Ford,* 255 Mich. 105, 83 A. L. R. 1413, and note. Delay of plaintiff in formally accepting the offer of agency did not destroy the property rights created by the lease. Services of the agent, performed for plaintiff and accepted pursuant to the terms of the contract of employment, waived prompt acceptance of the offer of agency, if delayed. The option of plaintiff to terminate the lease upon 30 days' notice did not invalidate it, since it created an estate for a fixed term of years. *Shell Petroleum Corporation v. Ford,* 255 Mich. 105, 83 A. L. R. 1413, and cases cited in note. Whether considered as a unit or as two instruments, the lease and the contract of agency were duly executed, delivered, valid agreements, as I view them in the light of the evidence and the mutual understanding of the parties in the first instance. Entertaining these views, I dissent from the affirmance.

DAY, J., concurs in dissent.

EARL TREPPISH V. STATE OF NEBRASKA.

FILED JANUARY 26, 1934. No. 28781.

1. **Homicide.** Evidence examined and *held* insufficient to sustain the verdict of murder in the second degree.
2. ———: CORPUS DELICTI. *Corpus delicti* is defined as, "The substantial and fundamental fact or facts necessary to the commission of a crime." Webster's New International Dictionary.
3. ———: ———: PROOF. Homicide *corpus delicti* is not established until it is proved that a human being is dead, and that death occurred as the result of the criminal agency of another person.
4. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. When, in a criminal case, the evidence is circumstantial, the circumstances established must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of defendant's guilt.
5. **Homicide.** "The fact that the deceased died suddenly never warrants an inference that he was foully dealt with. It is for the state to prove that his death was the result of a criminal act, and, unless or until this is proved, it is presumed that death resulted from natural causes." Underhill, Criminal Evidence (2d ed.) 541, sec. 312.
6. **Criminal Law:** TRIAL: EXCLUSION OF WITNESSES. An order excluding prospective witnesses from the courtroom during the trial of a cause, except when called to testify, is entirely within the discretion of the trial judge. When such an order has been made, it is the duty of the officers of the court to see that it is obeyed. Where, however, witnesses remain in the courtroom through a misunderstanding of the extent of the court's order, and without the knowledge of the court, they may be permitted to testify where it does not appear that the defendant's rights will be prejudiced thereby.
7. ———: ———. It is the duty of a trial court to expedite the trial of a case as much as is possible without infringing the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case, and reasonable effort on his part for such purpose does not constitute error.
8. ———: ———: REVIEW. Complaint in the brief that improper and prejudicial remarks were made by the prosecuting attorney in his argument to the jury will not be considered where the alleged offending remarks do not appear in the bill of exceptions.

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

D. R. Mounts and *Lyle E. Jackson,* for plaintiff in error.

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

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

CLEMENTS, District Judge.

The defendant, Earl Treppish, was charged in the information with the crime of murder in the first degree. He was convicted of murder in the second degree, and sentenced to the penitentiary for life, and prosecutes error to this court.

The petition cites 66 allegations of error. Many of these are not urged and need not be noticed.

The third, seventh and eighth assignments of error may be considered together, as each is based upon the proposition that the evidence is insufficient to support the verdict.

The determination of this question has required a careful and patient examination of a bill of exceptions consisting of nearly 700 pages. Such examination discloses that there is little dispute as to the main facts in the case. The dispute arises over the conclusions to be drawn from such facts.

Summarizing the evidence as briefly as possible, it is as follows: In the spring of 1931, the defendant, Earl Treppish, whose home was in the state of Wisconsin, where he has a wife, father, and other relatives, was in Wyoming, where he had gone to procure work. At the ranch of one Ostrom, near Sheridan, he met and became acquainted with Clarence Coy. Coy was a one-armed man, having lost an arm some years before through the accidental discharge of a gun. The kind of work he could perform was somewhat restricted by this misfortune, and he was in Wyoming for the purpose of getting a job

"tramping wool" (packing wool in sacks at shearing time).

Both Treppish and Coy were employed for a time on the Ostrom ranch, and their employment there ceased on the same day. Neither had definite plans for the future, and they decided to seek work in Kansas, where Treppish had acquaintances. They went by rail to Denver, where Coy purchased a used car for the sum of $50. With this car they drove to Kansas, where they were unsuccessful in finding work for both, and concluded to go to the wheat fields of Dakota. En route to Dakota, the car broke down, and they were delayed some three or four days while Treppish, who had had some experience as an automobile mechanic, repaired it. Failing to find work in South Dakota, they returned to the Ostrom ranch in Wyoming. Here they decided to embark on a trapping venture in Holt county, Nebraska. They then drove to Wisconsin, where Treppish said he could procure equipment for trapping. During the trip to Wisconsin, an arrangement was made whereby Treppish, in consideration of $20 loaned by him to Coy, and the work Treppish had done in repairing the car, became half owner of the car, and they were to share fifty-fifty in all equipment used in trapping and all proceeds of the venture. (Treppish's evidence.) The fact of the partnership is, however, established by the evidence of several of the state's witnesses.

Arriving at Mauston, Wisconsin, where Treppish's father and relatives reside, he procured from these relatives, and from friends, traps, guns, bedding, cooking utensils and rubber boots. With this equipment, they returned to Holt county, Nebraska, and, procuring like equipment which Coy had there, proceeded to the head of Beaver creek to commence their trapping venture. Coy had told Treppish that he had a house or shack at the head of Beaver creek, in which they could make their headquarters. On arriving at the place, they discovered that the house had been burned. Coy, when he found this, exclaimed, "The dirty skunk," but explanation of this

remark, or to whom it referred, is not found in the evidence. They camped on Beaver creek for a short time, then removed to an island on the Niobrara river, north from Dustin, Nebraska. Here they built a boat, 18 feet long, with a beam of 54 inches, and procured an engine or motor for it, and here an occurrence took place which, together with the burning of the house, is contended shows enmity of some person or persons toward Coy.

One evening while they were in camp, a noise in the brush was heard and, thinking it was a bobcat which had been stealing their meat, Treppish took a gun and, stepping outside the tent, shot at an object which he thought was the cat, but which proved to be a stump. His shot was immediately followed by a fusillade of shots from across the stream, some of which went through their tent, and one of which went through Treppish's hat. Abusive epithets were also applied to them, and a threat to burn their car shouted to them. This occurrence was investigated by the sheriff of Holt county, but without result. Because of this occurrence, Coy and Treppish moved their camp to a more secure place on the island, and remained there until in November. After this they made various moves, and in January of 1932 established a camp at Spring creek, on land belonging to a Mr. Sweet. Here they were visited a number of times by sons of the owner of the land. One of these visits was on March 31, 1932. At this time both Treppish and Coy were in camp. Some conversation was had with Treppish, in which he made the remark, "It is getting close to moving time." This was the last time, so far as the evidence shows, that Coy was ever seen alive by any person other than Treppish.

On the next day, April 1, Herbert Sweet visited the camp site. He found Treppish there breaking camp. He said they were going back on the island for awhile. Asked where Coy was, Treppish said, "He is down at the river, down the creek, picking up some traps." Thereafter, both Treppish and Coy disappeared.

Some weeks after the disappearance of the parties, the

relatives of Coy became uneasy at his continued absence, and asked the sheriff of Holt county to make an investigation. The sheriff made inquiries which resulted in finding Treppish working at the Bauman ranch, a short distance from Sheridan, Wyoming, but no trace of Coy was found.

Treppish was arrested and held in jail at Sheridan until the officers from Nebraska came and brought him back to Holt county. When Treppish was arrested he had, at the Bauman ranch, the car which the parties had had in Holt county, and at the Ostrom ranch was found the other property which he had brought with him, viz., about half the traps which he and Coy had been using in Nebraska, and a gun and two revolvers, which were identified as having formerly belonged to Coy.

Upon the arrival of the Holt county sheriff in Sheridan, Treppish told him when and where he had last seen Coy; how he came to Wyoming; what places he stopped at on the way out; and detailed all his movements and activities after arriving in Sheridan. A check by the sheriff showed that these statements were substantially accurate. He told the sheriff the story of his leaving Coy, and their agreements and future plans practically as he detailed them in his evidence taken at the trial. He assisted the sheriff in locating the traps, guns, and other property brought by him from Nebraska, and returned with the sheriff to Holt county without objection and without extradition papers.

Now follows the explanation of his presence in Wyoming without his partner Coy, as detailed by him at the trial of the case. He testified that for some time prior to April 1, 1932, he and Coy had been considering a plan whereby he, Treppish, would go to Wyoming and obtain work for the summer, and Coy would remain in Holt county on the island in the Niobrara river, where they had camped and where their boat and engine were located, for the purpose of gardening and raising vegetables for their use in trapping the following winter. No defi-

nite conclusion was reached as to this until the evening of March 31. On the 28th day of March, Treppish and Coy met a man by the name of John Brost, who had been gardening on a small tract of land not far from the island in the Niobrara, with whom they had had some previous conversation about gardening. This matter was again brought up, and a tentative agreement between Coy and Brost was entered into. Brost was to furnish the seed and team work for a garden on the island, and Coy was to plant and tend the garden, and they were to share fifty-fifty on the produce raised. (This is from the evidence of the witness Brost.)

The state, for the purpose of rebutting the evidence of Brost, called several witnesses who testified that the soil on the island was poor and not suitable for gardening.

Treppish testified further that on the evening of March 31 it was definitely decided that Coy should remain and engage in the gardening venture, and Treppish was to take the car and go to Wyoming, obtain work, secure a grub stake, and return in the fall, when trapping would be resumed. They had a few furs on hand which were divided. All their traps on Spring and Otter creeks had been taken up except some that had been set at badger holes. These were not taken up because the badgers had not yet begun to come out of their winter quarters. Treppish was to take some of the larger traps with him to Wyoming for the purpose of catching coyotes and bobcats for the bounty offered by that state. He was to take some small traps which had proved too small for their purpose and try to exchange them for larger ones. He was to take the rifle belonging to Coy for the purpose of night shooting, which means in the parlance of the sheep industry, patroling the range in the night, shooting a gun at frequent intervals to keep marauding animals away from the sleeping sheep. One of the revolvers he had bought from Coy, and the other he took in place of a German Lueger revolver, which he left with Coy, because Coy liked it better than his ".38." All the balance

of the equipment was left for Coy's use. This included traps, which had been taken up, and traps still set at the badger holes, tent, cooking utensils, a sheet steel stove (this stove was afterwards found on Spring creek), guns, bedding, and bedding roll, and Coy's personal belongings (all of these except the gun were afterwards found in the bed of Spring creek).

As Coy was to remove to the island as soon as he had taken up the traps set for badgers, it was agreed that all of this equipment, except the stove, some cooking utensils, and the tent, was to be transported by Treppish the following morning in the car to the bank of the Niobrara river and left there at a point opposite from where their boat was kept. The stove, bedding roll and other things were not to be taken because Coy expected to establish himself in a little shack higher up on Spring creek until the badger trapping season was over.

On the morning of April 1 the parties were up at daybreak. Treppish prepared breakfast while Coy rolled his bedding and gathered the articles he was to keep on Spring creek. After breakfast was over Coy, remarking that he must get out on the trap line because if he had caught a badger during the night it was likely to gnaw itself loose, shouldered his bedding roll, bid Treppish good-bye, and departed, and this was the last time he was seen by Treppish.

After Coy left, Treppish broke camp, loaded in the car the equipment he was to take to the river for Coy, also the articles he was to take to Wyoming, drove to Dustin, where he stopped at the post office and got a letter from his wife, then drove to the river and left the equipment for Coy at the point agreed upon. He then went to Stuart, Nebraska, where he presented to a bank for cashing a fur check. He was told by an officer of the bank that, as he was a stranger, he would have to be identified. He then went to an acquaintance, one Johnny Miller, had the check indorsed by him, and secured the money on the check without further trouble.

From there he went to Bassett, Nebraska, and then to Norden, where he was delayed two or three days waiting for a casing that had to be ordered. From Norden he drove by easy stages to Sheridan, Wyoming, and from there went out to the Ostrom ranch, where he and Coy had worked the summer before. He afterwards secured work at the Bauman ranch, where he was arrested.

Such is the story as told by Treppish upon the witness-stand. It was given in a frank, straightforward manner, and with a wealth of detail impossible to include in this summary. A long and grilling cross-examination failed to shake it. It was not rebutted except in two particulars.

The postmistress at Dustin and several others who were in the post office during the 1st of April testified that Treppish was not there on that day. However, the letter from his wife was directed to him at Dustin, and was postmarked Milwaukee, Wisconsin, March 25. It must have been delivered to him from that post office, Dustin, either on the 1st of April, or within a few days prior thereto, but the postmistress does not attempt to state when it was so delivered, nor could she or the other witnesses remember any person who received mail from the post office on any other date.

Several rebuttal witnesses were introduced who testified that they were at the river on or about the 1st of April, at or near the post where Treppish testified he left the equipment for Coy, and that nothing of the kind was there.

We will now proceed to further developments in the case as disclosed by the evidence. To understand these developments, it is necessary to know something of the topography of the country where the camp on Spring creek was located. Spring creek is a little brook, normally about a foot wide and two or three inches deep. It runs through a canyon or gulch with very steep sides; this gulch falls sharply toward Otter creek into which Spring creek empties. The camp was located on a shelf on the side of this canyon, about 60 or 70 rods from

where the two creeks join. At some distance above the camp, near the head of Spring creek, is the little shack where, according to Treppish, Coy was to make his headquarters for a time after Treppish left. The country around the camp is very rough and heavily wooded. Otter creek is a much larger creek than Spring creek and runs in a northerly course to the Niobrara river. Both creeks are subject to floods during and after heavy rains.

After the sheriff had returned Treppish to Nebraska he, the sheriff, on July 17, 1932, made a search of Spring creek and Otter creek, and the vicinity of the camp.

Near the camp site, the sheet steel stove and some stove pipe were found. About 100 yards below the camp site, in the bed of the creek, there were found a bedding roll, bedding and clothing, all identified as having belonged to Coy. A short distance from where the bedding roll was found, a small piece of bone identified as a piece of a human skull was picked up from the bank of the creek, 60 or 70 rods below the junction of Spring and Otter creeks; in Otter creek were found some bones of a human skeleton. These bones were identified as being from the skeleton of Clarence Coy. The skull was missing and was never found.

At the close of the evidence, defendant moved for a directed verdict in his favor on the ground that the evidence was insufficient to show that a crime had been committed, or that Clarence Coy came to his death through the unlawful agency of Treppish. This motion was overruled, the case was submitted to the jury, and a verdict of murder in the second degree returned.

The theory urged by the prosecution to the jury, and now urged to the court on the appeal, is that, on the night of March 31, or the morning of April 1, 1932, Earl Treppish killed Clarence Coy, breaking his skull with some weapon, the nature of which is not disclosed. That to conceal the crime, Treppish buried the body and Coy's bedding roll and belongings in the bottom of Spring creek, about 30 feet above the camp, and that a flood in the

creek some time in the summer washed the body, bedding and clothing down the creek to where they were found in July. Of course this may be the correct solution of Coy's death, but it is based entirely upon surmise.

There is no evidence that Coy's body, or his belongings, were buried in Spring creek. Some parties testified that about 30 feet above the camp some stakes were driven in the creek; that on these stakes had collected some brush and débris; and that in this débris were found a bottle, some tin foil from a cigarette package, and two sodden cigarettes. This is all the evidence that in any way relates to this part of the theory of the prosecution. It seems the height of absurdity to imagine that, to conceal a crime, a murderer would bury the body and then mark the grave by driving stakes around it.

There is no evidence that Treppish killed Coy by blows that broke his skull. Coy's skull was not found and, so far as the evidence discloses, his skull may be buried in the mud of Otter creek entirely intact. The piece of skull found was not and could not be identified as part of the skull of Coy. It was not found in the same place or near the other bones. The expert witness, called by the prosecution, could not and would not identify it as a part of Coy's skull. He, Dr. Wilson, testified: "Q. Now, handing you state's exhibit 13 (the piece of skull), is there any identity between that and the rest of the bones here (the skeleton of Coy)? A. No. Q. It is not possible to identify that as belonging to this body? A. No."

Not only was the piece of skull not identified as being part of the skull of Coy, but the condition in which it was found raises a strong presumption that it could not have been from his skull. It will be remembered that Coy was seen alive on the 31st day of March. This piece of skull was found on July 17, and yet it was in such a condition that it broke in two when picked up. It can hardly be credited that in 108 days after the death of Coy a piece of his skull would be in such a state of

disintegration that it would fall to pieces when picked up. It seems more reasonable to suppose that this piece of skull had laid for years in the vicinity of Spring creek, and had been washed into the creek by some of the many rains that occurred there in years past. This supposition is made more tenable by the fact that other unidentified skeletons had previously been found in the locality covered by the testimony in this case, viz., near the Grand Rapid bridge across the Niobrara river. (See evidence of George Robertson, page 211 of the bill of exceptions.)

If the theory of the prosecution is not supported by the evidence, and we must find that it is not, then the manner in which Coy met his death is purely conjectural. He may have died from natural causes. Heart disease or cerebral hemorrhage may have taken him suddenly while on the precipitous banks of Spring creek, and his body rolled or washed into the creek.

"The fact that the deceased died suddenly never warrants an inference that he was foully dealt with. It is for the state to prove that his death was the result of a criminal act, and, unless or until this is proved, it is presumed that death resulted from natural causes." Underhill, Criminal Evidence (2d ed.) 541, sec. 312.

He may have been shot by some person unknown. He may have met his death from a fall. He may have been drowned while Spring creek was in flood. Treppish may have killed him in some manner not disclosed.

We cannot determine from the evidence when he died, the cause of his death, or whether any person was criminally connected with it. The *corpus delicti* has not been proved.

If the fundamental fact of Coy's death, through the criminal agency of some person, was established, then the fact that Treppish last saw him alive, the finding of Treppish in Wyoming with the car, and all the facts and circumstances of the association of the parties are competent to be considered to connect Treppish with the crime. It may be doubted that the evidence is sufficient for that purpose.

No motive for the crime, on the part of Treppish, is shown. The relation of the parties was friendly. The car taken by him was of no greater value than the boat left behind. His actions after the alleged crime were not such as would be expected of a person guilty of murder. His story is not impossible of belief and is strongly supported by some of the circumstances that are undisputed.

Treppish told just what articles he left with Coy on Spring creek. All of these, with the exceptions of the gun and traps, were afterward found on Spring creek. Among the articles left were a bed roll and bedding. The evidence shows this was the only bed roll had by the parties. Treppish, when he reached Sheridan, was obliged to buy a bed roll on credit and pledge a revolver as security for it. If, when Treppish left Spring creek, Coy was dead and Treppish was appropriating his belongings, why would he have left the bed roll and bedding? Treppish told just what articles he took to the river and left for Coy. None of these articles have ever been found, nor is there any evidence that Treppish thereafter had or disposed of them.

It is contended that his evidence as to leaving these articles at the river is rebutted by evidence of parties who did not see them there. However, the boat owned by the parties was on the island just opposite where Treppish said these articles were left. Treppish could not have taken the boat with him, but it disappeared and has never been found. If the boat was stolen, it is at least possible that the articles which Treppish claims to have left on the bank of the river were taken at the same time.

There is much about this case that is mysterious, and suspicion inevitably pointed to Treppish, but suspicion is not sufficient to establish that a crime has been committed.

Having reached the conclusion that the case should not have been submitted to the jury because of the failure of the state to prove the *corpus delicti*, it will not be neces-

sary to devote very much time to an examination of other allegations of error.

The alleged error most earnestly urged is that, after an order had been made by the trial judge, excluding all witnesses from the courtroom except when called to testify, certain of the state's witnesses remained in the courtroom, heard the testimony of all or many of the other witnesses and were then permitted to testify in the case over the objections of the defendant.

It seems that, through a misunderstanding of the extent of the court's order, the witnesses in chief for the state, after testifying, remained in the courtroom during the remainder of the trial. Some of these were called as rebuttal witnesses. Other witnesses called on rebuttal alone had also been in the courtroom and heard all the evidence in the case. The defendant objected to any of these witnesses being permitted to testify after they had remained in the courtroom and heard the evidence of other witnesses, all in violation of the court's orders. This objection was overruled and the witnesses permitted to testify.

It does not appear that the trial court had any knowledge of the violation of this order until it was called to his attention by the objections of defendant. We have carefully examined the evidence given by these witnesses and do not find that it was of a nature to have been influenced by what they heard from other witnesses. Therefore no prejudice to the defendant resulted from the unintentional disregard of the court's order.

It is urged that the trial court interfered in the examination of defendant's witnesses, continually urging the defendant's attorneys in their examination of witnesses to hurry, and continually interrupting the defendant's attorneys in their examination of witnesses, thereby prejudicing the jury against the defendant. It is the duty of a trial court to expedite the trial as much as is possible without infringing the rights of the parties to a complete and orderly examination of all the facts and

circumstances connected with the case. In his endeavor to expedite the trial in this case, the trial judge used some expressions that perhaps would have been better omitted. However, we are satisfied reversible error cannot be predicated thereon.

Complaint is made that there was misconduct on the part of the prosecuting attorney in his argument to the jury, in that he called Treppish a liar, called attention to the crowd in the courtroom as being Coy's friends and said, "There have been men killed in this county for less money than that, and one of them not very long ago." If such remarks were made, they were clearly improper and prejudicial. However, no record of such remarks appears in the bill of exceptions nor are the statements in plaintiff's brief substantiated by affidavit or in any other manner. They cannot therefore be considered.

Many other alleged errors are cited, which we think need not be commented upon.

We find no reversible error in the case save and except the overruling of the defendant's motion for a directed verdict because of failure of proof that the death of Clarence Coy resulted from the unlawful act of the defendant Earl Treppish.

For this error, the cause must be reversed.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. AMERICAN STATE BANK OF SPRINGFIELD, APPELLANT: REVA GRELL, INTERVENER, APPELLEE.

FILED JANUARY 26, 1934. No. 28718.

1. **Banks and Banking**: SPECIAL DEPOSIT. A deposit of money in a bank under a contract or understanding that the same shall be held intact and returned in specie to the depositor is a special deposit.
2. ———: ———. A deposit of money in a bank under a con-

tract or understanding that it shall be held and used for a special purpose is a specific deposit.

3. ———: TRUST FUNDS. Where a trustee was appointed by the court over a fund to be paid over in instalments to a third person, and by the same order the fund was directed to be deposited in a certain bank of which the trustee was cashier and general manager, until further order of the court, a relation of trustee and *cestui que trust* was created between the bank and such third person.

4. ———: ———. In such case the sum became a specific deposit made for a special purpose, and was a trust fund payable out of funds in the hands of the receiver of such bank upon its insolvency, and payable in preference to the claims of other creditors.

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

F. C. Radke, Barlow Nye and *Dwyer & Dwyer,* for appellant.

E. S. Nickerson, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CARTER and REDICK, District Judges.

REDICK, District Judge.

The American State Bank of Springfield, Nebraska, is in the hands of receiver for liquidation and Reva Grell, by Exilda Grell, her next friend, filed a petition of intervention in the proceedings seeking to have the sum of $489.64 declared a trust fund payable in preference to the claims of general creditors. The receiver classified the claim as a preferred claim but declined to allow it as a trust fund payable in full. Upon appeal to the district court the classification of the receiver was set aside and the claim established as a trust fund payable in full before the claims of other creditors, and the receiver appeals.

The facts necessary to an understanding of the question presented are not in dispute and are substantially as follows: On April 2, 1926, in a divorce action then pending

in the district court for Sarpy county, Nebraska, wherein Exilda Grell was plaintiff and Fred Grell, Jr., was defendant, the defendant was directed by the court to pay to E. N. Christianson, who was by the court appointed trustee thereof, the sum of $1,700 for the support of Reva Grell, minor child of the parties. A copy of the order is given in full:

"It is therefore further ordered, adjudged and decreed, that the defendant, Fred Grell, Jr., pay to E. N. Christianson, who is by this court named trustee, who is required to give bond in the sum of $2,000 with surety to be approved by clerk of this court and make report to court once each year, the sum of $1,700 in cash, which is computed as the present worth of the allowance provided in the former decree, which is herein vacated, which said payment to said trustee by the defendant is in lieu of the provisions of said decree as to allowance, herein revised and vacated. That said money in the hands of the trustee shall be a trust fund for the support of Reva Grell, minor child of the parties, and the trustee shall pay out of said fund, with accumulated interest, the sum of $120 on April 1st and October 1st of each year, beginning with the month of April, 1926, to Exilda Grell, mother of said minor, for the support of said minor child.

"That said fund shall be kept on deposit in the American State Bank of Springfield, Nebraska, at the current rate of interest protected by the state guaranty fund, until further order of this court, and be evidenced by time certificates of deposit renewal April and October."

E. N. Christianson, appointed trustee by the court, was also the cashier of the bank, and therefore occupied a dual capacity with reference to the fund in question. In receiving the fund from Fred Grell, Jr., he acted as trustee under the order of the court, and in receiving the fund for deposit in the bank of which he was cashier he acted as agent of the bank. In this situation the bank must be held cognizant of all the facts within the knowledge of the trustee, with reference to the transaction in ques-

tion. *State v. American State Bank,* 108 Neb. 98. After payment of the first instalment of $120 to Exilda Grell, the trustee deposited in the bank the sum of $1,580, taking a time certificate of deposit therefor maturing at the due date of the next instalment in October. The fund was not kept separate by the bank but was mingled with its general assets, and a sum in excess of the amount claimed by intervener, $489.64, came into the hands of the receiver, and there remained. As each instalment became due new certificates were issued maturing at the date of the next following instalment, which was paid by check of the trustee until the closing of the bank, leaving the amount claimed still unpaid.

It is the claim of the intervener that the fund in question was deposited in the bank for a specific purpose, to wit, to be paid out in semiannual instalments to the intervener; not that it was a special deposit but a specific deposit, the distinction being that in the former case the fund is to be held intact and returned in specie, while in the latter the fund may be intermingled with the general assets of the bank, but is to be applied only for a certain purpose. In either case the fund may constitute a trust entitled to preferential payment over general creditors.

Whether or not a deposit is general or specific depends upon the terms of the contract at the time. *In re Warren's Bank,* 209 Wis. 121.

Counsel for receiver cites the case of *Reichert v. American State Savings Bank,* 264 Mich. 366, to the effect that money deposited in bank to be used for a specific purpose did not make it a trust fund, "but it would become trust fund only if deposited with understanding that it should be set apart for particular purpose, and not mingled with other money of bank." (249 N. W. 876.) In that case the contract was that all funds deposited in excess of $3,250 were to be transmitted to the bank's correspondent in Chicago in the ordinary course of business. While the holding in that case was undoubtedly

correct upon its special facts, we think the statement of the principle is too broad, as it leaves out of view entirely the distinction between a special and a specific deposit. To apply the law as there announced would exclude from protection a deposit made in a bank for the purpose of completing a transaction in real estate upon the delivery of deed, abstract, etc., in the ordinary terms of such transactions, unless the money was placed in a special fund and kept intact. Unless a special contract to that effect was made with the bank it could not be said that it was within the contemplation of the parties that the particular currency should be turned over to the grantor, but rather that the fund should be covered into the general assets of the bank upon the understanding that the bank would pay an equal amount upon presentation of the deed. To so hold would be contrary to practically all the decisions relating to deposits for a specific purpose. Counsel also cites *Ottawa Banking & Trust Co. v. Crookston State Bank,* 185 Minn. 22, that "guardian's deposit of ward's money in the guardian's name as such, in absence of special circumstances, constitutes 'general deposit' as respects preference." (239 N. W. 666.) The qualification, "in absence of special circumstances," renders this case inapplicable. Also to the point that a deposit represented by a time certificate of deposit is a general deposit, and not a trust, *State v. South Fork State Bank,* 112 Neb. 623; *Farrens v. Farmers State Bank,* 101 Neb. 285; *State v. Farmers State Bank,* 111 Neb. 117. An examination of these cases, however, will disclose that in none of them were there any special circumstances having a tendency to establish the existence of a trust.

Counsel for receiver cites a number of cases to the proposition that money deposited in the bank as a general deposit by a guardian or trustee, known to be such by the bank, cannot be considered and paid as a preferential claim over other depositors; the mere knowledge of the bank of the character of the fund will not raise a trust. This proposition may be conceded, but it begs the

question whether or not in the particular case the fund was a general deposit. He also cites a number of cases to the point that a deposit represented by a time certificate of deposit is a general deposit and not a trust, but in none of those cases was the question of trust involved. He also says that, "In the absence of a special agreement by which the bank becomes a trustee or circumstances sufficient to create a trust, a deposit will be deemed a general deposit"—citing *Pethybridge v. First State Bank,* 75 Mont. 173; *Gray v. Elliott,* 36 Wyo. 361; *Lamro State Bank v. Farmers State Bank,* 34 S. Dak. 417; *State v. First State Bank,* 123 Neb. 643. But the question here is whether or not the circumstances surrounding the deposit were of such a character as to create a trust. In none of the cases cited were any special circumstances shown having that effect. He also cites *Commercial Nat. Bank v. Smith,* 244 N. W. (S. Dak.) 521, in which it was held that a general deposit "possesses no trust quality and is mingled with the other funds of the bank, and if insolvency ensues, depositor shares *pro rata* with other creditors." It was, however, also held in that case: "As respects priority, when special deposit is made for specific purpose for third person's benefit, trust in favor of third person is created; title remaining in depositor." And in the opinion it was said, quoting from *City of Sturgis v. Meade County Bank,* 38 S. Dak. 317: "As a rule, when money is deposited in a bank, title to such money passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and, to that extent, the depositor becomes the creditor of the bank. * * * Such deposit then constitutes a part of the assets of the bank, and, in case of insolvency, belongs to the creditors of the bank in proportion to the amount of their respective claims. Exceptions to this rule are: First, where money or other thing is deposited with the understanding that that particular money or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specifically designated purpose; and,

third, where the deposit itself was wrongful or unlawful." In that case a general deposit was made in bank by railroad contractor for the purpose of meeting checks drawn by him for the payment of labor and materials in carrying out his contract, and the court held that no trust was created in favor of the holders of claims for labor and materials furnished. It seems to us that case presented merely the ordinary situation of the deposit of funds in the conduct of general business and presents no feature indicating the establishment of a trust.

In the case at bar we have the following special circumstances bearing upon the nature of the deposit: (1) The fund was established for the benefit of Exilda Grell for the support of the minor; (2) the court appointed Christianson as trustee of the fund; (3) the court ordered the fund deposited in the bank to be paid out in accordance with the order of the court; (4) the fund was accepted by the bank with full knowledge as to the specific purpose to which it was to be devoted. We think under these circumstances the deposit cannot be said to be a general one, but for a specific purpose, for the benefit of a third person, and that by the acceptance of the deposit the bank became the trustee of that third person, and that the claim should have preference over the general creditors of the bank.

It was held in *Officer v. Officer*, 120 Ia. 389: "A specific deposit exists when money or other property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose." In order to create a specific deposit, it is not necessary that the fund be kept intact as in the case of a special deposit, but it is sufficient if the deposit is made with the agreement or understanding with the bank that a sum equal to the deposit shall be forthcoming for the special purpose intended.

The case of *State v. Farmers & Merchants State Bank*, 125 Neb. 437, was in many respects like the case at bar.

There, one Cheney was appointed referee in partition for the sale of real estate, and received deposits of purchasers on their bids. He was required to give bond as referee and arranged with the cashier of the bank to sign the bond upon the agreement that Cheney would deposit the money accruing from the sale in the bank. The money was so deposited in the name of "L. H. Cheney, Referee Harsch Estate." Later on the sales were set aside and the referee ordered to return to the bidders the deposits made on their bids. In the meantime the bank had closed its doors and the referee was unable to comply with the order of court. This court held that the deposit in question constituted a trust fund entitled to preference over the claims of general creditors. But the court treated the fund as a special deposit, saying: "When there is an agreement with bank officers that certain money is placed in a bank for the specific purpose of being held intact until the completion of a contemplated land sale by a referee in partition, and then to be turned over to the parties entitled thereto, the money so placed in the bank may be reclaimed as a trust fund, where the bank becomes insolvent while holding such money." The case does not control the present one, as it is not contended that the fund in question here was a special fund to be held intact, the intention being that it was a specific fund agreed to be used for a specific purpose, which puts the case in another class. It was, however, held in that case that it was not necessary for the claimant to trace the identical funds into the receiver's hand, and the fact that the original fund may not have been kept intact did not prevent it being affected with a trust. It is true that in that case the general doctrine was announced that, where "certain money is placed in a bank for the specific purpose of being held intact until the completion of a contemplated land sale by a referee in partition, and then to be turned over to the parties entitled thereto, the money so placed in the bank may be reclaimed as a trust fund, where the bank becomes insolvent while holding

such money" (citing cases); but the statement of the contract in that case did not include a provision that the money should be held intact as a special deposit, and therefore the statement above quoted of the general rule as to special deposits does not detract from the previous holding of the court in that case that "Trust funds placed in a bank for a particular purpose are sufficiently traced into the hands of the bank's receiver to entitle their owner to claim them if the fund delivered to the receiver exceeded the amount of the trust, although the money deposited may not have been kept intact"—citing *Hudspeth v. Union Trust & Savings Bank,* 196 Ia. 706. Furthermore, Paine, J., in the opinion of this court, approved the following general statement of the rule, quoting from 31 A. L. R. 466, note: "Where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as to give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which entitles the depositor to a preference over the general creditors of the bank where it becomes insolvent while holding the deposit." See *Corporation Commission v. Trust Co.,* 194 N. Car. 125; *Blythe v. Kujawa,* 175 Minn. 88.

It would seem that there is greater reason for holding the deposit in the present case to be a special deposit than in the case cited, in view of the fact that it was to remain until further order of the court; however, we prefer to treat it as a deposit for a specific purpose.

The conclusion we have reached finds support in the following cases cited by appellee: *State v. Farmers & Merchants Bank of Kennard,* 118 Neb. 495; *Morton v. Woolery,* 48 N. Dak. 1132; *Village of Monticello v. Citizens State Bank,* 180 Minn. 418; *Reichert v. Midland County Savings Bank,* 254 Mich. 551; *In re Warren's Bank,* 209 Wis. 121, in which case it was said: "It seems to be well settled that a deposit made in a bank for a

specific purpose, and for that alone, partakes of the nature of a special deposit, and does not establish the relation of debtor and creditor between the depositor and the bank, but establishes a fiduciary relation which is sometimes declared to be that of principal and agent, while some courts hold that a trust relation is created (citing cases). Such a deposit is called a specific as distinguished from a special deposit."

The receiver objects that in the cases just cited the bank was to distribute the fund. If this objection has any force it is answered by the requirement of the court order that certificates of deposit be issued by the bank payable April 1 and October 1 of each year; that the bank was so directed, rather than to pay direct to Exilda Grell, creates no valid ground for distinguishing those cases.

We think the present case falls clearly within the principle announced by this court since the argument: "Where bank accepted check with knowledge that it was deposited for specific purpose of using proceeds to pay for cattle, deposit held trust fund to which payee of check given for purchase price of cattle was entitled to preference on bank's insolvency." *State v. Bank of Otoe,* 125 Neb. 530 (quoting from 251 N. W. 111).

Other matters referred to in the briefs do not seem to require discussion in view of our holding on the main point.

We find no error in the record and the decree of the district court is

AFFIRMED.

CARTER, District Judge, dissenting.

The facts in this case are correctly set forth in the majority opinion and I will refer to them only in so far as it is necessary so to do in explaining the reasons for my dissent.

It appears that one E. N. Christianson was appointed trustee of the fund involved herein by the district court

for Sarpy county. In the order appointing the trustee, the trustee, and not the bank, was required to make quarterly payments for the benefit of the *cestui que trust;* the fund was to bear interest, be protected by the depositors' guaranty fund, and be carried in the form of certificates of deposit which were to be made payable on the same dates that the trustee was to make his payments under the terms of the trusteeship. It seems to me that the above conditions contained in the order creating the trust are conclusive of the fact that the fund was to be placed in the bank as a general deposit; otherwise, there could have been no reason for their being in the court's order. It is undisputed that a trustee can lawfully make a general deposit of trust funds in this state. I do not concur with the view of the court as expressed in the majority opinion to the effect that, the fund having been accepted by the bank with full knowledge as to the specific purpose to which it was to be devoted, it is therefore a trust fund.

If the bank had full knowledge because of the fact that Christianson was also cashier of the bank, it certainly knew when it accepted the fund that it was doing so under the directions of the court as contained in the order set out in the majority opinion, and which provides conditions that clearly make it a general deposit. Mere knowledge of the nature and purpose of the trust fund is not sufficient to make the bank a trustee. *Diehl v. Johnson,* 123 Neb. 699. In the case of *Commercial Nat. Bank v. Smith,* 244 N. W. (S. Dak.) 521, it was held that a trust fund did not exist, for the reason that there was no allegation or proof of an agreement by the bank that the deposit was to be held other than as a general deposit. In the case of *In re Warren's Bank,* 209 Wis. 121, cited in the majority opinion, it was held: "A deposit in a bank is general or special, depending upon the contract of the parties at the time the deposit is made. It is presumed to be general in the absence of an agreement to the contrary." In *Reichert v. American State Savings Bank,* 264 Mich. 366, it is held: "That money deposited

in bank was to be used for specific purpose did not make it trust fund, but it would become trust fund only if deposited with understanding that it should be set apart for particular purpose, and not mingled with other money of bank." (249 N. W. 876.)

To hold that knowledge of all the circumstances in this particular case makes the bank a trustee of the fund when that knowledge of itself discloses that the order of the court creating the fund provides for a general deposit of the funds appears illogical as I view it.

The fact that the order creating the trust provided that the certificates of deposit were to fall due on certain dates does not indicate that the fund was to be distributed by the bank. This provision was for the convenience of the trustee, Christianson, whose duty it was to distribute the fund on the same dates the certificates of deposit became due. The court order expressly says that the trustee shall make the payments from the fund.

The creation of a trust fund is contractual in its nature, and for a court to hold that a trust fund could be created without an agreement or understanding, express or implied, gives the trust fund rule an interpretation, in my judgment, that is not supported by reason or by the authorities. Knowledge that a fund is deposited for a specific purpose should be accompanied by an agreement or understanding with the bank that it is accepted as such.

The rule seems to be almost universal that a special deposit is always the result of a special agreement, express or implied, between the bank and the depositor, whereby the bank becomes the disbursing agent to carry out the special purpose of the depositor. In the case at bar, if the depositor, Christianson, carried out his instructions given him by the court, and I believe he did to the letter, the deposit could be nothing other than a general deposit. In the face of these facts, mere knowledge by the cashier of the bank could not change the debtor and creditor relationship thus established.

In the case at bar, there is no evidence of any agreement or understanding with the bank. The deposit simply was a deposit of trust funds by the trustee thereof. It was not made in violation of the terms of the trust, but complied strictly therewith. The terms of the trust having expressly provided for a general deposit and the bank not having entered into any different arrangement or agreement, it is my opinion that the fund is a general deposit, and not a trust fund.

While I respect the opinions of the other members of the court sitting on this case and know that they have given it their serious and earnest consideration, yet I feel that the trust fund theory is being extended by the majority opinion to such an extent that it is unfair to the general depositors of failed banks. In my judgment the rule announced is not supported by the authorities and should not be adopted as the law of this state. For the reasons herein set out, I am obliged to dissent.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SOUTH OMAHA STATE BANK, APPELLANT: FRANK DEMOFF ET AL., INTERVENERS, APPELLEES.

FILED FEBRUARY 8, 1934. No. 28802.

1. **Banks and Banking**: PURCHASER OF CASHIER'S CHECK. "By purchasing a cashier's check, bank draft or certified check, the purchaser usually becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust, in absence of special circumstances creating the relation of trustee and beneficiary." *State v. Farmers & Merchants Bank*, 123 Neb. 358.
2. ———: TRUST FUNDS: BURDEN OF PROOF. The burden of proving that money in a bank is a trust fund rests on the person asserting it and must be proved by clear and satisfactory evidence, having in view all the surrounding facts and circumstances. 26 R. C. L. 1203, sec. 44.
3. ———: ———: ———. *Held*, that the evidence here failed to establish a trust fund in favor of claimants.

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

O'Sullivan & Southard, F. C. Radke and *Barlow Nye,* for appellant.

J. J. Krajicek, contra.

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

GOSS, C. J.

The receiver appeals from the allowance of the claim of Frank Demoff and Barbara Demoff as a trust fund with priority over claims of general depositors.

The claim was based upon a cashier's check for $1,500, issued August 3, 1931, payable to the Demoffs and still held and owned by them when the bank was closed and a receiver appointed a few weeks later. They duly filed their claim asking for its allowance as a trust fund. On December 18, 1931, the receiver classified it as a valid claim, ranking it with depositors and holders of exchange, but denied it priority of payment over other creditors. Claimants were given leave to file a petition of intervention and did so, claiming a trust fund for the amount named. Issues were joined and a trial had. In the meantime the Demoffs had been paid dividends of $600. The court decreed that the whole $1,500 was impressed on the assets as a trust fund, charged them the amount paid as dividends, and, on January 3, 1933, ordered the receiver to pay them $900, prior to the payment of other claims of general depositors.

It is now settled that the mere purchase of the cashier's check from the bank, by the Demoffs, did not create a trust fund in the hands of the bank. "A check on a bank does not operate as an assignment of funds therein to the amount of the check, a former rule to the contrary having been changed by statute. Comp. St. 1929, sec. 62-1606; *State v. State Bank of Belvidere,* 122 Neb. 797. By purchasing a cashier's check, bank draft or certified

check, the purchaser usually becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust, in absence of special circumstances creating the relation of trustee and beneficiary." *State v. Farmers & Merchants Bank*, 123 Neb. 358, citing, as precedents for the rules, *State v. State Bank of Belvidere*, 122 Neb. 797; *State v. First State Bank of Alliance*, 123 Neb. 23.

This leaves to be determined whether there were special circumstances present and proved which changed the usual relation of debtor and creditor, between the bank and the Demoffs, to that of trustee and beneficiaries.

In their brief appellees concede that the presumption, when money is deposited in a bank, favors the relationship of debtor and creditor. But they contend that the facts and circumstances "overcome the presumption, and show that this money was deposited as a bailment, or special deposit."

The testimony of the Demoffs was that they contracted to buy some vacant real estate adjoining their home. Their money was in a building and loan association, where advance notice to withdraw had to be given. They gave notice and after a month drew out $1,500 in money. The abstract did not show marketable title and there was delay. They were afraid to keep the money and so took it to the bank. Their testimony was given through an interpreter as they speak but very little English. They are said to be Bohemians.

Frank Demoff testified that he put the money in the bank, though there is other testimony from him clearly indicating that it was not money but in the form of a check. He says he dealt with Frank L. Vlach, who was vice-president and cashier of the bank and who issued the cashier's check. This check for $1,500, dated August 3, 1931, payable to the order of Frank and Barbara Demoff, is in evidence. When he gave Vlach "the check" and got the cashier's check, he says he told Vlach he intended to use the money to buy some property and wanted to leave it ten days. Vlach cautioned him not to lose the

cashier's check. When asked if, when Vlach gave him the check, he said he would keep the money for him for eight or ten days, he answered: "Surely, I knew he would keep it for me eight or ten days."

Barbara Demoff says she was with her husband when the money was put in the bank and met Vlach that day but left it to her husband to do the talking. Her husband told Vlach he "wanted to put the money in the bank for about seven days—eight or ten days," and "He said to keep it for us * * * and he said for us to watch that check and not lose the money, because if we lose it, if we lose the check, then we lose the money." On August 3 she had gone to the office of their attorney with the money in her pocketbook. The attorney told her the abstract of title was not right and they might have to wait for it. She got "scared to keep it at home" and she and her husband took it to the bank.

Frank L. Vlach testified that the usual method of handling money that was not to become a deposit of the bank was to put it in an envelope for safe-keeping and not to mingle that money with other deposits. He testified that he does not even recall how the money came into the bank for which the cashier's check was issued; that cashier's checks were issued to the number of 15, 20 or 50 each day; that he knows the Demoffs but does not remember any conversation with them or either of them about the matter involved here; if the fund had been left with instructions to hold for a specific purpose, a cashier's check would not have been issued.

"The burden of proving the existence of a trust rests on the person asserting it, and he must prove it by clear and satisfactory evidence, having in view all the surrounding facts and circumstances and the intention of the parties." 26 R. C. L. 1203, sec. 44.

The evidence, which we believe we have faithfully abstracted, is very lacking in the elements necessary to establish a trust against the bank. Even under the testimony of appellees, there was nothing establishing an ac-

ceptance of the money as a special deposit or special fund or indicating that the bank knew the purpose or intent except that Mr. Demoff told Vlach he intended to use the fund to buy some property and wanted to leave it ten days. The conventional thing to do was to issue a cashier's check to aid one to carry out such a purpose. The statement of the intent of Demoff was merely incidental. It does not raise an agreement that the fund should become a trust and that claimants should have priority when the bank failed leaving appellees as the holders of the cashier's check. The appellees have failed to sustain the burden of proof.

It follows that the district court erred in decreeing the balance due appellees to be a trust fund. The judgment is reversed, with directions to classify and order the claim paid as a general deposit, as originally classed by the receiver.

REVERSED.

JESS VOHLAND, APPELLEE, V. JOHN BARRON, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28812.

Appeal. When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong.

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

A. J. Luebs, for appellant.

George A. Munro, contra.

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

GOSS, C. J.

Plaintiff alleged that in the fall of 1931, at the special instance and request of defendant, he plowed 30 acres on defendant's farm; that the reasonable value of the work

was $1.50 an acre; that defendant was unresponsive to demand for payment, and plaintiff prays judgment for $45.

Defendant generally denies the petition and counterclaims, setting up a written lease of the quarter section to plaintiff for one year from March 1, 1931, at a cash rental of $50 for the buildings and pasture and two-fifths of all grain crops to be delivered at Gibbon; that plaintiff neglected to husk the corn within a reasonable time after it matured, that 60 bushels thereof was not picked by plaintiff, and defendant husked it at a cost of $1.80; that defendant's rent share of 440 bushels was negligently husked and delivered at the market too late, and damaged plaintiff 15 cents a bushel because of a decline in the market value, this damage totaling $65; that plaintiff violated his written lease, in which he agreed to protect all buildings and improvements, by removing siding from the house, by cutting holes in the plaster, by tearing down shelving and breaking windows, thus damaging defendant in the sum of $25; that plaintiff failed to haul out and spread the manure accumulated in the barns, as required by the written lease; that defendant had to do this and was thus damaged in the sum of $5. Defendant prayed judgment against plaintiff for $96.80.

Plaintiff's reply was a general denial.

On the trial both parties waived a jury and the case was tried to the court. The court found $39 due plaintiff on his cause of action, allowed defendant $1.80 for picking corn and $4 for cleaning manure from the barn; and entered judgment for plaintiff for $33.20. Defendant appealed.

Appellant says the court erred in rendering judgment immediately after the parties rested, without giving defendant an opportunity to address the court and submit arguments. The brief does not point out the evidence of such procedure on the part of the court nor do we dis-

cover it in the record. The assignment does not appear to be meritorious.

Appellant assigns error of the court in "entering upon the docket an order overruling a motion for a new trial before such motion was made by the defendant." The record shows that the motion was filed on January 10, 1933, and that "afterwards on the 10th day of January, 1933," the journal entry overruling the motion for new trial was entered on the journal. Appellant did not bring up any "docket" entry. The journal entry as shown by the transcript defeats this assignment.

All other assignments of error may be summarized as presenting one question, namely, that the evidence was insufficient to support the judgment. There was evidence to support the findings of the trial court. It has long been the rule that, when a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings by the jury. They will not be set aside unless clearly wrong.

We find no error. The judgment is

AFFIRMED.

LYDIA G. BRADLEY, APPELLEE, V. CLARENCE J. BRADLEY, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28748.

1. Divorce: CUSTODY OF CHILD. In litigation between parents, after they have been separated by divorce, over the custody of a minor child, the determining issue is the best interests of the child.
2. ———: ———. A decree granting a husband a divorce and awarding him the custody of a minor child may, after changed conditions, be modified to change the custody to the mother, if found to be for the best interests of the child.

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

Patrick & Smith, for appellant.

Sam E. Klaver, Gray & Brumbaugh and *Webb, Kelley & Lewis, contra.*

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

ROSE, J.

Lydia G. Bradley, plaintiff, and Clarence J. Bradley, defendant, were married December 24, 1914. They have two sons, Robert W. and Carl M. In the district court for Douglas county plaintiff sued defendant for a divorce. On a cross-petition defendant, the husband, procured a divorce October 26, 1931, and custody of the two sons was committed to him. By the decree the mother was permitted to visit her sons at proper times and places. In the same case plaintiff filed a supplemental petition September 14, 1932, in which she pleaded that defendant violated the decree by preventing her from visiting her sons, Robert then being 17 and Carl 13; that both defendant and Robert beat and otherwise mistreated Carl; that defendant's home was not a fit place for Carl who left his father and went to the home of his mother; that conditions have changed since Carl was committed to the custody of defendant; that the mother is a fit person to have the care and custody of her son Carl; that she has a suitable place for him with proper surroundings; that his best interests and welfare require a change of custody, for which she prays with an allowance for his support.

Defendant denied the alleged facts on which plaintiff sought the custody of her son Carl and an allowance for his support.

After a long trial the district court found generally the issues in favor of plaintiff; that the facts stated in the supplemental petition of plaintiff were established by the evidence; that the best interests of the minor son Carl required a change of custody from his father to his mother; that the change in conditions between the date of the first decree and the filing of the supplemental petition warranted such a change in custody; that defendant

is able to pay $4.50 a week for the support of his son Carl. From a judgment modifying the original decree to conform to the findings under changed conditions and requiring defendant to contribute $4.50 a week for the support of Carl until the further order of the court, defendant appealed.

The best interest of the child is the determining question on appeal, as it was on the trial below. The judge who granted the divorce and awarded the custody of the two minors to their father was the same judge who modified the original decree. When the modifying judgment was entered, Carl was 14 years of age—old enough to nominate his own guardian. Comp. St. 1929, sec. 38-104. He was discontented in the home of his father and brother, who cruelly beat and otherwise mistreated him. He refused to live with them and went to his mother who was kind to him and shared with him her meager earnings by honest labor.

A discussion of the evidence would not benefit either parent or either child nor add anything to the law relating to infants and parent and child.

Upon a trial *de novo,* the opinion is unanimous that the trial court made correct findings and they are adopted on appeal as the proper deductions from the evidence.

AFFIRMED.

JAMES MOST, APPELLEE, V. CEDAR COUNTY, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28783.

1. **Automobiles: OPERATION: MAINTENANCE OF ROADS.** It is the duty of a county to keep county roads in repair and for that purpose road tractors and maintainers may be operated on the left-hand side of a road in the face of traffic, when necessary.
2. **Appeal: DIRECTION OF VERDICT.** Where the evidence is insufficient to sustain a judgment in favor of plaintiff, failure to direct a verdict in favor of defendant may be reversible error.
3. **Automobiles.** Highway privileges of motorists require respect for the equal rights of others in the use of public roads.

4. ———: OPERATION: NEGLIGENCE. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead and the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

Clarence E. Haley, for appellant.

Carlos W. Goltz and *Alfred Pizey, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $17,600, for alleged negligence resulting in personal injuries. James Most, a minor 19 years of age, by his father, his next friend, Forrest Most, is plaintiff. Cedar county is defendant. In the daytime, July 8, 1932, while plaintiff, on a motor-cycle, was traveling westward a short distance east of Belden on a county highway, he collided with a county road maintainer that was going eastward and was severely injured. The negligence imputed to Cedar county is that its maintainer, without warning by horn, flag or other means, came up a hill to the top on the wrong, left-hand or north side of the road, as plaintiff, without negligence, approached the top of the hill from the east on the same side of the road, where he could not see the maintainer in time to prevent a collision. Defendant denied the negligence charged by plaintiff and pleaded that his injuries were caused by his own negligence. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $1,500. From a judgment therefor defendant appealed.

It is argued by defendant that plaintiff did not prove his case, that the uncontradicted evidence shows his in-

juries were caused by his own negligence, and that the district court erred in failing to direct a nonsuit. It is the duty of a county to keep county roads in repair and for that purpose necessary road machinery or suitable equipment may be used, even in the face of traffic on the left-hand side of the road. The road machinery with which plaintiff collided consisted of a tractor in front and a maintainer in the rear, each operated by a different employee of the county. On the maintainer a steel blade attached to a diagonal moldboard 16 feet and 3 inches in length extended into the improved roadway from the left-hand or north side about 12 feet and between 3 and 4 feet beyond the tractor. There was a flag 45 inches above the ground on the outer end of the blade. There is no evidence that this equipment was unsuitable for the purpose of repairing roads or that the county was negligent in using it or that it was negligently operated. The evidence does show, however, that there was no horn on the tractor, but the absence of a horn, if required by law, did not prove actionable negligence of defendant, for the reason that plaintiff's own testimony shows that if the operator of the tractor, whose attention was directed to his work, had sounded a horn at the instant plaintiff came into view, the accident could not thus have been prevented. Evidence that it was necessary to operate the maintainer on the left-hand side of the road in the face of traffic is uncontradicted. In broad daylight the road equipment evidenced itself in operation on the highway. At the time of the accident the tractor, moving no faster than five miles an hour, was ascending the hill from the west near the top, from which the road sloped down steep grades both east and west. The road there was in a proper condition for travel. The testimony of plaintiff shows that, traveling west, he came to the top of the hill at the speed of 30 miles an hour and that after he first saw the tractor he was going so fast that he did not have time to stop or turn far enough aside in order to prevent a collision. His testimony shows further that

he turned sharply to his left, applied the brakes and released the clutch. It was shown by uncontradicted evidence that his motor-cycle struck the moldboard or blade at the south end and flew through the air 45 feet and with plaintiff came to rest at a bank on the south side of the road. There was ample room for plaintiff to pass the maintainer on the south side at a safe pace. Two automobiles, going west, safely passed it where it stood shortly after the accident. The maintainer was in operation where the county had a right to use it. It would have occupied the same space in the road had it been going west instead of east. Plaintiff did not prove actionable negligence. The district court erred in failing to direct a verdict in favor of defendant on that ground.

A nonsuit should also have been directed on the ground that the negligence of plaintiff was the proximate cause of the accident and of his resulting injuries. On a 500-pound motor-cycle that could be driven at a speed of 90 miles an hour, plaintiff ascended the steep hill at a speed of at least 30 miles an hour, where he could not see the road immediately ahead beyond the top of the hill. He had no right to presume that, beyond his vision, the road on his right-hand or north side would be free from obstructions on the west side of the hill. It would have been safer for him to assume that danger lurked at the unseen place, if approached at a high speed, and to slacken his pace until he could safely pass objects in his path or stop without colliding with them. A motorist on an unpaved country road knows that it needs constant attention and repairs; that men with road machines and materials may be lawfully at work any where, occupying all or part of the main roadway in ravines or behind hills; that animals from farms may stray into the highways; that trucks and automobiles, without negligence of drivers, may be standing on either side of the highway when there has not yet been time for warnings of danger; that men, women and children have a right to use the highways everywhere. Highway privileges of motorists

require respect for the equal rights of others in the use of public roads.

It is a firmly established general principle, with exceptions not applicable to the present case, that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead. The cases stating and applying this rule are collected in notes in 44 A. L. R. 1403; 58 A. L. R. 1493; 87 A. L. R. 900. The rule applies to driving in the daytime where vision is shortened by storms or other physical conditions. For the reasons given, the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

CITIZENS STATE BANK, APPELLEE, V. ARAPAHOE FLOUR MILLS: GEORGE W. SHAFER, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28805.

Bills and Notes: INDORSEMENT: CONSIDERATION. Extension of time on obligation of a corporation is sufficient consideration for indorsement as surety of one who is president and large stockholder.

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

Stevens & Stevens, for appellant.

Butler & James and *George C. Proud, contra.*

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

DAY, J.

This is an action to recover on a promissory note brought by the Citizens State Bank of Arapahoe against the Arapahoe Flour Mills, a corporation, and George W.

Shafer. At the close of all the testimony, the trial court sustained a motion to discharge the jury and enter judgment in favor of plaintiff against Arapahoe Flour Mills and Shafer. Only Shafer appeals.

The action is founded upon a promissory note, signed "Arapahoe Flour Mills, by G. W. Shafer, Pres., Clyde S. Paine, Sec., and G. W. Shafer." The defendant answered that he thought he was signing only in the representative capacity as president; that he signed it without consideration; and that his signature was procured by fraud.

The note itself refutes beyond doubt that Shafer signed the note only in a representative capacity. The contention of defendant's business incompetence is not persuasive. He had regular and frequent legal advice from a reputable and able lawyer. The mill owed him money, and he was shrewd enough to get a mortgage on its property. He had never been adjudged incompetent. Unfortunately for him, as for many others, business transactions resulted disastrously.

It appears that the note herein was a renewal of an obligation of the mill, upon which Shafer was not liable. But since this obligation had been created, Shafer had secured a mortgage on the mill property. The bank had extended credit at a time when this property was clear. Shafer as president informed the bank that the mill could not pay the note when due and asked for an extension. Shafer was a large stockholder in the mill. A ninety-day extension was granted by the bank and this note executed upon the agreement that Shafer would sign personally, which he did. There is no issue of fact upon this phase of the case. The defendant himself corroborates the testimony of the managing officer of the bank but states that he thought he was signing another note upon which he was already personally liable.

Shafer was a stockholder and president of the mill. As such, he was financially interested in the mill. He desired an extension of time on the mill's debt. Extension of time on the obligation of a corporation is a sufficient con-

sideration for the indorsement as surety of one who is president and large stockholder. *Fulton v. Loughlin*, 118 Ind. 286; 8 C. J. 220. For analogous cases, see *Vybiral v. Maly*, 123 Neb. 436; *Bliss v. Venner*, 121 Neb. 44.

The evidence relating to the allegation of fraud is insufficient to submit to the jury.

The judgment of the trial court is correct.

AFFIRMED.

CITIZENS STATE BANK, APPELLEE, V. GEORGE W. SHAFER, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28821.

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

Stevens & Stevens, for appellant.

Butler & James and *George C. Proud, contra.*

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

DAY, J.

This is an action to recover on a promissory note against two comakers. A jury was waived and the case tried to the court. The court found for plaintiff and against both defendants, Shafer and another. Only Shafer appeals.

The note was executed by the defendants in connection with the affairs of the Arapahoe Flour Mills. The defendants were officers and stockholders in the mill corporation. It appears that they wished to gain control of the management of the corporation and to divest one who had been in control as the owner of a large number of shares of stock. They sought to do this by acquiring this stock which had been deposited as collateral for a note by payment of the note and assignment of the col-

lateral. This was accomplished by the defendants executing the note herein as payment.

The defense to the note is that it was signed as an officer of the mill and not as an individual; that there was want of consideration and that it was procured by fraud. A brief substantial statement of the evidence will be sufficient to establish the correctness of the judgment of the trial court. In this case, if there is evidence to support the judgment, the finding of the trial court will not be disturbed. This is so well established in this jurisdiction that citation of authorities would be superfluous. The defendant signed the note individually and not as officer of the corporation. After signing the note and by reason thereof, the makers secured stock of the corporation of the par value of $25,000, half of which was transferred to the appellant's name on the books of the company and thereafter voted by him at stockholders' meetings. This secured control of the corporation, which control was exercised by discharging the former owner of the stock as general manager of the corporation's business. This was consideration for the note. It was a personal deal of the individual and not one of the corporation. There is evidence that the transaction was to be handled otherwise, which is denied by other evidence. But it is disclosed that it was not so handled. A careful examination of the entire record, the assignment of errors presented, and the briefs of the parties disclose no errors, so that the judgment should stand.

AFFIRMED.

RACHEL WHINNERY, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28794.

1. Trial: INSTRUCTIONS. The instructions of the court to the jury are to be read and considered together, in reference to their subject-matter and any included reference to other in-

structions. If, so considered, they properly state the law of the case, they will be held sufficient.

2. ———: ———. Certain instructions examined and the giving thereof *held* not erroneous.

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

T. W. Bockes, C. B. Matthai and *Fred C. Foster,* for appellant.

Boehmer & Boehmer, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This is a suit to recover for personal injuries alleged to have been sustained by plaintiff in a collision on the highway a short distance south of Grand Island, Nebraska, between the car in which plaintiff was riding, driven by one Gunn, and the defendant's passenger bus then driven by its regular driver employed for that purpose. The particular place of the collision was at an intersection of highways.

The evidence clearly establishes that the defendant's bus was traveling southward and, under existing highway regulations, had the right of way over vehicles approaching on the east-west highway. There were at the time cars approaching the intersection from all four directions. The car from the east is said to have stopped at the stop sign. The one from the south slowed down. The car in which plaintiff rode approaching from the west ignored the stop sign and swung into the intersection, attempting to make the turn northward, and collided with the bus which had attempted to swing to the right as offering the only means of possibly avoiding collision, upon the situation becoming apparent to its driver. The actual collision was between the left side of the bus and the left side of the car in which plaintiff rode.

The allegations of negligence which find some support

in the evidence were (1) that the bus was negligently driven at a greater rate of speed than was reasonable and proper, having regard for the condition and use of the road and the traffic thereon; (2) that the bus driver failed to heed the slow sign which stood on the highway as he approached the intersection; (3) that the intersection was one of obstructed vision and the bus driver in approaching exceeded the speed of 15 miles an hour specified by highway regulations in such cases; and (4) that the bus driver failed to stop or slow down after he observed, or should have observed, the situation of the car in which the plaintiff was a passenger.

The answer was a denial and a plea of contributory negligence.

On the trial, negligence of the driver of the car in which plaintiff was riding, by overrunning the stop sign, by failing to yield the right of way, and in cutting the corner as he turned, was abundantly supported in the evidence.

On this appeal complaint is made of the giving of each of the instructions numbers 10, 13, and 14.

The trial court submitted the case to the jury upon 19 instructions. Numbers 1 to 4 covered the issues and burden of proof. Number 5 informed the jury that plaintiff was not responsible for the negligence of the driver of the car in which she rode, but was responsible for her own negligence, and directed the jury's attention to an examination of the question whether plaintiff was aware of acts or omissions of the driver as to which she should have remonstrated, applicable to the question of contributory negligence on her part. Numbers 6 and 7 defined, respectively, the terms preponderance of the evidence and the different degrees of negligence involved. Number 8 gave the rules pertaining to contributory and comparative negligence. Number 9 defined the relative rights of way as between the highways, the duties of drivers respecting slow and stop signs, and told the jury that in this case the statute gave to the defendant's bus the right of way

at the intersection over the car in which plaintiff was riding. Number 11 stated the general rule as to reasonable speed and the duties of drivers to keep to the right on the highway and in turning at intersections, and number 12 that the traffic rules were to be considered, "not that their violation is negligence in itself, but is simply to be considered by you in bearing upon the question of the negligence of the parties." Number 15 covered the last chance doctrine and informed the jury that in such case it was the duty of the bus driver to exercise reasonable care to prevent and avoid the accident. Numbers 16, 17, 18, and 19 covered, respectively, the measure of damage, the question of liability insurance, credibility of witnesses, and a concluding paragraph in reference to considering the evidence and reporting a verdict.

Considering now the objection as to instruction No. 10, the instruction is in the following language:

"There is another provision of our statutes which is applicable to this case and should be applied by you together with the provision of statute just set out and bearing upon the question of the negligence of the parties to this action. This statute provides it shall be *prima facie* lawful for a driver of a vehicle to drive it at a speed not exceeding the following: 'Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last fifty feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all highways entering such intersection for a distance of two hundred feet from such intersection.' "

It is urged that the giving of this instruction was error because there was no evidence to which it was applicable, and that the plat, exhibit 1, introduced by plaintiff, and said to be drawn to scale, shows the view from the route of defendant's bus to have been unobstructed for a distance of about 75 feet from the intersection. Conceding

that the plat furnishes some support for this argument, there was also other evidence which the jury were bound to consider in that connection. There were photographs introduced by both parties of sundry views from different angles of the intersection and of nearby territory and objects. There was also testimony of witnesses directed to this point. The bus driver said it was "kind of" a blind corner and that he approached it at a speed of 25 to 30 miles an hour and did not see the car in which plaintiff rode until it was out in the highway about 50 feet distant from him, and applied his brakes at a distance of approximately 10 feet before the cars hit. Over all was the consideration of the question whether under all the conditions of the road and the traffic at the particular time and place the speed was reasonable and proper. This was evidently in the mind of the trial judge when, upon the conclusion of plaintiff's testimony, in overruling the defendant's motion for a directed verdict, he stated he could not say as a matter of law it was not negligence for the defendant's bus not to slow down. Again at the close of the testimony, specific reference was made to the 15-mile-an-hour rule and the statement reiterated. The instruction by its language was connected with other instructions having to do with the statutory rules, and we conclude that there was sufficient in both pleading and evidence to justify the giving of the instruction.

Instruction No. 13 told the jury that, although the negligence of the driver of the car in which plaintiff was riding could not be imputed to plaintiff, "still that negligence may be considered by you in determining whether under all the circumstances surrounding the accident the defendant's negligence, if any, was the proximate cause of the accident." The criticism offered to this instruction is that the word "should" ought to have been used instead of the word "may" in the above quoted part. Considered in its proper setting, with the statements in the other instructions as to what might or might not properly be considered in determining the question of negligence, we

think that the distinction sought to be made calls for too much refinement of language to be held to be prejudicial error.

Instruction No. 14 had reference to defendant's claim that plaintiff knew that the driver of the car in which she was riding had on prior occasions failed to stop at stop signs, and "if you find from the evidence that this was true then you would be justified in finding that it was her duty to exercise reasonable care to direct his attention to the stop sign on the highway No. 70 as that highway entered highways Nos. 13 and 2." It is urged that this instruction is not complete in that it should have, in addition, told the jury what the penalty for failure on plaintiff's part to use reasonable care would be. The jury had been specifically informed in instruction No. 5 of plaintiff's duty in case she was aware of such acts or omissions of the driver, and that, if she failed in her duty in this regard, then she would be guilty of contributory negligence. This instruction directly followed instruction No. 13, already considered, having reference to the negligence of the driver of this car, and they, together with the provisions of instruction No. 5 and the other instructions having reference to negligence and contributory negligence, sufficiently covered the proposition.

Finally, it is urged that there was error in permitting plaintiff, without preliminary statements of qualification, experience, and observation to state her opinion of the speed of the bus as it approached the car in which she was riding. She stated she felt positive it was going at least 40 miles an hour. The trial court was not very particular in requiring foundation statements from the plaintiff, yet it should not be overlooked in the consideration of the question here that plaintiff had previously testified that, at least from the previous September until the time of the accident in March, she had been driving with this and other drivers between her residence in Grand Island and the school where she taught. This and the general knowledge that, in present times, practically

all persons may reasonably be presumed to have concerning the speed of automobiles would render particular foundation questions on the matter of the speed in this instance of less importance. Also, she was almost immediately thereafter permitted to state, "it was just rushing down upon us with such speed I was terrified and I couldn't tell anything else," which statement stood without protest. Obviously, any statement of the speed could be an estimate only. Other witnesses placed it at from 25 to 35 miles an hour, including the bus driver who said he was driving between 25 and 30. It may be that, strictly considered, a more definite foundation should be required; but, under the circumstances and testimony in this case, we cannot conceive that either the jury could have been misled or the defendant prejudiced by the failure of the trial court to require a more definite foundation for the statement.

The case was one of conflicting claims and evidence. We believe they were fairly submitted to the jury by the trial court. We have herein considered all the assignments of error in appellant's brief and find no prejudicial error therein.

The judgment of the district court is

AFFIRMED.

HOWARD L. CROOK, APPELLEE, V. EDWARD M. O'SHEA, DOING BUSINESS AS O'SHEA MOTOR COMPANY, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28672.

1. **Contracts.** A written order for the purchase of merchandise, or, as in this case, for the purchase of trucks and an acceptance thereof, amounts to a written contract under the laws of this state.
2. **Fraud.** Where fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promises as a contractual obligation.

3. ———. An action for damages for breach of contract for failure to furnish employment will not lie where the agreement to furnish employment was in the nature of oral inducements to the execution of a written contract for the sale of merchandise, or, as in this case, the sale of trucks.

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

Stewart, Stewart & Whitworth, for appellant.

O. B. Clark, William Niklaus and *J. E. Mockett, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is an action at law by Howard L. Crook, plaintiff, appellee herein, against Edward M. O'Shea, doing business as O'Shea Motor Company, defendant, appellant herein. The petition contains two causes of action.

In the first cause of action, the plaintiff alleged that on the 14th day of April, 1931, he entered into an oral agreement with the defendant, by the terms of which he agreed to pay defendant $818 and the defendant agreed to sell to him one Ford Model "AA" truck and to provide plaintiff with regular, continuous and steady employment with Abel Construction Company, the employment to consist of hauling material from May 1, 1931, until weather conditions rendered road construction work in Nebraska impracticable because of the freezing of materials used in road construction, for which hauling the plaintiff would receive 20 cents a mile for each mile traveled with a loaded truck plus 5 cents extra for the first mile of each trip, and the average daily compensation would be not less than $21.50 over and above the costs of gasoline, lubricating oil and necessary repairs to his truck, and that gasoline and lubricating oil could be purchased from Abel Construction Company at Lincoln wholesale prices. He alleged that, as an inducement and as a part of the negotiations leading to the making of the said contract, the

defendant represented that he had a contract with Abel Construction Company whereby defendant was empowered to make the contract for hauling and for the purchase of gasoline and lubricating oil at wholesale prices; that the plaintiff, pursuant to the said agreement and in consideration of the promises of the defendant, purchased and received the truck and paid the defendant the sum of $818; that the defendant failed and refused to secure employment for the plaintiff with Abel Construction Company, except a certain part time employment for which plaintiff received the sum of $393.11 over and above the cost of gasoline, lubricating oil and repairs, whereas, if he had been furnished employment pursuant to the agreement, he would have collected for his services the sum of $3,590.50; that by reason of the breach of contract on the part of the defendant he has sustained damages in the sum of $2,997.39.

The second cause of action is similar to the first, the material difference being that one Leslie Yost claims to have entered into a contract with the defendant identical with that of the plaintiff herein, except as to dates, description of truck and amount of damages. Yost has assigned his cause of action to the plaintiff and plaintiff has instituted action thereon herein.

The defendant filed a general demurrer to the petition, which was overruled, and thereafter filed an answer in which he alleged that he sold the two Ford trucks in question at the price of $818 each, upon which trucks each of the parties paid down $250 and gave a note with a conditional sales contract for the balance, which notes and contracts were transferred and later foreclosed on account of default in payment of said notes.

A trial to the jury was had, which resulted in a verdict and judgment in favor of plaintiff for $437.50 on his first cause of action and $387.50 on his second cause of action.

If, upon his pleadings and proof, the plaintiff was entitled to a recovery at all, the judgment in his favor was not excessive, so therefore this point requires no discus-

sion. The case must be decided on the question of whether or not the plaintiff set forth or proved or set forth and proved a cause of action recognizable in law.

We have set forth in some detail the issues as presented by the pleadings. With the purpose of supporting these issues as to the first cause of action, the plaintiff has adduced the following uncontroverted facts. On or about April 15, 1931, the plaintiff executed a written order for the purchase of a Ford truck from the defendant at the price of $818 on which he paid $250, leaving a balance of $568 to be paid in twelve monthly instalments of $54 each. The order was obtained by one Wisser, an agent of the defendant. The order was accepted by the defendant and on April 17, 1931, a promissory note and a conditional sales contract were contemporaneously executed by plaintiff and Ana L. Crook, his wife, and accepted by the defendant. The note was for the balance of the purchase price of the truck in question and finance charges and the conditional sales contract covered the same truck. The order, the note and the contract are in usual and customary form and contain no reference to employment.

As to the second cause of action, the evidence in this connection is substantially the same, except as to the dates and amounts and parties executing the instruments referred to. However, in addition, there appears upon the written order the following: "For construction work with Abel Const. Co."

The plaintiff, as has already been noted, seeks to recover for a breach of oral contracts. In support of the claimed contract of employment contained in the first cause of action, the plaintiff testified in part as follows: "Q. What did Mr. Wisser say? A. Well, he says Mr. O'Shea had a contract with Abel Construction Company to place ten new trucks on the job with them with ten men. * * * Q. Go ahead and give the substance of the conversation. A. Mr. O'Shea told me about the job. Q. What did he tell you about it? A. He said he had a contract with Abel to put on ten new trucks with dual

wheels. I told him I had looked at it on the floor and had been talking about it with Mr. Wisser, and he says, 'You will start the first of May and it will be steady, continuous employment until freezing weather sets in, if you are able to finance one of these trucks.' He says I would make $20 to $25 a day, and I told him it sounded all right to me, and he wanted to know if I was able to finance it, and I told him I thought I was, and he wanted to know the price Wisser had made, and I told him $818 and I would have to have $250 down, and he said he didn't want to let any of these go at $250 down but being Mr. Wisser told you that it was O. K. Q. Did he tell you who was furnishing this work to you? A. He told me that he was furnishing the work through the Abel Construction Company. Q. Now, did Mr. O'Shea mention gas or oil? A. Yes. Q. State what he said? A. He said, 'You will also be able to buy gas and oil at wholesale, wholesale Lincoln prices out on the job.' * * * Q. Who did you have that transaction with, with Mr. Wisser or Mr. O'Shea? A. After I accepted the proposition through Mr. O'Shea I signed the order for the truck in the presence of Mr. Wisser."

There is other testimony along the same line, but, in the main, these questions and answers set forth plaintiff's claim with reference to employment and income to be derived therefrom. The plaintiff claims that it was these representations and others of like character and import which caused him to purchase the truck.

As to the second cause of action, Yost, the other contracting party, has testified in part as follows: "Q. Now, I will ask you to state the substance of the conversation between yourself and Mr. Wisser at your home the first part of April, 1931, with respect to employment, if any, by the O'Shea Motor Company, or O'Shea, the defendant. A. Well, he came to my house and told me that Mr. O'Shea had a proposition whereby if I would purchase one of his Model "A" dump trucks Mr. O'Shea would furnish me with a job with the Abel Construction Company and the

work would start May 1st and last until freezing weather occurred which made road work impossible, and he also said that the job would pay $18 to $20 a day, net. Q. Did he tell you in any particular the kind of work it was? A. He said it would be hauling road material for paving and graveling roads. Q. Did he mention where and in what locality the work was to be done? A. He said it was all work that would be in and around Lincoln, near Lincoln, that the Abel Construction Company had several contracts that would furnish plenty of work and Mr. O'Shea had a contract with Abel to furnish this work. Q. Now, did you have any further conversation with Mr. Wisser at that time? A. Yes; he also said that Mr. O'Shea would sell ten trucks, not to exceed ten trucks so that the workmen could be kept busy and so there wouldn't be too many trucks on the job. Q. Did he tell you—did he mention what he meant by 'net?' A. Yes; he said I ought to make $18 to $20 a day net to me, over and above gas and oil. * * * Q. Was there anything other than that said at that time that you recollect? A. Well, he said, 'I have known you a long time, I wouldn't just want to be selling you a truck,' he says, 'Mr. O'Shea has this job and I am sure you can make plenty of money if you have got the money to buy one of these trucks, he will furnish you with a job.' * * * Q. You may state what Mr. O'Shea said in substance as near as you can recall. A. Mr. O'Shea said, 'I have a contract with the Abel Construction Company to furnish ten trucks for hauling road material for the Abel Construction Company,' and he said, if I had the money to buy one of these trucks he would furnish me with a job that would pay me from $18 to $20 a day, net. Q. Did he say how long this job would last? A. Yes. Q. What did he say about that? A. He said it would last from the 1st of May until freezing weather set in so road work was impossible. Q. Did he say what kind of work it was? A. Yes; hauling material, gravel, sand, cement for the Abel Construction Company. * * * Q. You may state whether or not you accepted that

proposition or what you did with respect to what Mr. Wisser and Mr. O'Shea told you? A. Well, I told Mr. O'Shea that if he could furnish me with a job I would buy one of them trucks; if I could make $18 to $20 a day net for that period of time I would be interested."

If defendant is to be bound on a contract of employment with Yost he must be bound on the basis of the language quoted.

What, then, is the force of the language employed between the plaintiff and defendant in the one case and Yost and the defendant in the other? In a view which we think most favorable to plaintiff, it appears that defendant was seeking to sell trucks and in pursuance of such purpose, personally and through an agent, offered his wares for sale and told these two men, as prospective purchasers, that he had a contract with Abel Construction Company to furnish ten trucks and if they purchased trucks he would give them employment with Abel Construction Company where they would continue to be employed until freezing weather and that for their work the Abel Construction Company would pay them on a fixed basis which would net them a certain daily income. Stripped of its gloss and forceless verbiage, this is the commitment of the defendant.

The defendant nowhere binds himself to the payment of any compensation to any person or persons whomsoever. He only promises orally to secure and to procure employment with a third party, which employment will provide a certain return in compensation for such employment, on which promises the plaintiff and Yost relied.

The evidence indicates that the parties would not have purchased the trucks in question in the absence of this commitment of the defendant, or, in other words, that this promise was the impelling force or inducement which brought about the execution and consummation of the contracts of sale of the two trucks.

If, then, the commitments of the defendant were matters of inducement, it therefore is unnecessary for us to

discuss the question of whether the contracts were verbal or written, and likewise a discussion of the parol evidence rules is not in point here, further than to say that the written orders for the trucks in question and acceptance thereof by the defendant were a written contract under the laws of this state.

A lengthy discussion of this subject would serve no useful purpose here. It is sufficient, we think, to say that, when fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promise as a contractual obligation. *Schuster v. North American Hotel Co.*, 106 Neb. 679; *Davis v. Ferguson*, 111 Neb. 691. If the plaintiff had any right of action at all, which question we do not determine, it was not for damages for breach of contract for failure to furnish employment.

In the light of the conclusion arrived at, it at once becomes apparent that plaintiff has not sustained the causes of action set forth in his pleadings, and, further, that no suit upon contract or for breach of contract to furnish employment is maintainable, so therefore the decision and judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

A. J. MILLS, APPELLEE, V. B. O. MILLS ET AL., APPELLANTS.

FILED FEBRUARY 8, 1934. No. 28681.

1. **Appeal.** This court will not take notice of error in the admission of evidence bearing on an issue not tendered by the pleadings and which does not bear upon any theory upon which the case was tried and which could not otherwise affect the issues presented.
2. **Bills and Notes.** Where the evidence discloses a substantial conflict on the question of whether or not the indorsers sign for the accommodation of the payee of a promissory note, the determination of such question is for the jury.

3. ———. An accommodation maker or surety of a promissory note is not liable to the party accommodated.

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

Butler & James and *J. F. Ratcliff,* for appellants.

Scott & Scott, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is a suit instituted for the purpose of recovering on three promissory notes. The plaintiff recovered judgment thereon and the defendants have appealed.

The action as originally instituted was by the appellee, A. J. Mills, against C. E. Mills and the appellants B. O. Mills and J. E. Mills, all brothers, but no service of process was had upon C. E. Mills, so the action proceeded against the appellants.

The petition set forth, in three causes of action, that the defendants were indebted to the plaintiff on the 1st day of February, 1927, in the sums of $765, $500, and $900, and that as an evidence of such indebtedness they executed three promissory notes, one for $765, due January 1, 1928, one for $500, due April 1, 1928, and one for $900, due February 1, 1929, each of which notes bore 8 per cent. interest per annum, payable per annum from date until maturity, and 10 per cent. per annum in case of default at maturity; and that the interest was paid thereon to February 1, 1929, but that nothing was paid thereafter thereon, either by way of interest or principal.

The appellants admitted the execution of the notes sued upon and also that the interest had been paid thereon, as alleged, by C. E. Mills. They alleged as a defense to the suit on the said notes: (1) That the said notes were executed by them only for the accommodation of the appellee, and that they, the appellants, received no consideration for the said notes; and (2) that because of the failure of

the appellee to present the notes in question at the time of maturity he is estopped from claiming that the appellants are liable thereon.

The appellants urge three propositions as a basis for reversal, only two of which require any consideration in this case. They are as follows: (1) The court erred in admitting evidence as to the ownership of the notes in question after sustaining a motion of the appellee for a directed verdict in his favor. (2) There was sufficient evidence on a disputed question of fact as to whether or not the notes in question were signed by them as an accommodation to the appellee to require the submission of that question to a jury.

At the conclusion of the evidence the court sustained a motion made by the plaintiff and appellee for a directed verdict in his favor. After sustaining the motion for a directed verdict the plaintiff was given leave to adduce additional evidence as to the ownership of the notes, the purpose being to show affirmatively that the plaintiff, appellee herein, was the true owner.

Taking the two propositions in their order, on an examination of the record we fail to find in the transcript of the pleadings that any issue was tendered on the question of ownership of the notes, and likewise an examination of the bill of exceptions fails to disclose that the case was tried on any theory not tendered by the pleadings. Therefore, the *prima facie* presumption that the payee in possession of a promissory note not indorsed is presumed to be the actual owner must prevail.

Did, then, the record in the case present an issue of fact on the question of accommodation indorsement which should have been submitted to a jury? On the trial of the case the appellee and the appellants testified. All three witnesses agree on one point of fact and that is that the appellee requested the appellants to sign the notes with C. E. Mills, which request was made out of the presence of C. E. Mills. There is nothing to be found in the record wherein it was stated that C. E. Mills ever

requested the appellants to sign with him. The appellee substantially stated that he asked them to sign because the notes were not considered bankable by the bank with the signature of C. E. Mills alone thereon, since the notes were given for the purchase price of horses which were to be removed to Canada, and that the appellants signed in order that C. E. Mills might obtain the horses. On the other hand, the appellants testified substantially that they signed the notes at the request of the appellee, who represented that he wanted their signatures thereon for the purpose of causing the notes to become acceptable at the bank and in order that appellee might be able to complete his sale of horses; and, further, that appellants would never be called upon to pay the notes.

The only evidence in the record given by the appellants which tends toward an admission that they were anything more than accommodation indorsers for the benefit of the appellee was given in response to three questions, which questions are set out here: "Q. In fact, it was your intention at that time to secure your brother so that he could buy these horses and take them to Canada; is not that right? A. Our understanding was that he just wanted the interest. * * * Q. But the fact is that you signed these notes to help your brother so he could take the horses—take the horses out of the country? A. Yes. * * * Q. Just state, as near as you can recollect, just what was said at that time. A. He wanted to fix the notes * * * and he thought the notes would look better if we would sign with him; it would show up better to satisfy the clerk; that he intended to hold the notes himself, and that he wanted the interest paid; * * * and he did not intend for us to pay them." It must be remembered that these questions and answers have reference to conversations between the appellee and the appellant or appellants and out of the presence of the purchaser of the horses, and, further, the evidence is all to the effect that the purchaser never at any time requested appellants to sign the notes in question. To hold that

this language amounted to an admission of something beyond accommodation to the appellee would give it a meaning beyond its context either taken alone or taken in conjunction with the rest of their testimony which is a clear cut denial of anything except accommodation indorsement for the benefit of the appellee herein.

The sale was had on the last day of January, 1927, and the notes signed the next day at the bank, and at that time they were delivered to the bank, all of which proceedings took place out of the presence of the appellee. Presumably at least these proceedings took place in the presence of some officer of the bank and presumably some conversation took place at that time but no enlightenment is furnished on that point.

The record therefore disclosed that in so far as the appellants are concerned they were accommodation indorsers of the notes in question. There is also disclosed by the evidence a substantial conflict on the question of whether or not they were indorsers for the accommodation of the appellee. This court is committed to the rule that an accommodation maker or surety of a promissory note is not liable to the party accommodated. It is committed to the further rule that where there is a substantial conflict in the evidence as to whether or not the indorsement is for accommodation, then the question is one for a jury.

We are therefore of the opinion that the district court erroneously sustained the motion of the plaintiff for a directed verdict and for judgment for the plaintiff; and that the judgment should be reversed and the cause is remanded.

REVERSED.

RAPER, District Judge, dissents.

CITY OF COZAD, APPELLEE, V. WILLIAM T. THOMPSON ET AL., APPELLANTS.

FILED FEBRUARY 13, 1934. No. 28773.

1. **Appeal.** When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong.
2. **Municipal Corporations:** DEPOSIT OF CITY FUNDS: LIABILITY OF TREASURER. A treasurer of a city of the second class, who is also a stockholder, director and officer of a bank, and who deposits moneys of the city in such bank, knowing it to be insolvent, and that the bank has given no bond for the security of such moneys, and who fails to inform the city of the condition of the bank, is guilty of actionable negligence rendering him liable for such moneys remaining in the bank when taken over by the banking department.
3. ———: ———: LIABILITY OF TREASURER'S SURETY. Likewise, under the facts stated, the treasurer's surety is liable under a bond conditioned that the treasurer will promptly pay over all moneys coming into his hands by virtue of his office and will faithfully discharge all other duties of his office.
4. **Estoppel.** A municipality is not estopped by the unauthorized acts of an officer of limited authority.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Cook & Cook, Montgomery, Hall & Young and *Harvey M. Johnsen,* for appellants.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

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

GOSS, C. J.

On a trial to the court judgment was rendered against William T. Thompson, former city treasurer, and American Surety Company of New York, surety on his official bond, for principal and interest found due upon the unpaid balance of city deposits made by the treasurer in Farmers State Bank of Cozad when that bank was in-

solvent, and while Thompson was admittedly a stockholder, director and officer of the bank. Defendants appealed.

Thompson was elected city treasurer for a term of two years commencing May 1, 1928. His official bond for $10,000 was executed by himself and by the surety company on April 9, 1928. It contracted to protect the city for "two years from May 1, 1928, and until his successor is duly elected and qualified" and contained the following: "Now, therefore, if the said W. T. Thompson, Jr., shall render a true and just account of his office and doings therein to the proper authority, when required thereby or by law, and shall promptly pay over to the person or officer entitled thereto all moneys which may come into his hands by virtue of said office, and shall faithfully account for all balances of money remaining in his hands at the termination of his term of office, and shall hereafter exercise all reasonable care and diligence in the preservation and lawful disposal of all books, papers and securities, or other property appertaining and belonging to his said office, and deliver them to his successor or to any person or party authorized by law to receive the same; and if he shall faithfully and impartially, without fear, favor, fraud or oppression, discharge all other duties now or hereafter required of him as such an officer by law, then this obligation to be null and void, otherwise to be and remain in full force and effect."

The petition was bottomed upon the theory that the treasurer knew the bank was insolvent and an unsafe depository for city money but, with gross negligence and without regard to the welfare of the city, deposited its money in the bank and allowed it to remain there for his own benefit and for the purpose of assisting the bank financially.

On May 20, 1929, the bank was taken over by the guaranty fund commission as insolvent. When Thompson took office the bank held deposits of city money amounting to $3,962.37. On May 20, 1929, these deposits amounted to $7,786.54. Pursuant to a reorganization plan agreed

to by more than 85 per cent. of depositors and unsecured creditors, under section 8-181, Comp. St. 1929, the bank was reorganized, with the approval of the banking department, and was reopened on July 3, 1929. The old capital stock was canceled, 500 new shares were issued and paid for at $120 a share, depositors and creditors scaled their credits 50 per cent. and were allowed the slow and doubtful assets, to be liquidated by a trustee. The plaintiff did not join in the reorganization agreement but was paid 50 per cent. of its deposits. This action was brought to recover from Thompson and his surety the balance due the city, which had been charged off when the bank reorganized. The payment by the bank and smaller payments by the trustee so reduced the balance due from Thompson to the city that it amounted to $3,036.78. The court allowed interest at 7 per cent. on this sum from May 1, 1930, and rendered judgment against defendants on September 26, 1932, for $3,585.78.

By stipulation of the parties, jury trial was waived and the cause was tried to the court. When a jury is waived and a law action is tried to the court, findings of fact by the court have the same effect as findings of a jury. They will not be set aside on review unless clearly wrong.

Without reciting the evidence, it is sufficient to support the conclusion that at least from May 1, 1929, to the end of his term a year later, the bank was insolvent, and Thompson, as one of its active officers, knew it. See *Westbrook v. State,* 120 Neb. 625. What he knew as a banker he knew as a treasurer. Yet, as treasurer, he continued to use the bank as a depository of city funds and failed to inform the city authorities of the unsafe condition of the bank. The city claims this was a violation of the condition of his bond and was actionable neglect of his official duty.

The bank had been designated as a depository of city funds but had not given any bond to secure the city deposits. Under the law then existing state banks were,

by statute, exempted from the requirement to give bond imposed upon other banks. Comp. St. 1929, sec. 17-515. This exemption was removed in 1931. Laws 1931, ch. 33, Comp. St. Supp. 1933, sec. 17-515. Appellants argue that the designation of the bank as a depository relieved the treasurer from liability for funds lost in this insolvent bank. They cite section 17-515, Comp. St. 1929, as supporting this proposition. The implication of that section results, ordinarily, in that rule in the case of a treasurer whose depository has been duly selected and who has faithfully exercised his duties to the city; but the matter at issue goes deeper than that, for the city charges a violation of his duty, expressed in the condition of his bond, that he will "faithfully and impartially, without fear, favor, fraud or oppression, discharge all other duties now or hereafter required of him as such an officer by law," in that, knowing the bank was unsafe, he did not inform his principal as to the insolvent condition of the bank but continued to deposit the city funds in the bank. On this point the defendants also cite section 77-2513, Comp. St. 1929. It says: "No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given bond." Here the bank had not given any bond to the city. Hence, the section does not apply.

A city treasurer was also assistant cashier of a bank in which he deposited city funds knowing the bank was insolvent. His surety bond was very similar to the bond involved here. The court held that "there was such bad faith or lack of diligence on the treasurer's part as to render him and surety on his official bond liable for loss on bank failing." *City of Wessington Springs v. Smith*, 54 S. Dak. 515. Closely following that case came another South Dakota decision, to the effect that, when a treasurer knowingly deposits his principal's money in a failing bank, he commits a "breach of duty, for which he was liable on common-law principles and under statute, and for which surety was liable by virtue of contract."

Independent School District v. Flittie, 54 S. Dak. 526. A commissioner of finance and revenue of a city who, knowing a bank in which city funds are on deposit was in a poor financial condition, allowed the funds to remain was guilty of "a neglect of duty for which his surety was liable under the bond given it (the city) guaranteeing to save the city harmless from loss caused by his neglect of duty." *City of Topeka v. Independence Indemnity Co.,* 130 Kan. 651.

"The great weight of authority is in favor of holding public officers handling public funds to a much stricter accountability than fiduciaries for the loss of private funds. The liability of a collector or receiver of public moneys is in a majority of jurisdictions that of an insurer. He is answerable in all events. The theory on which the doctrine is based is that a public officer having public moneys in charge is a debtor bound to account and pay over the exact sums received. His liability is not regulated by the law of bailment. The basis of this rule is public policy." 22 R. C. L. 226, sec. 5.

Appellants argue that section 8-181, Comp. St. 1929, requiring the depositors, not joining in a reorganization agreement signed by 85 per cent. of the unsecured creditors, to be bound thereby is unconstitutional and void under the due process and contract impairment clauses. We do not regard these questions as involved in this action. Thompson deposited the money in the bank and the account ran in his name as city treasurer. It was money collected by him as such officer which he and his surety agreed by the terms of their bond to turn over to the city. When the bank reorganized, the city refused to approve the reorganization plan and did not join the creditors therein. This action is based upon Thompson's direct liability to pay to the city all moneys coming into his hands, and upon the contract of his surety to stand behind him in that duty. So the constitutionality of the section questioned, not being involved, is not decided here.

Appellants assign error because the court refused to allow them to amend their respective answers so as to plead estoppel against the city arising out of the receipt of the two dividends from Peter Jensen, trustee, collected by him out of the part of the assets of the bank not taken over by the reorganized bank. It is argued that this was a ratification of the depositor's contract and estopped the city; and that the city has destroyed the defendants' right of subrogation against the bank and should not be permitted to recover. Considering these amendments as allowed, we do not think they would accomplish the result claimed. The city council never ratified the acts of Thompson and his successor in office in receiving the dividends from the trustee. The council has at all times refused to accept the money and to ratify or approve. In the petition the allegations and prayer were for the full half of the amount in the bank when it closed. The dividend was received by or on behalf of Thompson and not by the city, but he caused it to be turned over to the city. He could not bind the city to the reorganization plan. The court decreed that this money was a credit due Thompson and his surety and rendered judgment for the balance due, thus giving both the credit for the dividends.

No estoppel of a municipality can grow out of dealings with public officers of limited authority. A municipality is not estopped by the unauthorized acts of its officer or agent. 10 R. C. L. 707, sec. 35. Thompson, the treasurer, had the city money in the insolvent bank. The city refused to join in the reorganization of the bank, relying upon the treasurer and his surety to restore the money. Thompson could not bind the city to the plan, a part of which was to join in a trust to collect for depositors whatever was collectible on poor assets taken out of the bank at the time of its reorganization. The city had a right to take from Thompson or on his behalf whatever he secured by his own arrangement with the trustee and other depositors of the bank. The mere fact that the city

had been charged by the trial court with these payments does not work an estoppel against the city in view of its consistent attitude up to that point.

Lastly, the decree is criticized because it allowed interest from May 1, 1930, on the $3,036.78 balance Thompson did not have on hand and which so far has not been paid. That was the date on which his term expired and the date recited in his surety bond as the end of his term. While the bank had been taken over by the department on May 20, 1929, the trial court allowed interest only from the end of the term on the above sum withheld by the treasurer. In this we find no error.

The judgment of the district court is

AFFIRMED.

S. J. LARSON ET AL., APPELLEES, V. JULIUS BUMANN, APPELLANT.

FILED FEBRUARY 13, 1934. No. 28715.

1. **Appeal:** DIRECTION OF VERDICT. Where each party to an action at law requests a peremptory instruction in his favor after the evidence has all been adduced on both sides, a direction by the trial court to the jury in favor of plaintiff is equivalent on appeal to a verdict in his favor on every material issue of fact.
2. **Subrogation.** When the facts warrant, a surety who pays the debt of his principal may by subrogation acquire collateral security held by the creditor for payment of the debt and maintain an action on such security.

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

Hutton & Mueting, for appellant.

Fred S. Berry, W. A. Meserve and *P. H. Peterson, contra.*

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

ROSE, J.

This is an action on a 1,000-dollar promissory note dated April 24, 1925. The First National Bank of Wausa was payee and Julius Bumann was maker. S. J. Larson, Fred Frevert, Olof Olson, A. W. Stenberg, Emil Bumann, August Mord and Emil Engdahl are plaintiffs. Julius Bumann, maker, is defendant. Plaintiffs pleaded that, for a valuable consideration, payee, before maturity of the note, indorsed it without recourse and delivered it to the First National Bank of Omaha, an innocent purchaser and holder in due course of business without knowledge or notice of any defense to it, and that the indorsee named sold and delivered it to plaintiffs for $1,000.

In an answer to the petition defendant denied that plaintiffs were owners or holders of the note and alleged in detail the following facts: The note in suit was a renewal of an original note executed October 15, 1924, for five shares of stock in the First National Bank of Wausa. To protect their own interests, plaintiffs, who were interested in that bank, engaged in a joint enterprise to reorganize it, the reserve having become impaired. It was alleged further in the answer that plaintiffs falsely represented to defendant they were organizing a new bank by selling new stock; that defendant believed the false representations, relied on them and purchased five shares; that defendant did not receive new stock in a new bank, but gave his note for stock which was worthless. He pleaded further that the note in suit was pledged by the original payee as collateral security for money lent to plaintiffs by the First National Bank of Omaha.

A reply put in issue facts alleged as defenses.

Upon a trial of the issues the district court directed a verdict in favor of plaintiffs for $1,730 which the jury rendered. From a judgment therefor defendant appealed.

After the evidence had been adduced on both sides, each party requested a peremptory instruction in his favor. In this situation the direction to the jury to render a verdict for plaintiffs was equivalent to general findings by the

trial court in their favor on every material issue of fact. On appeal such findings have the same effect as if voluntarily made by the jury. The sufficiency of the evidence to sustain the judgment is the question presented on the issues of fact. *Knies v. Lang,* 116 Neb. 387, and cases cited in the opinion.

For convenience, the First National Bank of Wausa will be called the "Wausa Bank" and the First National Bank of Omaha the "Omaha Bank." The note in suit was executed and delivered by defendant and no part of the debt evidenced by it was ever paid by him. In October, 1924, the reserve of the Wausa Bank was impaired and a federal bank examiner insisted on an improvement of its condition. A plan to reorganize with new capital and officers was adopted. The old stock was surrendered and canceled and new stock was issued. There were 130 purchasers of the new stock, some of them paying for shares with cash, some with checks and others with notes. Five shares were issued to defendant who accepted them and gave in payment his personal note for $1,000 October 15, 1924, payable six months thence to the Wausa Bank, payee. The 1,000-dollar note in suit was executed and delivered by defendant to the Wausa Bank in renewal of his former note for the same amount. Pursuant to the plan adopted, the Wausa Bank was reorganized with new stockholders generally, with new capital furnished in the manner indicated and with new directors and new executive officers in control. The five shares of stock issued to defendant by the Wausa Bank were in the form of a single stock certificate, showing on its face what the stock was and what he procured for his original 1,000-dollar note. His shares represented a proportionate ownership of the reorganized Wausa Bank, which openly continued under federal authority to transact a commercial banking business with the location unchanged. Defendant treated his stock as his own and never surrendered his shares or tendered them back. While resisting judgment on his renewal note, he retained his stock throughout the trial without

any attempt or offer to rescind his contract of purchase. He did not prove his stock was worthless and the evidential facts and circumstances abundantly support the district court's finding that defendant was not induced by fraud to purchase stock or to give his note for it.

Did plaintiffs become the owners of the 1,000-dollar note given by defendant in renewal of the note with which he purchased his stock, including the right to maintain this action? The answer depends on the nature of the transactions through which plaintiffs acquired the note in suit. The propriety of keeping in the Wausa Bank the notes received by it for capital stock was questioned by a federal bank examiner and currency or its equivalent was needed in place of the stock notes. In this situation the Wausa Bank negotiated with the Omaha Bank for a loan of $13,700, which was subsequently made. As part of the transaction the Wausa Bank indorsed, transferred and delivered to the Omaha Bank $13,700 in stock notes. A note for $13,700 by directors of the Wausa Bank, plaintiffs, to the Omaha Bank was also exacted by the latter as a condition of making the loan. Plaintiffs, as individuals, executed their note for $13,700 October 29, 1924, in favor of the Omaha Bank and delivered it to the latter with a number of stock notes aggregating the same amount. Among the stock notes so transferred by the Wausa Bank to the Omaha Bank was defendant's 1,000-dollar note in suit. The amount of the loan was received directly by the Wausa Bank. No plaintiff received any part of it. By means of payments on stock notes in the hands of the Omaha Bank, it received on its loan to the Wausa Bank $6,700, thus reducing the debt to $7,000. April 29, 1925, plaintiffs renewed their 13,700-dollar note to the extent of $7,000 by giving a new one therefor and the Omaha Bank retained stock notes aggregating the amount of the renewal, among them the unpaid renewal note of defendant. Later plaintiffs paid from their individual funds the 7,000-dollar note owing by the Wausa Bank to the Omaha Bank and the latter delivered it to plaintiffs with the unpaid

stock notes remaining in its hands including defendant's note. The evidence of these facts is undisputed and the proper conclusions therefrom, in view of all the circumstances and the real transactions, are as follows: The 13,700-dollar loan was the primary obligation of the Wausa Bank to the Omaha Bank. In the transactions between the two banks plaintiffs were sureties for the Wausa Bank, the principal debtor. When plaintiffs, the sureties, paid to the Omaha Bank from their individual funds the remainder of the loan, or $7,000, they acquired the unpaid stock notes then remaining in the hands of the Omaha Bank, including the right to recover the amount due on the 1,000-dollar stock note of defendant, to which there was no valid defense. When the facts warrant, a surety who pays the debt of his principal may by subrogation acquire collateral security held by the creditor for payment of the debt and maintain an action on such security.

These conclusions will not subject defendant to a double liability on his note. The Wausa Bank, maker, indorsed it to the Omaha Bank without recourse and delivered it to the indorsee in good faith. The $13,700 received by the Wausa Bank by means of the loan for that amount included the proceeds of the sale of defendant's note to the Omaha Bank. The debt evidenced by it is now owing to plaintiffs alone. The evidence sustains the judgment.

AFFIRMED.

HERMAN ACKMANN ET AL., APELLANTS, V. HATTIE ACKMANN: E. G. DRAKE, APPELLEE.

FILED FEBRUARY 13, 1934. No. 28804.

1. Wills. The right of a childless devisee to mortgage land willed to him in fee by his father *held* not defeated by a later provision in the same will that, upon the death of any one of testator's children without leaving a child and without conveying such land, it shall be divided equally among testator's surviving children.

2. ———. The right of a devisee to "convey" land willed to him in fee may include the right to mortgage it.

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

E. A. Wunder, for appellants.

Rinaker & Delehant and *M. S. Hevelone, contra.*

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

ROSE, J.

This is an action in which there is a prayer by plaintiffs for the construction of a will and for the cancelation of a mortgage as a cloud on a tract of land. The district court sustained a demurrer to the petition. Plaintiffs refused to plead further and the action was dismissed. From the judgment of dismissal plaintiffs appealed.

The will in controversy was executed by Ferdinand Ackmann who died October 25, 1917, leaving surviving him his widow and 12 children. The will was probated December 6, 1917. Testator had acquired title to the land described in the petition March 2, 1907. Ten of testator's children are plaintiffs. Of the other two, Emil Ackmann, son, has no interest in the mortgaged land and William F. Ackmann, son and devisee, died childless November 5, 1931. The principal defendant is E. G. Drake, to whom the land involved was mortgaged by William F. Ackmann for $3,000 February 27, 1930.

The second paragraph of the will bequeaths to Caroline Ackmann, wife of testator, his personal property and devises to her a life estate in his real property. In each of several other paragraphs of the will, land is devised by testator to a child, subject to the life estate of testator's wife, who died June 21, 1929. Some devises of remainders were limited by the clause, "without any power or right" in the devisee "to sell, mortgage or otherwise encumber said land." The facts summarized are stated at length in the petition which contains a copy of the will. The fourth

and fifteenth paragraphs of the will are as follows:

"Fourth. To my son William F. Ackmann I give and devise the east half of the northeast quarter of the northwest quarter and the south half of the said northwest quarter of section eight in township three, range three, in Jefferson county, to have and to hold the same to the said William F. Ackmann and his heirs and assigns forever but subject to the rights of my said wife in paragraph two hereto."

"Fifteenth. In the event that any of my said children shall die without leaving any child surviving and without having conveyed the real estate herein then it is my will that said real estate belonging to said deceased shall be divided equally among my other children then living, and surviving child or children of any deceased child."

The land described in the fourth paragraph of the will is the tract in controversy. The fee was thereby granted to devisee "to have and to hold the same to the said William F. Ackmann and his heirs and assigns forever," subject only to the life estate of his mother, which was extinguished by her death June 21, 1929. The mortgage was executed at a later date and William F. Ackmann died childless November 5, 1931. Plaintiffs claim his land unencumbered by the mortgage. They take the position that the devises to the children and the fifteenth paragraph should be construed together, that the will so construed vested in each surviving child a defeasible or determinable fee and that the contingencies and conditions were defeated by the fifteenth paragraph. This position seems to be untenable and the cases cited in support of it inapplicable, except as to construing the will in its entirety.

The fourth devise wills the land to devisee subject only to the life estate, since extinguished. This devise includes the power to sell and convey. Under the fifteenth paragraph, it is only in the event of the death of a childless devisee that his land shall be divided equally among the other children of testator. The later paragraph recognizes the devise of the fee in the fourth. Real estate belonging

to decedent is what is to be divided among other heirs, in the event of the death of devisee without leaving a child. Death of devisee "without having conveyed the real estate" is a condition of division among the other children. Construing the two provisions together in connection with the entire will, it is clear that the later provision does not cut down the former grant to convey. Ownership and title creating the right to convey land include the lawful right to mortgage it. While a "mortgage," in a technical sense, is not a deed conveying land, it is a "conveyance" in the common use of that word—the sense in which it was used in the will. In *Potter v. Vernon,* 129 Okla. 251, the court said:

"Under the general rule that all instruments affecting real estate are included under the word 'conveyance,' are included the following: A mortgage of an equitable interest (*Sullivan v. Corn Exchange Bank,* 154 App. Div. 292, 139 N. Y. S. 97); a leasehold (*Lembeck, etc., Eagle Brewing Co. v. Kelly,* 63 N. J. Eq. 401, 406, 51 Atl. 794); of personal property (*Patterson v. Jones,* 89 Ala. 388, 390, 8 So. 77); an agreement to execute a mortgage (*In re Wright's Mortg. Trust,* L. R. 16 Eq. 41, 46); an assignment for the benefit of creditors (*Prouty v. Clark,* 73 Iowa, 55, 56, 34 N. W. 614); an assignment of a chose in action (*Wilson v. Beadle,* 2 Head (Tenn.) 510); the satisfaction of a mortgage (*Foss v. Dullam,* 111 Minn. 220, 126 N. W. 820); an instrument in the nature of a trust deed, even without a seal, acknowledgment or witness (*White v. Fitzgerald,* 19 Wis. 480); a release, as an instrument by which the title to real estate might be affected in law or equity (*Palmer v. Bates,* 22 Minn. 532); a release of a mortgage (*Baker v. Thomas,* 61 Hun, 17, 15 N. Y. S. 359); or part of land covered by a mortgage (*Merchant v. Woods,* 27 Minn. 396, 7 N. W. 826)."

In executing the mortgage in controversy, William F. Ackmann was within his legal rights under the will. The mortgage created a valid lien. The petition does not state

facts sufficient to show that plaintiffs have title to the land free from the lien of the mortgage. The demurrer was properly sustained and the dismissal is

AFFIRMED.

ELSIE DE COU TROUP, EXECUTRIX, AND LESLIE E. TROUP, ADMINISTRATOR OF THE ESTATE OF ALEXANDER C. TROUP, APPELLANTS, V. NELL PORTER, APPELLEE.

FILED FEBRUARY 13, 1934. No. 28738.

Negligence. Where contributory negligence of plaintiffs' decedent was more than slight when compared with the negligence of defendant, there can be no recovery.

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

Baker, Lower & Sheehan and *Edward Shafton,* for appellants.

Kennedy, Holland & De Lacy, contra.

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

DAY, J.

This is an action for damages for wrongful death brought by the executrix and administrator of the estate of Alexander C. Troup. At the close of plaintiffs' evidence, the trial court sustained the motion of defendant to discharge the jury and enter judgment for defendant.

This unfortunate accident in which decedent met his death occurred October 23, 1929, near the intersection of Thirty-eighth and Farnam streets in the city of Omaha. It was conceded that his death was the result of the accident; that he was a judge of the district court with a salary of $5,000 per annum; that he was 75 years old, able-bodied, and in good health. The sole issue presented by the appeal is the sufficiency of the evidence as to negli-

gence of decedent and defendant to require a submission of this issue to the jury.

Mrs. Porter was driving west on Farnam street and had passed the intersection of Thirty-eighth street somewhere between 40 and 60 feet. This was a congested corner at the time of day (8:20 a. m.) this accident occurred. The decedent had come from the entrance of the Colonial Hotel, 66 feet west of the west curb of the intersection, supposedly crossing the street at that point to board an east-bound street car which was stopped on the opposite side of the street with the rear end about even with the hotel entrance. The defendant's car was proceeding close to the cars parked on the north side of Farnam street and north of the west-bound street car track. The distance from the north rail of the west-bound street car track to the curb at the place of the accident is 14.6 feet. It was the custom of many people, both from the hotel and those living west, to board the east-bound car by crossing the street west of this intersection. This custom was known to defendant. Many cars were parked on the north side of Farnam street. The plaintiffs offered in evidence admissions of defendant made in a deposition taken some time before the trial. There was no eyewitness to the accident. Even the defendant stated in her answers to questions in the deposition which was offered by plaintiffs that she did not see the decedent until he stepped about two feet in front of her car.

It was into this situation that the defendant drove her car with full knowledge of the congestion at the intersection and the custom of the people intending to board the street car to cross the street in front of the hotel some distance west of the intersection. The evidence as to speed is that of the motorman of the standing street car, that when defendant passed the front of the street car at least 40 feet east of the accident, her car was moving 25 miles an hour. In addition to this, there is testimony that the decedent when hit was hurled into the air and rolled from 18 to 40 feet. From this testimony speed might be de-

termined. Section 39-1102, Comp. St. 1929, which was the statute in force at the time of the accident, provided that "within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." Violation of this statute, if any, would be evidence of negligence. While the judges of this court are not in entire accord upon the question, the majority is of the opinion that this evidence is sufficient to require the submission to the jury on the question of defendant's negligence unless the negligence of decedent was more than slight in comparison thereto.

It is therefore necessary to consider the negligence of the decedent for the purpose of determining whether or not it was as a matter of law more than slight when compared to the negligence of the defendant. If it was not more than slight when so compared, then the trial court should have submitted the question of comparative negligence to the jury. The evidence relating to the decedent's negligence is that introduced as the admissions of the defendant and is as follows: "He was running, as I say; he came between the parked cars, between the cars, and he was into my car,—he was into my car before I realized it, and I put my brakes on, released the clutch and put the brakes on immediately." No other witness saw the impact or saw the decedent from the time that he came out of the door until he was lying on the pavement after the accident. One witness (Palmer) testified that he had to go around a parked automobile after he heard the impact before he could see the decedent, and at the time he saw him he had not yet stopped rolling. We are of the opinion that the contributory negligence of decedent was more than slight. The decedent could not be presumed to have exercised due care for his safety, because there is direct evidence of negligence. In such a case there was no duty of making the comparison under the comparative negligence

law imposed upon the jury. *Francis v. Lincoln Traction Co.*, 106 Neb. 243; *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333, 22 A. L. R. 607; *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692; *Johnson v. City of Omaha*, 108 Neb. 481; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221. It seems the evidence fairly establishes as a matter of law that 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.

AFFIRMED.

OLD LINE INSURANCE COMPANY, APPELLEE, V. ELDON STARK ET AL., APPELLEES: ELMWOOD STATE BANK, APPELLANT.

FILED FEBRUARY 13, 1934. No. 28760.

1. **Vendor and Purchaser:** RECITALS IN CONVEYANCE. The pertinent recitals in a duly recorded deed or mortgage concerning the status and capacity of the parties, and the estate conveyed or intended to be conveyed, are binding upon the grantors and notice to those subsequently dealing with the title.
2. **Mortgages:** ESTOPPEL. A mortgagee whose mortgage contains an express recital that it is subject to an existing prior mortgage is thereby, in the absence of special equities, estopped to question the validity of such prior mortgage.

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

Carl D. Ganz and *W. A. Robertson*, for appellant.

Dwyer & Dwyer, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This case is presented here by the Elmwood State Bank, defendant and sole appellant. It is an action to foreclose certain mortgages, in the trial of which it developed that the title of the original mortgagor was derived from the will of Joseph Mullin which was probated in January, 1916, and contained the following provisions:

"I give and bequeath to my daughtar, Minnie B. Stark, a life lease on the following described real estate: The west half of the southwest quarter of section eight (8), range ten (10), town ten (10), in Cass county, Nebraska, together with the west thirty acres of the northwest quarter of the northwest quarter of section seventeen (17), range ten (10), town ten (10), in Cass county, Nebraska. All of this subject only to the one-half the expense of furnishing a home and maintenance for my stepmother aforesaid. The residue of the interest in the last described real estate to which my daughter Minnie B. Stark shall have a life lease I give and bequeath in fee simple to the lawful heirs of my daughter Minnie B. Stark. My desire being that my daughter Minnie B. Stark shall have a life lease to the real estate described in clause seven of this will and that her lawful heirs shall have it in fee simple without any encumbrance or lien thereon upon the death of the said Minnie B. Stark."

The district court entered a decree of foreclosure in the plaintiff's behalf and awarded to the appellant a subsequent lien upon certain interests in the real estate involved.

The appellant states in its brief that there is only one issue involved in the case, to wit, whether the mortgages asked to be foreclosed are valid liens upon the land involved, and that this issue depends upon (1) whether or not the will of Joseph Mullin by which the mortgagor, Minnie Belle Stark, derived title effectively restricted the land from being encumbered, and (2) whether or not the restriction in the will was cured by the deed given to her by her children prior to the execution of the mortgages.

For a correct understanding of the situation, the following additional facts appearing in the record should be noted. Any interest of the stepmother named in the will was eliminated by a release as to this land executed by her and she died before the institution of this suit.

Minnie Belle Stark and her husband, John Gerry Stark, after the probate and allowance of the will, entered into the possession of the premises and continued to occupy the same as their homestead until their deaths, respectively, in 1925 and 1931. They had four children, all of whom were adults at all times referred to in these transactions.

In September, 1923, these children executed a deed for the premises to their mother Minnie Belle Stark containing these recitals:

"That the said parties of the first part * * * have remised, released, and quitclaimed, and by these presents do, for themselves, their heirs, executors and administrators, remise, release, and forever quitclaim and convey unto said party of the second part, and to her heirs and assigns forever, all their right, title, interest, estate, claim and demand, both at law and in equity, of, in and to all (description).

"The grantors herein being all of the children, and the heirs of the said Minnie Belle Stark, it is their intention to hereby vest title in said Minnie Belle Stark, in fee simple, in and to the premises described above. Together with all and singular the hereditaments thereunto belonging.

"To have and to hold the above described premises unto the said Minnie Belle Stark, heirs and assigns; so that neither the said grantors, or any person in their name and behalf, shall or will hereafter claim or demand any right or title to the said premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred."

In February, 1924, Minnie Belle Stark and her husband negotiated with John H. Fowler a loan on said premises of $9,000, which was evidenced by notes of $8,500 and

$500 and a commission mortgage of $423.70, secured by separate mortgages all executed at the same time. The deed and mortgages were all properly recorded, and in the execution thereof W. N. McLenon, cashier of appellant bank, acted as witness to the instruments and as notary certifying the acknowledgments thereof. The appellant bank thus had both actual and constructive notice of the transactions.

In September, 1925, Minnie Belle Stark died intestate, leaving her husband and four children surviving. No administration was had of her estate and the occupancy continued, otherwise, as before.

In December, 1928, the husband, John Gerry Stark, and his son, Cecil, executed appellant's mortgage securing three notes in the amounts of $500, $500, and $3,050, respectively. The mortgages described the premises with the added clause, "as the respective interests of the said grantors in and to the foregoing described real estate appear" and "subject, however, to one prior mortgage."

The status of the parties and property continued unchanged, the interest on all the mortgage debts and $500 principal of appellant's debt being paid, until after the death intestate of John Gerry Stark which occurred April 18, 1931. No administration of his estate was had, and thereafter all payments were defaulted and this suit was commenced in July, 1932. The original $8,500 mortgage to Fowler is held by plaintiff herein.

Appellant contends that the will and the deed should be so construed as to hold that Minnie Belle Stark took only a life estate under the will, which estate became extinguished by her death; that she took nothing and the grantors lost nothing by the deed to her of September 1, 1923; that the restrictive terms of the will prevented any valid conveyance by the children until after her death; and that, therefore, when she died there was no estate left upon which the plaintiff's mortgage could operate, hence the lien of the appellant stepped into first place

covering the one-third interest which the husband, and the one-sixth interest which the son, owned.

A considerable part of the briefs and argument in this court is devoted to a discussion of the limitations of the will and the rules of law pertaining to vested and contingent remainders, but we will first give attention to another phase of the case.

Appellant, upon the matter of estoppel, argues that plaintiff was charged by the record with notice of the terms of the will and consequent incompleteness of the title of its mortgagor, and that, if the title turns out to be bad, it must suffer the consequences. This may be admitted, but the question of estoppel enters the case from the opposite direction.

In this case the original mortgagee, the owner of the life estate and the defendants through whom appellant claims and has derived whatever interest it has in the subject-matter recognized an incomplete title and set about to perfect it. In so doing the deed was executed. The parties knew that they at the time were the only existing persons holding vested, contingent, or potential interest in the land. With the express purpose of so disposing of their interest as to vest in their mother the fee title, they executed the deed reciting that purpose. Thereupon, the loan was made and the plaintiff's mortgage executed, and the mortgages and the deed have stood of record and unchallenged by the grantors or any one claiming through them, throughout the remaining life and death of their mother, also that of their father, and at and after the execution of appellant's mortgage, during a total period of more than seven years before even a default was made in the payment of interest, and of eight years before the question was raised. Moreover, the appellant, having both actual and constructive notice of the will, the deed, and the prior mortgages, itself accepts its mortgage asserted in this suit which does not purport to convey a definitely described interest in the premises, but recites that it conveys only such "as the respective interests of the said

grantors in and to the foregoing described real estate appear," and that even such mortgage was "subject, however, to one prior mortgage."

We agree with the statement that there is no principle of law more elementary or better founded in reason than that all persons claiming an interest in or a lien upon real estate are bound to take notice of the recitations in a duly recorded instrument in the chain of title of their grantor. We think it is applicable to the situation of the appellant in this case.

As the title stood upon the probate of the will and before the deed, the interest which would eventually become perfected in the grantors of the deed would not be, in respect to this deed, properly an after acquired interest. It had, whether vested or contingent, a present existence with potential enjoyment, destined to completion upon the death of the mother. It was more than a prospect of inheritance. It was the actual substance, with well-defined attributes. The deed was in the chain and made by, with others, the very persons through whom appellant immediately claims. It purported to establish the grantee therein as fee simple owner. Under its recitals neither the grantors therein, nor the appellant who claims through one of them and the husband of the deceased grantee, should be allowed to repudiate the fair import of the conveyance and set up a claim in hostility thereto. *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161; *Carter v. Leonard*, 65 Neb. 670; *Hagensick v. Castor*, 53 Neb. 495; *King v. Boettcher*, 96 Neb. 319; *Van Rensselaer v. Kearney*, 52 U. S. 297.

In the case of *O'Connor v. Power*, 124 Neb. 594, it is expressly held: "While the mortgagee may ordinarily assert the invalidity of a prior mortgage, when that mortgage is a valid subsisting lien between the parties, and there are no intervening equities, he is estopped to question its priority when his mortgage contains an express recital that it is given subject to the prior mortgage."

So far as concerns the appellant, the case presents an

instance of estoppel fully established and effectually preventing the appellant from asserting the invalidity of plaintiff's mortgage.

The conclusion reached on the proposition discussed renders unnecessary the consideration of the proposition pertaining to the limitation by the will of the right of conveyance, or the kind of remainder created thereby.

The judgment of the district court is

AFFIRMED.

HOLT COUNTY, APPELLEE, V. JOHN MULLEN, APPELLANT.

FILED FEBRUARY 13, 1934. No. 29041.

1. **Pleading.** Although the statutes and rules of court are liberal in reference to amendment of pleadings, the trial court must necessarily have a reasonable discretion in allowance of amendments. No abuse of such discretion appears in the instant case.
2. **Master and Servant.** Evidence examined and finding that neither emancipation of the minor son nor a direct contract of hire between him and his father had been established is approved.

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

George M. Harrington, for appellant.

Deutsch & Stevens, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

In this, a case under the workmen's compensation act, the original claimant, John Mullen, a minor, who sues by his father as next friend and is defendant herein, made application to recover compensation from the county of Holt. It appears that there was a stretch of highway near the farm home of the father, Michael Mullen, in need of repair and the proper authorities of Holt county con-

tracted with Michael Mullen to furnish two men with teams and wagons to haul gravel and distribute it on the highway for the purpose of effecting such repair work. Michael Mullen owned the teams and wagons and started the work by putting his hired man on the job with one team and wagon and his son John Mullen, a minor under the age of 16, on the other wagon. In the course of the work, the team which the boy, John Mullen, drove became frightened and ran away throwing him out, and from which he suffered a skull fracture, which injury forms the basis of this suit. Michael Mullen, the father, did not carry compensation insurance and the county with whom he contracted did not require him to carry such insurance; whereby it is claimed, and not controverted herein, that because of such failure on the part of the county to require Michael Mullen to carry insurance the county became liable with him in the event a proper compensation claim should arise. Comp. St. 1929, sec. 48-116.

The questions presented as the basis of this appeal arise upon the propositions whether there was a contract of hire between the father and his minor son, and whether the son had been emancipated so that such contract could be made and established in this case. It appears to be the position of both sides to the suit that, in order for the claimant to maintain his suit against the county, he must have established both his emancipation and a direct contract of hire between himself and his father, to which purpose, and the defeat thereof, the efforts of the parties at the trial were principally applied.

Upon the threshold of the case, however, there arises this proposition. The appellant makes complaint that he was wrongly denied the privilege in the district court of amending his answer so as to allege a direct contract of hire between himself and his father instead of an implied contract which he had pleaded. The record shows that in his pleadings before the compensation commissioner the claimant alleged an implied contract. He also in the district court, in his answer which he was given leave to file

at the beginning of the trial, alleged an implied contract. It appears that, at the conclusion of the trial after the evidence was all in, the claimant asked leave to so amend his answer as to change his allegation from that of an implied contract with the father to a direct contract, which request was denied by the trial court. Complaint is here made of that ruling. The application to amend appears at the close of the bill of exceptions, and the final ruling thereon by the district court is:

"I have been quite liberal in the matter of allowing amendments to pleadings, both as to substance and as to time; in fact, too liberal. This case was tried; the evidence was taken and submitted, except the matter of the bank account of the young man at Emmett. No such motion as this was presented before or during the trial and it will be disallowed."

The appellant bases his contention here upon abuse of discretion by the district court in refusing to permit the amendment. Upon the record we cannot so hold. It is true that our statutes, and rules of the court as well, are liberal in matters of amendment of pleadings, but the trial court has and must necessarily have a reasonable discretion in such matters. It appears that, not only having pleaded an implied contract before the commissioner and repleaded the same in his amended answer which was allowed immediately prior to the trial, the court had been reasonably liberal, and that the character of the proposed amendment was such as to materially change the basis of the defendant's suit and claim, so that we cannot say that there was an abuse of discretion by the trial court in refusing, after the trial was over, to allow such an amendment.

This then leaves the case in the situation that the allegations of the defendant's answer do not agree with his proofs and he does not plead the sort of contract which, it seems to be conceded by both parties, is necessary to support his claim.

Assuming, however, that the proposed amendment may

have been allowable, we then proceed to an examination of the question whether the minor son, claimant, had been emancipated so that he could contract with his father in the present instance, and whether there was a direct contract of hire between the father and the son under which the son was working at this time so as to bring him within the provisions of the compensation law. Upon this question we have reviewed the evidence as contained in the bill of exceptions in detail. To set the same out herein would unnecessarily extend the length of this opinion. It must suffice to say that our conclusion is that the district court was right in its finding upon both of said propositions, and that the evidence herein is not sufficient to support a finding either that the claimant had been emancipated or that there was a direct contract of hire between him and his father. In reference to a similar matter, there is language in the opinion in the case of *Aetna Life Ins. Co. v. Industrial Accident Commission*, 175 Cal. 91, quite applicable to the present situation, from which we quote:

"Nor, finally, does the fact that the father from time to time gave the son small sums of money, even though both father and son should testify that these sums were on account of payment of wages, at all militate against the incontrovertible fact that the son had not been emancipated. A son nineteen years of age was surely entitled to some spending money, and as his earnings belonged wholly to his father, it would be strange indeed if his father did not give him such sums for his own purposes. Many fathers are called upon to do the same thing, and many, to encourage their sons to form habits of industry and frugality, and 'to learn the value of money,' make these donations dependent to a greater or less extent upon the conduct and services of the child. But such payments in no sense work an emancipation of the child himself."

It follows that the judgment of the district court should be and is

AFFIRMED.

LOLLA PERRY, ADMINISTRATRIX, APPELLANT AND CROSS-APPELLEE, V. IRA E. NEEL ET AL., APPELLEES AND CROSS-APPELLEES: L. H. CHENEY, ADMINISTRATOR, CROSS-APPELLANT.

FILED FEBRUARY 13, 1934. No. 28628.

1. **Witnesses: COMPETENCY.** Failure to make proper objection to the testimony of a witness known to be disqualified under section 20-1202, Comp. St. 1929, waives the right to exclude his testimony.
2. **Liens.** An equitable lien will not arise in favor of one who loans or advances money to another to pay the purchase price of real estate, in the absence of any agreement to give a lien.
3. **Fraudulent Conveyances.** In an action to set aside transfers of property, made during the marriage relation, by a husband to a son, which transfers are alleged to have been made for the purpose of fraudulently depriving the wife of her marital rights under the law of descent, the burden is upon the plaintiff to establish by a preponderance of the evidence that the husband was actuated by bad motives and fraudulent intent to deprive the wife of her marital rights, and that the entire transaction was a mere device by which he sought to defraud her.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Butler & James and *Perry, Van Pelt & Marti,* for appellant.

L. H. Cheney, for cross-appellant.

Cordeal, Colfer & Russell, contrd.

Heard before GOOD AND EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

RAPER, District Judge.

This action was brought by plaintiff, Lolla Perry, as administratrix of the estate of Eliza Neel, to subject to the payment of a judgment for alimony rendered in favor of Eliza Neel against John R. Neel two tracts of land, one

of them being near the village of Bartley, a farm of 90 acres, which will be designated as the Bartley property; the other a farm of 232 acres near the town of Red Willow, and will be designated as the Red Willow property, both tracts being in Red Willow county.

In the first cause of action in her petition, plaintiff alleges that she is the duly qualified and acting administratrix with the will annexed of the estate of Eliza Neel; that, since this action was begun, John R. Neel died and said action was revived in the name of L. H. Cheney as his administrator; that on April 13, 1929, in the district court for Lancaster county, Nebraska, Eliza Neel recovered a judgment against John R. Neel in the sum of $4,000 as permanent alimony; that said judgment was revived in the name of plaintiff on the 20th day of June, 1930; that a transcript of said judgment was duly filed in the office of the clerk of the district court for Red Willow county on the 26th day of June, 1930; that execution was issued on said judgment which execution was returned unsatisfied on November 16, 1930, by the sheriff; and that said judgment is in full force and unpaid.

Plaintiff further alleges that, prior to October 20, 1924, the defendant John R. Neel was the sole owner (except the homestead right of Eliza Neel) of a property known as the "hospital property" in the village of Holbrook, Nebraska, and, on October 20, 1924, John R. Neel exchanged the "hospital property" for the 90-acre tract of land known as the Bartley property, and that, without the knowledge of Eliza Neel and without any consideration, John R. Neel caused said property to be conveyed to Ira E. Neel, and that said conveyance was made with the intent to hinder, delay, and defraud Eliza Neel in obtaining her marital rights; that, in fact, Ira E. Neel is not the owner of said land but only holds title thereto as trustee for John R. Neel.

The second cause of action alleges that, on January 1, 1921, John R. Neel was the owner of 232 acres of land designated as the Red Willow land; that this land was

conveyed to Ira E. Neel by John R. Neel and Eliza Neel, without consideration except two notes for $13,000 and $6,000, respectively, secured by real estate mortgages, and that these notes were dated February 21, 1921, one of which mortgages covered the Red Willow land and the other mortgage covering other land; that Eliza Neel, when she joined in said conveyance, was unaware of the fact that said conveyance was for the purpose of fraudulently converting said real estate into personal property, and that she joined in the conveyance only on the representation of Ira E. Neel that the notes and mortgages would remain in full force until they were paid; that thereafter, unknown to Eliza Neel, Ira E. Neel secured from John R. Neel releases of the said two mortgages; that said releases were without any consideration, and that, on or about December 29, 1921, defendants Ira E. Neel and W. Frank Neel, in order to deprive Eliza Neel of her distributive share under the law of descent, induced John R. Neel to cancel the mortgages of $19,000 under the agreement of Ira E. Neel and W. Frank Neel to pay interest only on the principal; that the consideration for the canceling of the indebtedness and releasing of the mortgages was inadequate and unconscionable and amounted to a fraud upon Eliza Neel and was done for the purpose of depriving Eliza Neel of her marital rights, and to evade the law of descent; that Eliza Neel was not a party to said transaction, had no knowledge thereof, did not assent thereto, but was led to believe that her marital rights had been protected. She prays that, as to the "Bartley property," Ira E. Neel be adjudged to hold it in trust for John R. Neel, and that the releases of the mortgages on the "Red Willow property" be canceled and set aside and Ira E. Neel adjudged to hold the property in trust for John R. Neel and required to account for all rents received while in possession of said properties, and that same be offset against any claim of Ira E. Neel against John R. Neel.

The answer to the first cause of action admits the judgment for alimony, the filing of the transcript and the issuance and return of execution thereon, and admits that, on October 20, 1924, John R. Neel held the record title to the Holbrook property, and that on said date he exchanged it for the Bartley property; and denies other allegations of the petition. Then, as to first cause of action, the answer alleges that, prior to September 16, 1910, one Penelope Neel owned certain property in Indianola, and that on that date she died intestate leaving as her only heirs John R. Neel, her husband, and Ira E. Neel and W. Frank Neel; that, on December 29, 1915, John R., Ira E., and W. Frank Neel joined in a conveyance of the Indianola property for the Holbrook property, title to which was taken in the name of John R. Neel, who was in fact owner only of an undivided one-third interest, Ira E. and W. Frank owning the remaining two-thirds; that, on October 20, 1924, John R. Neel, on behalf of himself and Ira E. and W. Frank Neel, exchanged the Holbrook property for the Bartley land, the consideration expressed in the exchange contract for the Holbrook property was $6,000, and for the Bartley land $9,000; and that Ira E. Neel furnished the money with which the difference, $3,000, was paid; that the deed for the Bartley property was duly filed for record in the office of the county clerk of Red Willow county on April 4, 1925, and became and ever since has been notice to Eliza Neel of the rights of Ira E. Neel therein; that, at the institution of this suit, more than 5 years had elapsed since the filing of said deed, and any right of action Eliza Neel had was barred by the statute of limitations.

The answer to the second cause of action alleges that, on January 1, 1921, John R. Neel was the owner of the Red Willow land; that the land did not yield sufficient income to properly maintain him and Eliza Neel; that, being indebted to Ira E. Neel in the sum of $1,000, he proposed that he and Eliza Neel should execute deed to Ira and the latter to execute mortgages aggregating $19,-

000, bearing interest at 6 per cent.; that, as a result of this suggestion, John R. Neel and Eliza Neel deeded the Red Willow property to Ira E. Neel for the expressed consideration of $20,000, and Ira E. Neel executed to John R. Neel the two mortgages for $13,000 and $6,000; that, on December 29, 1921, in consideration of the release of the two mortgages, John R. Neel and Ira E. and W. Frank Neel entered into a contract whereby W. Frank Neel and Ira E. Neel each agreed to pay to John R. Neel the sum of $50 a month as long as he lived; that, in consideration of the agreement made by W. Frank Neel, Ira E. Neel conveyed to W. Frank Neel certain real estate; that John R. Neel than executed releases of the two mortgages which were recorded in the office of the county clerk of Red Willow county, and these releases have ever since been notice to Eliza Neel, and that at the institution of this suit more than 10 years had elapsed, and that any right of action Eliza Neel had was barred by the statute of limitations. The answer does not ask for affirmative relief, but prays that plaintiff's action be dismissed.

Plaintiff for reply denies the allegations of the answer, except admissions, and alleges that, at the time of the marriage of John R. Neel and Eliza Neel, John R. Neel owned the Red Willow land of the then value of $20,000, and other real estate and personal property of the value of $6,000; that John R. Neel had a homestead interest in the Indianola property, and the value of the property did not exceed $2,000; that Ira E. and W. Frank Neel released and conveyed all their rights to said property, and any cause of action which Ira E. and W. Frank Neel had therein was barred by the statute of limitations prior to the sale of the Holbrook property; that Ira E. Neel is estopped from claiming that the value of the Holbrook property was less than $6,000; that the title to the Bartley land was placed in the name of Ira E. Neel was concealed from Eliza Neel; that, at the time the Bartley land was acquired, Ira E. Neel held title to the Red Willow

land but had paid no part of the consideration except $1,000, and alleges that any sum claimed to have been advanced to John R. Neel should be applied on indebtedness owing by Ira E. Neel to John R. Neel.

L. H. Cheney, the administrator of the estate of John R. Neel, filed an answer and reply in which he substantially incorporates the contentions of plaintiff, and prays the court to decree that the lands belonged to John R. Neel at his death.

The trial court found that, at the commencement of the action, John R. Neel was the owner of the "Bartley property," subject to an equitable lien in favor of Ira E. Neel in the nature of a mortgage for money advanced on purchase price, and interest thereon, and for the payment of a mortgage of $1,000 and interest, and for taxes paid $335.93, amounting in the aggregate to $5,036.56; that Ira E. Neel be charged with the rents from 1928 to 1931, at $225 a year, which with interest to date of decree was $630.74, leaving a balance due Ira E. Neel of $4,405.82. The court dismissed plaintiff's second cause of action.

At the outset, in considering the evidence, we are met with the competency of much of the testimony. The trial judge overruled all the objections and apparently admitted all that either side offered, with the statement that he would consider only what was competent, but he has not given any indication in his findings as to what, if any, he rejected.

The first one of these questions relates to the offered testimony given by John R. Neel at the trial of the divorce action. Objection was made that it was immaterial because it was taken in an action in which the defendants in this action were not parties. This objection is not sufficient to exclude that testimony. Transcript of the testimony of Eliza Neel given in the divorce action was received without objection. The testimony of Lolla Perry and Ada Burton is in depositions, and it is not certain whether the objections to parts of their evidence were made at the time of the trial or at the time the deposi-

tions were taken. If the objections as to their competency under section 20-1202, Comp. St. 1929, were first made at the trial, the objections were unavailing. If made at time depositions were taken, their testimony was inadmissible in part. There are very few statements in Lolla Perry's deposition as to conversation with John R. Neel that are material. The appellant claims that, inasmuch as Ada Burton is the sole beneficiary under her mother's will, Lolla Perry, as executrix, is not barred from testifying as to conversations with John R. Neel, but it will be unnecessary to determine that. As to Ada Burton's testimony, appellees in their brief claim that her testimony was improperly received. This would be true if proper objection had been made, but only in a few instances were such objections interposed.

Ira E. Neel's testimony was objected to under section 20-1202, Comp. St. 1929, but, as many of the matters covered in his testimony had been offered by plaintiff, much of his evidence was admissible. *Kroncke v. Madsen*, 56 Neb. 609; *Bangs v. Gray*, 60 Neb. 457; *Dickenson v. Columbus State Bank*, 71 Neb. 260.

L. H. Cheney, the administrator of the estate of John R. Neel, objected to the testimony of Ira E. Neel. John R. Neel was made a party defendant but died after the case was begun. It is not disclosed whether he was served with a summons before his death. Cheney, administrator, filed an answer to plaintiff's petition, alleging in substance the same cause of action as that of plaintiff. John R. Neel was not a necessary party, and it is doubtful if his administrator is. Cheney did not object to the testimony offered by plaintiff as to the transactions between John R. Neel and his son Ira, and he is not in position to object to Ira testifying to those transactions that were offered by plaintiff.

The testimony discloses that Eliza Neel and John R. Neel were married July 21, 1915. Both had been previously married, and both had adult children by their previous marriage. They separated in 1927, and on April 13,

1929, in the district court for Lancaster county, Eliza Neel was granted a divorce and awarded a judgment for $4,000 permanent alimony. Eliza Neel died testate in December, 1929, and on January 31, 1930, Lolla Perry was appointed and qualified as administratrix with the will annexed, and on June 26, 1930, transcript of said judgment was duly filed in the office of the clerk of the district court for Red Willow county, upon which an execution was issued and duly returned unsatisfied. At the time of the marriage, John R. Neel owned a one-third interest in a property in Indianola, and a homestead right, the other two-thirds being owned by Ira E. Neel and W. Frank Neel, who were the only children of John R. This property was worth about $1,800. John R. Neel also owned in his own right three other lots in Indianola, and a farm of 232 acres near the town of Red Willow, which is referred to as the Red Willow property. All these properties were unencumbered. He also owned 16 shares of bank stock. On the 28th of December, 1915, John R. Neel traded all the Indianola lots to Jacob Thompson for two lots in Holbrook, known as the "hospital property." Eliza Neel, Ira E. Neel and his wife, and W. Frank Neel and his wife joined with John R. Neel in the conveyance to Thompson. The deed to the Holbrook property was made to John R. Neel. John R. Neel and his wife Eliza then moved to and lived in the Holbrook property until the year 1924, when John R. Neel and his wife Eliza deeded the Holbrook property to one James Carroll in exchange for a 90-acre farm near Bartley, which is designated as the Bartley property. By direction of John R. Neel, the deed from Carroll to the Bartley land was made to Ira E. Neel. There is doubt as to the admissibility of some of the evidence of Ira E. Neel as to how the consideration in part was paid for this exchange. The value of the Holbrook property in the exchange agreement was fixed at $6,000, and the value of the Bartley land at $9,000. Appellant in her brief, however, concedes that Ira paid $3,000 to his father to pay the difference. She

claims, and the record shows, that Ira did not know the Bartley land was deeded to him until after the whole deal was closed. Ira now claims, and the trial court found, that Ira has an equitable lien on the land for the $3,000 and interest, less the rentals received. Ira, in his answer, does not claim a lien nor does he assert title, but insists that by implication he is entitled to the lien. In the testimony of John R. Neel, at the divorce hearing (and which was offered by plaintiff herein), he testified that he owned no property. Nowhere in the record is there any evidence that there was any agreement or understanding that Ira was to have a lien on the land for the money he advanced to his father to pay the $3,000 difference in the value of the two properties. Without some such agreement no such lien can attach. The mere fact that one loans money to another, wherewith to buy land, gives the lender no equity in the land bought therewith by the borrower. *Fike v. Ott*, 76 Neb. 439; *Boring v. Dodd*, 116 Neb. 366. In this latter case, this rule is given:

"Where there is no contract out of which a lien can grow, nor any duty of one party to give to another a charge or lien on real estate, no basis for such lien exists."

It is no more consistent with the facts in this case that by placing the title in Ira's name the father intended to give only the legal title, and this is further evidenced by Ira's claim that he paid the rentals to his father for several years. The fact that the deed was made to Ira was concealed from the wife, and, in view of the occurrences which will be later referred to about the 232-acre farm, and John R. Neel's denial at the divorce trial that he owned any property, we hold that the placing of the deed in Ira's name does not give him an equitable lien for money advanced or loaned to his father.

Ira claims that he was a part owner of the two homestead lots in Indianola, which were part of the lots traded for the Holbrook property. He joined in the deed, and from that time there seems to have been no attention paid to any share of the two homestead lots, and the value

of his one-third interest, subject to his father's life estate, would be very small, and it is properly inferable that, when the father took title to the Holbrook property, Ira relinquished whatever right he might have had in the Indianola homestead, and there is no evidence from which his share therein can be valued, so that claim cannot be asserted as giving rise to a lien on or title to the Bartley 90 acres. Furthermore, the fact that Frank does not claim any interest indicates that both Frank and Ira relinquished their small interest.

However, plaintiff in her brief, while insisting that there is no competent evidence that Ira loaned or advanced to his father $3,000 to pay the difference in the exchange, concedes that Ira helped his father in that transaction to the extent of $3,000, and is willing to have decree entered that John R. Neel owns two-thirds and Ira E. Neel one-third of the Bartley land, that being the proportionate share of the consideration paid by them. This is equitable and, under the evidence, it is all that Ira can justly claim. It is well known that land values have greatly depreciated since 1925, and to give Ira a lien with interest would in all probability result in plaintiff receiving nothing under the trial court's decree.

Ira testified that he paid his father the rent for the years 1925, 1926, and 1927, which plaintiff insists was incompetent evidence and is in fact inadmissible.

Several witnesses testified as to the rental value of the Bartley land for the years 1925 to 1931, inclusive. The lowest estimate by any witness other than Ira was $270 per annum and their estimates ranged from that to $360 per annum. According to Ira's testimony he received rentals in the aggregate sum of $794.19, an average of less than $200 for the years 1927 to 1931. The trial court fixed the annual rental at $225 per annum, but by a fair preponderance of the evidence it should be fixed at $300 per annum. These amounts for the years 1925 to 1931, inclusive, should draw interest at 7 per cent. from the 1st day of March following each succeeding

rental year. The appellant concedes that Ira should receive credit for the taxes paid, in the aggregate sum of $335.98, and interest at 7 per cent. from the date of each year's payment, which we therefore conclude should be allowed; but, as Ira holds title to one-third of the land, he of course will be entitled to one-third of the rents and liable for one-third of the taxes, so when the computations are made, as above directed, two-thirds only should be charged against Ira's share in the land.

The testimony concerning the 232-acre farm called the Red Willow property is that, on February 21, 1921, John R. Neel and wife Eliza conveyed this land to his son Ira for an expressed consideration of $20,000, and Ira gave his father two mortgages for purchase price, one of the mortgages was for $13,000 on the Red Willow land, and $6,000 mortgage on some other land owned by Ira. These mortgages bore interest at the rate of 6 per cent. per annum and matured in 10 years. John R. Neel executed releases of these mortgages December 29, 1921, and the releases were then duly recorded in the office of the county clerk. It is difficult to determine in some of Ira's evidence whether he was competent to testify as to particular parts. However, upon the circumstances attending the releasing of these mortgages, the plaintiff offered statements of John R. Neel that he received after the date of the releases the same amount from his sons as the interest on the mortgages, by which the inference is to be drawn that there was no consideration for the releases, it seems that Ira might testify as to the facts concerning such consideration. There was received in evidence a written contract signed by John R. Neel and his two sons, Ira and Frank, dated December 29, 1921, in which it is agreed that, in consideration of the releases of the two mortgages, Ira and Frank bound themselves to pay to their father the sum of $100 a month so long as he lived. Ira testified that he and his brother each paid $50 a month to their father during his life as the contract provided. It further appears that Ira deeded to Frank some

land as a consideration for Frank joining in this contract. There is no evidence in the record to indicate that John R. Neel ever had possession of the 232-acre farm after it was conveyed to Ira, nor that he paid taxes thereon or claimed any right or title to it, so that it definitely appears that the land was actually conveyed to Ira without any restrictions in favor of the grantors. In Ira's answer he alleges that, at the time of such conveyance, the land was not worth more than $10,000. It is a suspicious circumstance that Ira would purchase the land for $20,000, and, after deducting $1,000 that his father owed him, give mortgages for $19,000 to secure the balance of the purchase price, if the transfer was made as a *bona fide* sale. The father was at that time about 73 years of age, and, considering the probable duration of his life, the arrangement to release the mortgages was a very profitable one for Ira. Later, and in 1925, the placing of the title to the Bartley land in Ira's name, without a satisfactory reason why that was done, is another circumstance which points toward a plan to get the property out of the ownership of John R. Neel. The releasing of the mortgages was concealed from Eliza. She supposed the conveyance of land and the giving of the mortgages was a *bona fide* transaction. Ada Burton, her daughter, testified that Ira in her presence told her mother long after the date of the releases that he was paying the interest and would pay the principal as needed. Ira denies that statement. At the time of the releasing of the mortgages, the domestic relations between John R. and Eliza were pleasant. Trouble did not arise until about 1926 or 1927, which trouble culminated in a separation in this latter year. In 1921 John R. Neel owned the Holbrook property and some bank stock, besides the 232-acre Red Willow land. What became of the bank stock is in doubt. John R. Neel's testimony states that he gave that to Ira to pay a debt he owed Ira. With the property situation in this condition, and under the circumstances disclosed by the evidence, the proposition to be determined is whether the

transfer of the 232-acre farm to Ira and the subsequent release of the mortgages were made for the fraudulent purpose of depriving Eliza Neel of her marital rights. It seems, as above stated, that the conveyance to Ira and his giving of the mortgages were actual and *bona fide* transactions. The only thing that throws doubt on it is the statement in the answer that the property was then worth only $10,000. This in itself is not sufficient to impeach the sale. As to the fraudulent character of the releases of the mortgages, there is more doubt. The burden was upon the plaintiff to prove that the transaction was only colorable and was made for the purpose of depriving the wife of her marital rights. *Krull v. Arman,* 110 Neb. 70; *In re Estate of Sides,* 119 Neb. 314, 323. There is nothing directly indicating that John R. Neel at that time had any ill feeling towards his wife, and it may fairly be inferable from the evidence that Mr. Neel, with a proper fatherly regard toward Ira, felt that the payment of the $100 a month allowance would be satisfactory to him, and at the same time be a means of relieving Ira from a burdensome debt, and consented to and did release the mortgages without having in his mind the desire to injure his wife's expectations to inherit the property. Fraud is not to be presumed, but must be proved. Of course, it can be proved by circumstantial evidence, but the circumstances here do not appear sufficient to overthrow the transaction. There was a consideration for the releases, and, while the consideration appears to be less than the value of the mortgages, it was such as to satisfy Mr. Neel. He might be willing in entire good faith to accord to his son a better bargain than to a stranger.

There is considerable conflict in the decisions of several of the states as to the effect of transfer of property by a husband which operates to diminish the distributive share which a wife would otherwise have in his estate. There were but two cases in our state cited in the briefs which seem to have a bearing on that principle, and, in

the case of *In re Estate of Sides*, 119 Neb. 314, Judge Stewart states in the opinion, if the transfer of personal property by a husband during his lifetime is a mere device and means whereby he retains the use and benefit of the property during his lifetime and at his death seeks to deprive the widow of her distributive share, it is to be regarded as fraudulent as to the wife, and he cites the case of *Allen v. Henggeler*, 32 Fed. (2d) 69. In that case, Judge McDermott, in construing the Nebraska statute, gives the rule that the surviving widow must establish by a preponderance of the evidence that, in making gifts to his children, the father was actuated by bad motive and fraudulent intent and that the entire transaction was a mere device by which he sought to defraud her. The other Nebraska case is *Stansberry v. Stansberry*, 102 Neb. 489. Judge Cornish states the rule rather more broadly, but says: "The courts, however, as bearing upon the question of fraud (as to a transfer of real estate without consideration), take into consideration the fact that the conveyance is made to one's own children by a former marriage, or to other members of the family. Was the conveyance one which the person, under the circumstances, could and would make without intending to do or doing his wife a wrong?" These cases are not directly in point because in those cases the widow was seeking to set aside the transfers. Here plaintiff is asking to set aside the transaction to satisfy a judgment, but those cases are applicable because at the time of the transaction parties were sustaining the marital relation, and unless the fraudulent intent to deprive the wife of her rights existed at that time, the subsequent divorce does not change their respective rights.

Guided by those principles, we hold that transfer of the 232-acre farm near the Red Willow station, and the subsequent release of the mortgages, are valid as against plaintiff's claim, and the decree of the district court dismissing plaintiff's second cause of action is affirmed. As to the first cause of action, the decree of the district court

is reversed and the cause is remanded, with directions to enter decree on the first cause of action, adjudging that two-thirds of the 90-acre farm is the property of John R. Neel and the other one-third the property of Ira E. Neel, but that the share of Ira be charged with the rentals as above found and fixed, less taxes paid, and that the share of John R. Neel be sold to satisfy plaintiff's judgment.

AFFIRMED IN PART, AND REVERSED IN PART.

WESTERN PUBLIC SERVICE COMPANY, APPELLEE, V. WHEELER COUNTY: SCHOOL DISTRICT NO. 33, APPELLANT.

FILED FEBRUARY 13, 1934. No. 28660.

1. **Taxation**: VOID TAXES: RECOVERY. An owner of real estate may maintain appropriate action to recover illegal or void taxes paid by him, and it is immaterial whether they were levied while he was owner or prior thereto.
2. ———: ———: ———: PETITION. A petition in an action at law which sets forth that a tax is illegal and void for the reason that it was made without authority on the part of the officer making the same, without notice, and in a year which was not the regular year for the assessment of real estate, and that proper demand for refund was made, states a cause of action under subdivision 2, sec. 77-1923, Comp. St. 1929.
3. ———: ASSESSMENT. Under the law as it existed during the period covered by this action, real estate was assessable as of April 1, 1926, and every four years thereafter.
4. ———: ———. Except in cases where real estate becomes subject to assessment or where improvements have been added of a value in excess of $100, a precinct assessor is without power to make a return of assessment on real estate at any time other than the regular year for assessment of real estate.
5. ———: ———. The county board of equalization alone, but only on notice, may in proper cases in a year other than the regular year for the assessment of real estate equalize the value of individual parcels of real estate.
6. **Judgment.** In a case where a former adjudication is pleaded, the party so pleading assumes the burden of proving such former adjudication.

7. Taxation: VOLUNTARY PAYMENT. Where by requirement of statute a tax must be paid as a condition precedent to the bringing of action and recovery thereunder, payment under such conditions cannot be considered as voluntary.

APPEAL from the district court for Wheeler county: RALPH R. HORTH, JUDGE. *Affirmed.*

F. J. H. Lawson and *A. L. Bishop,* for appellant.

Clarence A. Davis and *Wilber S. Aten, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is an action at law instituted by Western Public Service Company of Maryland, plaintiff, appellee herein, against School District No. 33 of Wheeler county, Nebraska, defendant, appellant herein. The record discloses that the plaintiff filed a petition wherein it alleged that in 1926 and up to some time in February, 1927, one Enoch Hallner was the owner of a certain five-acre tract of land within the boundaries of School District No. 33 in Wheeler county, Nebraska; that while the tract of land was owned by Enoch Hallner and in the year 1926 it was assessed for taxation at a valuation of $100; that in February, 1927, the said land was conveyed to the Nebraska Electric Power Company; that during the year 1927 the precinct assessor, or some other person, increased the value of said land, without any notice to the Nebraska Electric Power Company, arbitrarily, without authority of law and contrary to the statutes, from $100 to $18,000; that in June, 1929, the Nebraska Electric Power Company conveyed the said premises to the appellee and also conveyed to the appellee all of its personal and chattel property, choses in action, rights, titles, interests and all other property, both real and personal, and all rights attached and appertaining thereto, by a bill of sale; that such increased assessment is of record on the rolls of Wheeler

county, Nebraska, for the years 1927, 1928, and 1929, and that taxes for said years were levied thereon; that the appellee on October 7, 1929, paid the taxes based upon the $18,000 valuation for the years 1927 and 1928, and on the same date filed a written demand for a return of said taxes with the county treasurer of Wheeler county, and on November 6, 1929, a supplemental written demand was filed with the said treasurer and the treasurer of School District Number 33; that on August 9, 1930, the appellee paid the taxes based on the valuation of $18,000 for the year 1929 and on said date filed a written demand with the county treasurer and school district treasurer for a return of the same. The prayer was for the return of $1,404.46 taxes claimed to have been unlawfully and illegally collected for the years 1927, 1928, and 1929. The defendant School District No. 33, appellant herein, demurred generally, and on the further ground that there was a defect of parties in that the state of Nebraska was not made a party defendant. The demurrer was overruled and the appellant filed an answer in which the appellant reserved to itself all of the rights presented by its general and special demurrer.

In the answer, after generally denying the material allegations of the petition, the appellant alleges that the assessments complained of were adjudged to be legal in a certain action in the district court for Wheeler county, Nebraska, wherein Nebraska Electric Power Company was plaintiff and the county of Wheeler and T. E. Wyman, county treasurer, were defendants, and that the question of said assessments is *res judicata,* and that appellee is estopped from seeking a refund of the taxes for said years by reason of said adjudication and by the laches and waivers of its grantor, Nebraska Electric Power Company; that the appellee bought the said property clouded by the taxes for the years in question and is bound thereby; that the bill of sale set forth did not transfer or convey to the appellee the right to claim a return of taxes voluntarily paid by it after the said bill

of sale was executed. It further says that great improvements were added to the said real estate between April 1, 1929, and July 1, 1929, and that such improvements were subject to taxation; and that the appellee had notice of the said assessed valuation at the time of purchase and had actual or constructive notice of the findings of the suit by the Nebraska Electric Power Company to enjoin the collection of the said taxes. It further alleges that appellee has a remedy against its grantor, Nebraska Electric Power Company, under the covenant in the deed of conveyance to the appellee.

On the issues presented by the pleadings, a trial was had to the court without a jury, and judgment was rendered in favor of the plaintiff and against the defendants. The defendant, School District No. 33, alone has appealed. Two series of errors are assigned in appellant's brief as grounds for reversal of the judgment of the district court.

Appellant contends in the first of its second series of assigned errors that the demurrer to the petition should have been sustained. It is insisted, first, that the cause of action did not accrue prior to the time it is alleged to have been assigned to the appellee herein, and could not thereafter ripen into a maintainable cause of action; and, second, that no action was pleaded agreeable to subdivision 2, of sec. 77-1923, Comp. St. 1929, commonly referred to as the "Refund Law."

We cannot find ourselves in agreement with either of the propositions urged. In the case of *Haarmann Vinegar & Pickle Co. v. Douglas County,* 122 Neb. 643, Cynthia M. Daniel, the real plaintiff, was permitted to recover taxes paid, based upon assessments made when the title to the real estate in question was held by her predecessors. In that case it was substantially held that an appropriate action for the recovery of illegal or void taxes may be maintained by the owner, whether the same were assessed during his ownership or prior thereto, and thus cause to be removed the cloud from the title.

As to the second proposition, the section of the statute

referred to is in part as follows: "If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth," etc. The remaining portion is not important for present purposes. The appellee contends that the assessment was invalid for the reason that it was made without any authority of law. An examination of the foregoing quotation, together with an examination of the entire section, indicates that the conclusion of the pleader was entirely agreeable to the relief contemplated by the statutory provisions referred to.

The only remaining question in this connection is as to whether or not the precinct assessor had power to increase the assessment of real estate in 1927, as it is alleged he did. A determination of this question, if favorable to the appellee, is determinative of all other questions raised in this action, as well as the demurrer, except the question of former adjudication.

We take judicial notice of the fact that the year 1926, being the year in which the real estate in question was valued at $100, was the regular year for the assessment of real estate, and under the statutes such valuation continued for a period of four years, unless changed on review by action of the county board of equalization on notice to the owner of the real estate. Comp. St. 1929, secs. 77-1601, 77-1702. The only power of the assessor in 1927, the year in which the new valuation was placed on the real estate involved here, was to make return of real property that shall have become subject to taxation, and of all improvements placed on real property exceeding in value $100. Comp. St. 1929, sec. 77-1605. No claim is made either that the real estate in question was not assessed in 1926 or that improvements were placed thereon before April 1, 1927. It is not suggested that any improvements were placed on the real estate until after April 1, 1929, which, of course, is immaterial, since real estate is assessable as of April 1 of any given year.

It therefore follows that the increased assessment was made by the precinct assessor without authority of law, and the judgment of the district court was right, unless the appellee is prevented from recovering because of a former adjudication upon all or a part of the subject-matter of this action.

The Nebraska Electric Power Company instituted an action in equity to enjoin the collection of a part of the taxes in question. A demurrer to the petition in that case was sustained and no appeal was taken. It is contended that this amounts to an adjudication upon the issues involved in this case. The record in this case does not disclose what was intended to be the purport of the ruling on the demurrer in that case. In so far as the record shows, it may have been intended as a decision on the merits, or only that the petition did not state a cause of action. The burden was on the appellant, having pleaded a former adjudication, to prove that the subject-matter of this action was adjudicated in another action. It has failed in this regard to sustain the required burden.

Appellant contends that the taxes paid by the appellee were paid voluntarily and therefore cannot be recovered back. It is sufficient to say that, where by statute taxes must be paid as a condition precedent to a right of action and consequent remedy, such payment may not be considered as voluntary.

For the reasons herein stated, the judgment of the district court is

AFFIRMED.

JOHN HAVENS V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1934. No. 28786.

1. Criminal Law: NEW TRIAL. The district court has no jurisdiction to grant a new trial in a criminal case on the ground of newly discovered evidence at a term subsequent to the one at which the verdict was rendered.
2. ———: ———. Where one has been convicted of a criminal offense and new evidence is discovered after the term at which

the verdict was rendered, such evidence may not be considered by the court.

3. **Rape: EVIDENCE: CORROBORATION.** In a prosecution for rape, there must be corroboration in some material respect, but corroboration as to the identity of the person is unnecessary.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

John E. Lowe, for plaintiff in error.

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

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is a criminal action, wherein it is charged that John Havens, the defendant, plaintiff in error here, on or about the 1st day of April, 1932, committed the crime of rape upon Blanche Havens, his daughter, then a minor of the age of 13 years. The case was tried to a jury and on October 17, 1932, the jury returned a verdict finding him guilty as charged in the information. A motion for new trial was duly and regularly filed. On December 16, 1932, the motion for new trial was overruled and on the same day the defendant was sentenced to serve a term of ten years in the state penitentiary. Thereafter, on the 12th day of April, 1933, and during the March term of the district court, the defendant filed a second motion for new trial grounding the same on newly discovered evidence. The motion was supported by affidavits. Thereafter the state filed counter affidavits relating to the second motion for a new trial. On June 10, 1933, the court overruled the second motion. The affidavits were by order of this court made a part of the record in this case.

In his brief the plaintiff in error has set forth 24 separate assignments of error. We have examined them all and have concluded that only two propositions require consideration or discussion here.

The motion for new trial on the ground of newly discovered evidence was filed almost six months after the verdict was returned and nearly four months after judgment and sentence. This particular length of time is of no consequence except in the sense that it shows that the motion was filed out of the time allowed for the filing of motions for new trial in criminal cases.

This court is definitely committed to the proposition that the district court has no jurisdiction to grant a new trial in a criminal case on the ground of newly discovered evidence at a term subsequent to the one at which the verdict was rendered. A late decision on this question is found in *Simmons v. State,* 111 Neb. 644.

In the light of this existing rule of law, it has not been necessary to examine into the merits of the motion and its supporting affidavits. If the matters therein contained merit consideration, then the only tribunal empowered to examine into them is the board of pardons and paroles.

The defendant complains of a failure of the corroboration of the prosecutrix required by law, and of instruction No. 5 given in this connection. His position does not appear tenable.

The prosecutrix, a girl under the age of 15 years, testified that she had sexual intercourse with the defendant, which fact, if true, if the defendant was 18 years of age, or over, would constitute the crime of rape on the part of the defendant. The evidence shows that, at the time in question, the defendant was much over 18 years of age. Before a conviction was justified, the prosecutrix must have been corroborated in some material respect. The evidence conclusively shows that she was pregnant and proof of pregnacy is corroboration of that phase of the crime of rape.

It is earnestly urged that there is no corroboration of the testimony of the prosecutrix that the defendant was the person who had sexual intercourse with her. An examination of the record discloses this to be a fact, unless

we consider that evidence of opportunity is corroboration. It, however, is not necessary to decide this point. It has long been the rule of this court that corroboration as to the identity of the person charged with rape is not necessary to sustain the charge. *Noonan v. State,* 117 Neb. 520.

We perceive no good and sufficient reason for a departure from that rule in this case. There can be no more reason for requiring corroboration as to the identity of the person charged with rape than the identity of one charged with any other major offense; but there is good reason for the requirement that there shall be corroboration of the prosecutrix which may consist of circumstances and is not limited to the principal fact. *Swogger v. State,* 115 Neb. 621.

There is a strong probability that a woman of previous good repute, when called upon to relate facts surrounding sexual relations, will give an account which negatives rather than affirms acquiescence or voluntary participation.

The defendant complains of instruction No. 5, relating to the question of corroboration. The instruction in its first paragraph sets forth correctly the general rule with reference to corroboration of the prosecutrix in this case. In the second paragraph the jury are told in part, the following:

"The unsupported testimony of the prosecutrix, or assaulted party, may be sufficient to identify the assailant if, when together with all other facts and circumstances in evidence, it convinces the jury of such identity beyond a reasonable doubt."

This is a correct statement of the law when considered along with other parts of the instruction, and without it, or language of similar import, the instruction would have been incomplete. We cannot, therefore, find any error in this portion of the charge to the jury when considered with the other instructions given by the court.

We have considered all other assignments of error and in them find no merit. The judgment of the district court was correct, and is

AFFIRMED.

ANDERS KAUSGAARD, APPELLEE, V. MICHAEL ENDRES ET AL., APPELLANTS.

FILED FEBRUARY 16, 1934. No. 28778.

1. **Witnesses.** "When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel." American Bar Ass'n Canons of Ethics (1926) 142, sec. 18.
2. ———. Except when essential to the ends of justice, a violation of the foregoing rule constitutes prejudicial error.
3. **False Imprisonment.** "In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was held. Where the facts are in dispute, it is for the jury to determine as to the reasonableness of the detention, under proper instructions by the court." *Diers v. Mallon*, 46 Neb. 121.

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

Paul F. Good, Attorney General, Paul P. Chaney, Crossman, Munger & Barton and *Lester L. Dunn*, for appellants.

Burkett, Wilson, Brown & Van Kirk and *Hanson & Hanson, contra.*

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

GOSS, C. J.

Defendants appeal from a judgment for $1,000 against

them as damages to plaintiff for false arrest and imprisonment.

Plaintiff, a merchant in Bellevue, Sarpy county, sued Michael Endres, state sheriff, and his surety, Fidelity & Casualty Company of New York, Harold W. Hulfish, deputy state sheriff, and his surety, Massachusetts Bonding & Insurance Company, Karl Greiner, sheriff of Seward county, Louis M. Anderson, detective sergeant, and Edward T. Sledge, an officer of the Omaha police department. The petition contained four counts: For false arrest and imprisonment; for malicious prosecution; for libel and slander; and for conversion of personal property. The case went to the jury on the first count and the trial court dismissed the other three. From this order of dismissal the plaintiff did not appeal.

Plaintiff was arrested at his store in Bellevue, in Sarpy county. The officers suspected him of buying goods and merchandise that had been stolen. Articles claimed by them to be of that nature were found in the store. Upon his arrest he was taken to Omaha, in Douglas county, and held in the jail overnight and until about 10 o'clock; then he was taken to Papillion, county seat of Sarpy county, and held in jail there and on trips to find justices of the peace until late in the afternoon, when the magistrate discharged him; until he was discharged he was not allowed to talk to his attorney; afterwards he was informed against but, upon trial in the district court, he was acquitted and brought this action later.

The defendants assign error because the trial court permitted Dewey Hanson, one of the attorneys for plaintiff, over objections of defendants, to participate actively in the trial as such attorney after he had testified as to material matters on behalf of plaintiff. He was a witness for plaintiff on direct examination and testified at considerable length as to material matters in several of the issues involved and as to the treatment of plaintiff while under arrest and imprisonment. After this testimony Mr. Hanson continued to participate in the trial. He was

also a witness in rebuttal to impeach or contradict the testimony of Garrow, the convicted thief who robbed country stores and claimed to have sold the stolen goods to Kausgaard, as to a conversation in the penitentiary when Garrow was serving a sentence. He cooperated with his associate counsel, conducted examinations and made an argument to the jury. The trial court, while ruling against defendants in this procedure, in effect warned plaintiff as to its legality.

At least three times we have criticized the legal ethics of permitting one to act both as attorney and witness. In *Wilson v. Wilson,* 89 Neb. 749, a divorce action, a reversal was ordered upon other grounds, but the court agreed with appellee's criticism of defendant-appellant's counsel who, the court said, was her "corespondent, an important witness for defendant, and assumes principal charge of the cause of defendant on trial." In *Cox v. Kee,* 107 Neb. 587, this court said: "An attorney is a competent witness for his client, and he may properly testify to mere formal matters, such as to account for the possession of an exhibit, or the like. But if he testifies generally, it is unbecoming for him to examine witnesses, or to address the jury." *In re Estate of Bayer,* 116 Neb. 670, we repeated what we had said in the *Cox* case and quoted from American Bar Ass'n Canons of Ethics (1926) 142, sec. 18, as follows: "When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client."

The attorney ought not to have participated in the trial after he considered it necessary to present himself as a witness. The court ought not to have permitted it over objections of defendants. Its tendency was to prejudice the rights of defendants, particularly when the attorney argued the case to the jury. While the argument was not

preserved and the brief on behalf of plaintiff says Mr. Hanson did not there discuss his own testimony, nevertheless, if, as a witness, he made a good impression upon the jury, it would be difficult for them to separate what he said as an advocate from what he said as a witness. The presentation of his client's cause to the court and jury did not demand his personal attention. Able and experienced counsel were associated with him, who would have carried on the battle after he was disqualified for action. We are of the opinion this constituted prejudicial error, for which the judgment ought to be reversed.

Defendant officers complain of the refusal of the court to submit a requested instruction relating to liability for alleged cruel and harsh treatment of plaintiff while being arrested and detained. The first sentence of the instruction states the law when it gives the officers the right to use necessary force to safely keep plaintiff. But the second sentence was objectionable in that, by ambiguity, it gave the jury the right, if they found unnecessary force used, to decide the whole case upon liability for that alone. It said: "Then the defendants would be liable to the plaintiff for any injury or damage suffered by the plaintiff by reason alone and rising solely out of the use of such excessive force or violence wantonly or excessively inflicted." Other issues were involved in the case. The instruction was too broad and was properly refused.

The defendant officers assign that the tenth instruction given by the court was erroneous. This submitted to the jury whether there was an unreasonable delay between the arrest of plaintiff one afternoon and taking him before a magistrate on the afternoon of the next day. There was no conflict in the evidence as to the time. This was erroneous.

"In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was

held. Where the facts are in dispute, it is for the jury to determine as to the reasonableness of the detention, under proper instructions by the court." *Diers v. Mallon,* 46 Neb. 121. See 25 C. J. 550; *Keefe v. Hart,* 213 Mass. 476; *Oxford v. Berry,* 204 Mich. 197. On another trial, if there be no conflict in the evidence as to the length of time of detention, this matter should be decided by the court as a matter of law.

The surety companies place reliance upon the proposition that a surety cannot be held for the acts of a state sheriff and his deputy when committed merely under color of office, rather than by virtue of their office, and cite authorities thereon. We do not find it necessary to discuss this point further than to say that, in our opinion, under the pleadings and the evidence, the acts of the officers, in investigating the dealings of plaintiff and the arrest of plaintiff, came within the official jurisdiction of these state officers and were done by virtue of their offices. Whether they committed a wrong and, in so doing, damaged the plaintiff is the controversy here.

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

REVERSED.

HARRY M. LUX ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1934. No. 28926.

1. **Contempt.** Section 20-2121, Comp. St. 1929, specifically gives every court of record power to punish by fine and imprisonment, or by either, "Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."
2. ———: INFORMATION: VERIFICATION. An information charging constructive contempt, if made by a county attorney, when direct and positive in its charging part, need not be verified positively, but may be made on information and belief. *Tasich v. State,* 111 Neb. 465.
3. **Criminal Law:** CONTINUANCE. "The granting or refusing of

a continuance of a criminal cause rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion." *Dinsmore v. State*, 61 Neb. 418.

4. Contempt: DEFENSE. The so-called foreclosure moratorium act, Laws 1933, ch. 65, Comp. St. Supp. 1933, secs. 20-21,159 to 20-21,164, is not available to defendants.
5. ———: PENALTY. The fines of defendants were neither excessive nor inconsistent.

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

Harry E. Holeman, Alice M. Holeman and *Maxey & Maxey*, for plaintiffs in error.

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

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

GOSS, C. J.

Harry M. Lux and Robert Jackson, also known as D. Robert Burleigh, hereinafter called defendants, were found guilty of contempt of court. Lux was ordered to pay a fine of $250 and certain costs, Burleigh to pay a fine of $100 and certain costs, and to be committed to jail until such fines and costs were paid. After their motions for new trials were overruled they brought proceedings in error. No bill of exceptions was secured. Only the transcript was brought up.

The information charged these and fourteen other defendants with the execution of a concerted plan and wilful attempt to impede and obstruct the due administration of justice in a described cause then pending in the district court for Saline county for the foreclosure of a real estate mortgage and a sale thereunder. It alleged that the sheriff had been duly ordered by the court to sell said real estate at the east front door of the county courthouse at 1 o'clock p. m. on March 14, 1933; that about 10 minutes before the hour so set, the defendants and

many others, with intent to prevent the sale, assembled in the private office of the sheriff, locked the door so he could not go to officiate at the sale, locked the windows and disconnected the telephone, so he could not communicate with any one outside said office; though he told them about three minutes before he was to open the sale that he had that legal duty to perform, the defendants informed the sheriff that he could not hold any foreclosure sale on that day, crowded him so he could not move, took hold of his person and stood around him in a menacing manner, prevented him from leaving the office, wilfully and unlawfully held him in his office against his will for about an hour and thereby prevented him from making the sale. The sheriff was finally released, when some were ejected forcibly from the office by citizens of Wilber and others were dispersed therefrom by a tear gas bomb which was thrown into said room.

Harry M. Lux filed an "answer and showing" in opposition to the information. In this he described himself as "a resident of Lancaster county, Nebraska, and has been working for and is now employed as an organizer for the Holiday Association, * * * and that he was in Wilber on or about March 14, 1933, being interested in the prosperity of the rural communities and their accomplishments through collective effort. That he was not a leader of any group or gathering but here for the purpose of being informed of the results growing out of the moratorium act and other legislation for the interest of the rural communities. * * * That no acts transpired by him or his associates that did intimidate, suppress, or in any manner hinder or violate the free, voluntary actions of any court official. Defendant generally denies each and every material allegation in the complaint. * * * That the acts * * * of this defendant were harmonious, lawful, and in accord with the rights of every citizen of the United States to lawfully assemble and discuss their inherent rights."

Defendants assign that the district court was without

power or jurisdiction to punish them for contempt in such manner or form and that the records fail to show any obstruction or hindrance.

Section 20-2121, Comp. St. 1929, specifically gives every court of record power to punish by fine and imprisonment, or by either, "Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."

The form of the information is clear and specific. It was not attacked by demurrer or by motion to quash. True, it was not verified positively but was verified by the county attorney upon information and belief, but this court held, in *Tasich v. State,* 111 Neb. 465, that an information in a constructive contempt case, made by a county attorney, when direct and positive in its charging part, need not be verified positively but may be made upon information and belief.

While the defendants did not bring up the bill of exceptions and therefore we do not have the evidence before us, the legal inference from the final order appealed from is that the facts charged were presented by evidence to the trial court and justified the findings and judgment.

Error is assigned because the court did not grant what counsel for defendants considered sufficient time to prepare the defense. The record shows the information was filed March 17, 1933. On the same day an order to show cause was issued and defendants were at once served with copies of the complaint. The order to show cause gave them five days' notice and set the hearing for March 23. Defendants employed counsel March 18. March 23 they moved for a continuance (without suggesting a date). The court continued the case to the next day. The trial began on March 24, 1933. The journal entry of that day recites that all defendants were present in court "and all being represented by counsel, except the defendant Sylvester Mendoza, * * * all announce that they are ready to proceed to trial." "The granting or refusing of

a continuance of a criminal cause rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion." *Dinsmore v. State,* 61 Neb. 418. See *Ringer v. State,* 114 Neb. 404; *Biddick v. State,* 113 Neb. 851; *Dilley v. State,* 97 Neb. 853.

Defendants say the district court erred in failing to take into consideration the act of March 2, 1933, known as the foreclosure moratorium act. Laws 1933, ch. 65, Comp. St. Supp. 1933, secs. 20-21,159 to 20-21,164. The first section makes that act usable "upon application of the owner or owners of said real estate or persons liable on said mortgages," etc. There is nothing in the record suggesting the right or power of these defendants to invoke the provisions of the act. They were neither owners nor liable on the mortgage. All inferences from the record indicate that they were uninvited strangers, crashing the doors, who now seek to avoid punishment for their bad legal manners.

Defendants complain that the fines imposed are inconsistent because of their difference. They ask, "if both parties are equally guilty of contempt of court, or conduct constituting contempt of court, why should not their fines be the same?" The answer would be found in the evidence, which is not before us. We assume the court had good reason to decide that Lux was more of a leader and organizer of the raid than Burleigh. We find no abuse of discretion on the part of the trial court. The fines of defendants were neither excessive nor inconsistent. The defendants were fortunate that they were let off with fines; the statute authorized imprisonment. In *Tasich v. State, supra,* prosecuted for attempting to obstruct the administration of justice (but not succeeding in the attempt), the district court committed the defendant to jail for six months and this court affirmed the judgment. Here the defendants succeeded in preventing the judicial sale.

Under our plan of government the judicial department

may not lawfully be intimidated by threats, coerced by force, or influenced by anything outside the facts and the law. It was timely and fortunate for the cause of law and order that the unlawful scheme of defendants was promptly frustrated by a resolute prosecutor and a courageous judge.

The judgment was right and it is

AFFIRMED.

IN RE YELLOW CAB & BAGGAGE COMPANY.

FILED FEBRUARY 16, 1934. No. 28470.

1. **State Railway Commission:** HEARINGS: CONTINUANCE. State railway commission is vested with discretion in granting continuance of hearing in proceeding pending before it. Its ruling upon application for continuance will not be disturbed unless it appears there was an abuse of discretion.
2. **Automobiles:** TAXICAB COMPANIES: REGULATION. Taxicab companies are common carriers. The control and regulation of their operation is vested in the state railway commission, in absence of such control and regulation by specific legislation.
3. ———: ———: ———. Subdivisions 17, 18, and 25 of section 14-102, and sections 14-109 and 14-110, Comp. St. 1929, being parts of the statutory charter of cities of the metropolitan class, are not such specific legislation as will deprive the state railway commission of jurisdiction over the control and regulation of the operation of taxicab companies in the city of Omaha.
4. ———: ———: ———. Sections 60-101, 60-102, and 60-326, Comp. St. 1929, being parts of the chapter on motor vehicles, are not such specific legislation as will deprive the state railway commission of jurisdiction over the control and regulation of the operation of taxicab companies.
5. ———: ———: ———. Section 74-1101, Comp. St. 1929, being part of the chapter dealing with street railways, is not such specific legislation as will deprive the state railway commission of jurisdiction over the control and regulation of the operation of taxicab companies.
6. ———: ———: ———. Regulation adopted by the state railway commission, requiring taxicab companies to obtain

certificates of convenience and necessity, is not unreasonable or arbitrary.

7. ———: ———: ———. Regulation of the state railway commission, requiring companies operating taxicabs to equip them with taximeters, *held* to be a reasonable regulation.

8. **State Railway Commission:** POWERS. Failure or refusal of the state railway commission to adopt a rule or regulation which, in its nature, is legislative is not the subject for review by this court.

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

Francis P. Matthews, John P. Breen and *W. P. Kelley,* for Publix Cars, appellant.

Kennedy, Holland & De Lacy and *Ralph Svoboda,* for Omaha & C. B. Street R. Co., appellee.

Paul F. Good, Attorney General, and *Edwin Vail,* for Nebraska State Railway Commission.

Hugh H. Drake, amicus curiæ.

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

GOOD, J.

This is an appeal from the action of the state railway commission in promulgating certain rules and regulations governing the operation of taxicabs in the city of Omaha. The Yellow Cab & Baggage Company and six other taxicab companies joined in filing an application before the commission, requesting it to enter an order establishing rules and regulations. Omaha & Council Bluffs Street Railway Company intervened and asked for the same relief. Publix Cars, a corporation operating in Omaha a taxicab business on a substantially different basis from the other taxicab companies, appeared before the commission and filed objections to the application. The commission set a time for hearing, and Publix Cars requested an extension of time, so that it might present its side of the matter. After hearing a part of the evidence, the

commission adjourned the hearing for five days, and thereupon Publix Cars introduced its evidence. After hearing and argument, the commission entered an order which will be more particularly referred to later in this opinion. From that order, Publix Cars appealed. All of the other taxicab companies and intervener filed a cross-appeal.

Publix Cars, hereinafter referred to as appellant, complains of the action of the railway commission in not granting it a continuance for a greater length of time in order to present its contentions. It does not appear that appellant desired to call any other witnesses than those who were called, or that it did not have all the facts in evidence before the commission that might have been produced. The question of continuing a hearing before the commission is one within its discretion, and its action in granting or refusing a continuance will not be interfered with unless an abuse of such discretion is shown. The record shows no abuse of discretion.

Appellant contends that the railway commission is without any power to regulate the business of taxicab companies within the city of Omaha, and that the city of Omaha, under its charter provisions, has power to establish all rules and regulations for the conduct and operation of taxicab business within its borders.

In 1906 the people of Nebraska adopted an amendment to the Constitution, providing for the creation of a state railway commission, and which now appears as section 20, art. IV of the Constitution. That section, among other things, provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." After the adoption of this amendment, the legislature in 1907 adopted a comprehensive act, defining the powers and duties of the railway commission, and providing generally the au-

thority that the commission might exercise over common carriers. Section 4 of that act, being section 75-401, Comp. St. 1929, defines the term "common carriers" to include "all corporations, companies, individuals and association of individuals, * * * that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line * * * express company, * * * and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire." This statute brings taxicab companies within the term "common carriers," and that they are such common carriers is recognized by this court in *Peterson v. Beal,* 121 Neb. 348. See, also, *Terminal Taxicab Co. v. Kutz,* 241 U. S. 252, 60 L. Ed. 984; *Anderson v. Yellow Cab Co.,* 179 Wis. 300; *City Cab Corporation v. Patrick,* P. U. R. 1932C, 1. It thus appears that the commission, both by Constitution and statute, is given power to regulate and control the operation of common carriers.

Relative to the powers conferred upon the state railway commission by the constitutional provision above quoted, it was held in the case of *In re Lincoln Traction Co.,* 103 Neb. 229: "Unless there has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise." And such we deem to be the rule. The question then arises: Is there any specific legislation that limits or affects the power of the commission to act in the premises? Appellant contends that the provisions of the Omaha charter are specific legislation which confers this power upon the city council of Omaha and thus deprives the commission of the power to enact the rules and regulations. The distinction between specific and general legislation is drawn in *State v. Clarke,* 98 Neb. 566.

To support its contention that the city of Omaha, and not the state railway commission, is vested with authority to promulgate rules and regulations governing the operation of taxicabs within the city, appellant cites and relies

upon subdivisions 17, 18, and 25 of section 14-102, sections 14-109 and 14-110, Comp. St. 1929. These sections are all parts of the statutory charter of cities of the metropolitan class, in which the city of Omaha belongs.

Subdivision 17 of said section 14-102 authorizes the council "To regulate the transportation of articles through the streets, and to prevent injuries to the streets from overloaded vehicles, and regulate the width of wagon tires, and tires of other vehicles." Clearly, this has no application to the question under consideration. Subdivision 18 of said section provides: "To prevent or regulate the rolling of hoops, playing of ball, flying of kites, the riding of bicycles or tricycles, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams or horses. To regulate the use of vehicles propelled by steam, gas, electricity, or other motive power, operated on the streets of the city." Evidently this relates to the police power to control the manner of the use of the streets. The city council no doubt is vested with power to regulate the rate of speed, parking privileges, the manner of turning to the right or left, and other regulations of that character. Primarily, the provision is to regulate the use of the streets for the protection and safety of the public, and not to the general control of taxicab companies or other common carriers. Subdivision 25 of said section confers on the city council the power to make and enforce all police regulation for the good government, general welfare, health, safety and security of the city and its citizens. This provision in no manner gives to the city general control and regulation of common carriers.

Section 14-109 authorizes the imposition of occupation and license taxes and for registration of vehicles. Section 14-110 merely provides that where any power is conferred upon the city, and the manner of its exercise is not especially pointed out, the council may exercise that power by ordinance.

Appellant also cites and relies upon sections 60-101, 60-

102, and 60-326, Comp. St. 1929. These are sections of the motor vehicle chapter. Section 60-101 defines "motor transportation company" for the purpose of that act and provides that the term shall not include persons, companies or associations, operating motor vehicles exclusively for the transportation of persons and baggage, and which are operated exclusively within the limits of a municipal corporation. Section 60-102 provides: "The Nebraska state railway commission shall have general control of the common carriers mentioned in section 1 hereof (60-101) and is hereby vested with authority to make reasonable regulations, except the fixing of rates or fares to be charged, governing each motor transportation company in this state; is vested with authority to regulate the service and safety of operation of each such motor transportation company in this state; to require said common carriers to file annual and other reports, containing such information and data as the commission may require, and to provide uniform accounting systems." We fail to find in these sections that any power is given to the city to regulate the general control of taxicabs. Section 60-326 provides: "Nothing contained in the provisions of this article shall be construed to limit the power of local authorities to make, enforce and maintain any ordinances, rules or regulations, in addition to the provisions affecting motor vehicles." This is a negative provision only, and does not purport, in itself, to confer any power upon the city to exercise general control over the operation of taxicabs or other common carriers.

Appellant also cites section 74-1101, Comp. St. 1929. This is a section of the article dealing with street railways. After defining the term "street railway" and authorizing extension of the street railway service by motor busses, the section concludes with this language: "Nothing in this act shall be construed to deprive any city of this state of the right and power to grant licenses issued by the proper city authorities to other auto or motor busses, taxicabs or vehicles, to use the streets of

the city in carrying passengers for hire, and to regulate such carriers as to rates, fares and service." This, again, is a negative provision limiting the scope of the article on street railways and does not, in terms, confer any powers upon cities to control and regulate the operation of taxicabs or other common carriers.

We are unable to accept appellant's view that the statutory provisions above referred to answer to the call of "specific legislation," mentioned in section 20, art. IV of the Constitution. All of the provisions referred to are general in their nature and not specific legislation, within the meaning of the constitutional provision. None of these provisions is availing to take from the railway commission the power to regulate and control the operation of common carriers.

Appellant cites and relies upon the opinion of this court in *Omaha & C. B. Street R. Co. v. City of Omaha,* 114 Neb. 483. It may be conceded that there are some expressions in the opinion which apparently lend support to appellant's contention. It must always be borne in mind that what is said in the opinion must be construed in the light of the question before the court for determination. That was an action to enjoin the enforcement of a city ordinance. Many grounds for the invalidity of the ordinance were urged, among them that it granted a franchise without having complied with the statutory and charter provisions relative to the granting of franchises. A general demurrer to the petition was filed and was overruled by the trial court. The following appears in the judgment of the court in that case: "The court upon due consideration finds and concludes that any permit or license issued or attempted to be issued by the defendant city or its officers under the provisions of the ordinance No. 12696, attached to plaintiff's petition as exhibit 1, would be a granting of a franchise to the licensee within the meaning of the city charter of the city of Omaha section 3719, Statutes of 1922, and hence the court overrules the defendant's demurrer to the plain-

tiff's petition." Defendant elected to stand upon its demurrer and refused to further plead. The injunction was thereupon granted by the trial court. The decision of the trial court was based exclusively upon the proposition that the ordinance granted a franchise without having complied with statutory and charter provisions relative to the granting of franchises. The only question for determination by this court upon appeal was whether the court erred in that holding. The only question properly before the court for decision was whether the ordinance granted a franchise, and any holding that the ordinance was valid should be construed to mean only that it was not vulnerable to the charge that it granted a franchise.

We have no doubt that, under the charter provisions, the city of Omaha is vested with police power to regulate the use of its streets by taxicabs or other vehicles; that it may require an occupation or license tax from those operating such; that it may, in some respects, regulate manner of operation of vehicles on the streets; but this does not amount to giving to the city the general control and regulation of the operation of taxicabs or other common carriers.

The city is authorized to legislate as to matters which are strictly local or municipal, while the railway commission enacts rules and regulations which are matters of general public or state concern. It is difficult to draw a line marking the distinction between those matters which are of local or municipal concern and those which are of a general nature. The court must consider each case from the facts and circumstances peculiar to it and draw the line of demarcation in that particular case. *Omaha & C. B. Street R. Co. v. City of Omaha,* 125 Neb. 825; *Carlberg v. Metcalfe,* 120 Neb. 481.

It must be borne in mind that any power given to a city must be strictly construed. If the grant of power is in doubt, the power will be held not to exist. Of course, the city has the implied powers which are necessary to the exercise of those specially granted. A differ-

ent rule obtains with reference to the railway commission. It derives its power generally from the Constitution and, as above stated, has plenary power with reference to the control and regulation of common carriers, in the absence of specific legislation. The powers of the railway commission, therefore, are to be liberally construed, while those of the city are to be strictly construed. The plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field. No provision by the legislature has been pointed out, nor are we aware of any, which occupies the field with reference to the control and regulation of taxicabs, and, therefore, we conclude that such power is vested in the railway commission.

Appellant complains that certain of the regulations, contained in the commission's order, are unreasonable, arbitrary and confiscatory of its property and property rights. It complains of the regulation which requires taxicab companies to make application for and obtain certificates of convenience and necessity before they may operate within the city. The regulation does provide that such certificates will be issued as a matter of course, upon application, to all taxicab companies for the number of cabs they were operating at the time the regulation was adopted. In other words, such certificate, as to existing taxicabs in service, was a mere formality, but such certificates are required by the regulation before any extension may be made to any taxicab system. Such certificates have been required in many of the states with reference to the establishment and the extension of public utilities. The object in requiring such certificates is not only to protect those already occupying the field in their investment, but to protect the public as well. Unreasonable and unwarranted competition might be carried to the extent that it would not only injure and jeopardize the property of those operating the utilities, but might even result in destroying them. Such a result might be disastrous to the interests of the public.

In the instant case, it appears that street railways are necessary for mass transportation. If an unnecessary and unreasonable number of taxicabs are authorized to operate in the city and along the lines of the street railway, it may result in destroying the street railways to the great detriment of the public interest. It has now come to be recognized that unwarranted competition, especially in the line of public utilities, may be and frequently is harmful to the public interest, as well as to those engaged in such competition. Certificates of convenience and necessity for the addition and extension of service in public utilities are, therefore, to be considered a proper regulation.

Appellant complains particularly of regulations Nos. 3 and 4. Regulation No. 4 requires all taxicabs to be equipped with a practicable standard fare-registering device, or instrument, commonly known as a taximeter, that will measure the distance traveled by the vehicle, to which it is attached, and record, by figures or design, the fare determined or charged in dollars or cents, pursuant to such measure of distance or record of time. Regulation No. 3 provides that all fares shall be computed and determined on a mileage basis, plus waiting time, and recorded on a taximeter, and that no operator shall charge, or attempt to charge, any passenger a greater rate of fare than that to which the taxicab is entitled. It is a matter of common knowledge that taxicabs generally are equipped with taximeters, and that they are necessary to prevent persons or passengers using these taxicabs from being overcharged; that they may know exactly the charge for which they are liable, and not left to the mercy of any driver or operator of such vehicle. We think the regulations are reasonable, are not arbitrary, and are not confiscatory. In fact, most reputable taxicab companies have voluntarily, without requirement, installed taximeters in their cabs as a protection to the public and to the owners.

The Yellow Cab & Baggage Company and the other tax-

icab companies that joined with it in the application to the railway commission, together with the intervener, have filed a cross-appeal, because of the refusal or failure of the commission to fix a minimum fare for taxicabs. It is said that the commission refused or failed so to do because of section 75-1001, Comp. St. 1929, which provides: "No public body in this state authorized to fix rates for the service of any public utility shall establish other than maximum rates, and any minimum rate established by said body shall be deemed null and void." Upon the one hand, it is contended that said section is specific legislation and prevents the railway commission from adopting any order or regulation fixing minimum fares. On the other hand, it is contended that the statute is not specific legislation, within the meaning of the constitutional amendment, and in no way affects the power of the commission to adopt a rule or regulation providing for minimum fares.

It is unnecessary to pass upon the validity of the statute or its effect. If, without the statute, the commission did not deem it proper or wise to enact a rule fixing a minimum fare, that was a matter for it to determine. It would be, in effect, a legislative act of the commission, and failure to adopt a legislative act is not a subject for review by the court. We find no merit in the cross-appeal.

It follows that the order of the railway commission, in so far as involved in this appeal and passed upon in the opinion, is right and is

AFFIRMED.

PAINE, J., dissents.

EBERLY, J., concurring separately.

I concur in the result and the statement of the law as set forth in the syllabus, but do not agree with the views expressed by the learned author of the opinion on the subject of the powers of metropolitan cities as defined and conferred by charter, and which, in the absence of affirmative action on any particular subject involved by

the state railway commission, might be lawfully exercised by such city.

I am in harmony with the view that these grants of power to the municipality are general in their nature, may not be deemed "specific legislation" in the constitutional sense of that term, and must be now regarded as expressly subject and subordinate to rules and regulations of the state railway commission lawfully adopted within the scope of its constitutional powers.

JAMES CORCORAN ET AL., APPELLANTS, V. LEON'S, INC., ET AL., APPELLEES.

FILED FEBRUARY 16, 1934. No. 28668.

1. **Contracts**: OFFER: ACCEPTANCE. "An acceptance may be transmitted by any means which the offerer has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offerer, unless the offer otherwise provides." Restatement, Contracts, sec. 64.
2. **Landlord and Tenant.** "A tenancy from year to year will be presumed, where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord." *West v. Lungren*, 74 Neb. 105.
3. ———. "This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption." *West v. Lungren*, 74 Neb. 105.
4. ———. Evidence examined, and *held* ample to rebut the presumption that the occupancy of the leased premises by defendant from March 1, 1929, to February 28, 1930, was of such a character as to impose on it the obligation of continued payment of rent after the termination of that period.

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

S. L. Winters, for appellants.

Leon & White, contra.

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

EBERLY, J.

This is an action at law by James Corcoran and wife against Leon's, Inc., (a corporation) for rent of a storeroom and basement owned by plaintiffs, situated in Omaha, Nebraska, for the period commencing March 1, 1930, and terminating in May, 1931. Issues were joined by the defendant, and the trial, in which by agreement of parties a jury was expressly waived and the cause submitted to the court for determination, resulted in findings for the defendant and judgment dismissing the action. Motion for new trial was overruled, and plaintiffs appeal.

The undisputed facts are that defendant occupied the premises referred to from March 1, 1924, to February 28, 1929, under the terms of a written lease for five years, executed by the parties to this litigation. The covenants of this lease were performed, and all rent reserved was paid promptly. In the months of January and February, 1929, oral negotiations were carried on in the city of Omaha by the parties to this litigation for the purpose of securing a renewal or extension of this five-year lease, which, by its terms, expired on the last day of February of that year. All parties were residents of Omaha and the conferences were carried on by personal interviews as well as by use of the telephone. As the result of these efforts, excepting as to the amount of the monthly rental to be paid, a substantial agreement had been arrived at extending the terms of this five-year lease for the period of an additional year. On the subject of the monthly rental there was as yet no meeting of minds. Finally, on January 24, 1929, a letter in behalf of plaintiffs, duly subscribed, was transmitted by mail to defendant, from which we quote the following: "Since our conversation at your store, some ten days ago, relative to terms for renewal of lease on your Leon Store in South Omaha, which lease expires on March 1, 1929, will say that I am

obliged to notify you that I cannot make any concession to you relative to the reduction in rent. * * * Please notify me if you desire to continue to lease this building, at your earliest convenience."

By a letter dated February 1, 1929, the defendant replied to the foregoing communication. This letter of reply is, in part, as follows: "We are in receipt of your letter of Jan. 24. We believe your attitude is a most unreasonable one in view of the fact that property values have fallen and business conditions no longer justify such high rents. However, since we have already committed ourselves to purchases of merchandise for the next six months, we have decided to accept your proposition to hold over for one year at the same rental and under the terms and conditions of our present lease."

Plaintiffs deny receipt of this letter, and challenge the sufficiency of the testimony to establish this fact. However, the evidence is uncontradicted, and corroborated, that this letter of February 1 was dictated and signed by the authorized representatives of defendant; that it was placed in an envelope properly addressed, and with the necessary postage affixed thereto was on the day of its date deposited in the United States mail at Omaha, Nebraska.

The trial court expressly found that a contract was entered into, by virtue of this exchange of letters referred to above, for a lease for one year commencing March 1, 1929, and terminating February 28, 1930. This conclusion, omitting consideration of the question of the effect of the statute of frauds, the evidence amply supports.

The governing principle on this question appears to be that, where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post, the acceptance is communicated and the contract is completed from the moment the acceptance is mailed. *Burton v. United States,* 202 U. S. 344; *Tayloe v. Merchants Fire Ins. Co.,* 9 How. (U. S.) 390, 399, 400; *Patrick v. Bowman,* 149 U. S. 411, 424;

Adams v. Lindsell, 1 B. & Ald. (Eng.) 681; *Henthorn v. Fraser* (1892) 2 Ch. (Eng.) 27; *Wester v. Casein Co.*, 125 N. Y. Supp. 335; *Bluthenthal v. Atkinson*, 93 Ark. 252; *Campbell v. Beard*, 57 W. Va. 501.

"The request or authorization to communicate the acceptance by mail is implied * * * where a person makes an offer to another by mail and says nothing as to how the answer shall be sent." 13 C. J. 300.

"Since agreements made by means of the post * * * are simply an illustration of the general rule before stated that the offerer takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed, * * * and it makes no difference whatever that, through mistake of the post office authorities * * * or through accident in transmission, it is delayed or is lost in transit and never received by the offerer." 13 C. J. 301.

In short, "An acceptance may be transmitted by any means which the offerer has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offerer, unless the offer otherwise provides." Restatement, Contracts, sec. 64.

But, considered wholly without reference to the letter of plaintiffs dated January 24, and the rule as to implied authorization invoked thereby, we are persuaded that the presumption that was created by the facts disclosed in the evidence, viz., that defendant's letter of February 1 reached the addressee in due course of mail, is not rebutted by the proof offered in behalf of plaintiffs; that the question of fact arising from the conflicting evidence on this subject was for the trial court to determine, and that its judgment thereon is conclusive on this as a tribunal of review. *Papillon v. Brunton* (1860) 5 H. & N. (Eng.) 518; *Gresham House Estate Co. v. Rossa Grande Mining*

Co. (1870) W. N. (Eng.) 119; *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437; *City of Omaha v. Yancey*, 91 Neb. 261; *Heyen v. State*, 114 Neb. 783; *Leininger v. North American Nat. Life Ins. Co.*, 115 Neb. 801.

Further, the evidence fairly established that, in reliance on the validity of the agreement effected by the oral negotiations and the two letters already referred to, defendant continued in possession of the premises after the expiration of its five-year lease for the period of the year terminating on February 28, 1930; that it paid the monthly rental of $275 as promised in its letter of February 1, which was accepted by plaintiffs; that it complied with all the other provisions of its lease, and tendered possession of the demised premises to plaintiffs and abandoned possession thereof on or prior to the last day of its extended term.

Plaintiffs insist that the lease, which defendant claims the evidence establishes for the year ending February 28, 1930, is not in writing, is not signed by the lessor, and is void under the statute of frauds (Comp. St. 1929, sec. 36-103); that the defendant, remaining in possession after the termination of the five-year lease, claiming under a void lease, and thereafter making payments of rent, became thereby a tenant from year to year, for the termination of whose tenancy the service of a six months' notice was necessary, which had not been given; further, that until such service of notice had been made upon the lessee its liability for rents would continue indefinitely. Under the facts in the instant case we are unable to agree with plaintiffs' contention. Of course, it is true that "A tenancy from year to year will be presumed, where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord." *West v. Lungren*, 74 Neb. 105. But, "This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption." *West v. Lungren*, 74

Neb. 105. See, also, *Montgomery v. Willis,* 45 Neb. 434; *Bradley v. Slater,* 50 Neb. 682.

The exact issue presented in this case for determination is not the validity of the extension agreement, for that has been fully performed. It is rather the legal effect of this act of the parties in view of the provisions of the statute of frauds, as negativing, preventing, or terminating the liability of the tenant for continued payment of rent indefinitely, in the absence of the service of a six months' notice by it. It will be noted that the liability here sought to be enforced is an incident of the five-year lease which, when coupled with continuing possession of the tenant after expiration thereof, and no further agreement disclosed, the lessee at his option may ordinarily enforce. It arises by implication of law. The nature of an estate from year to year is a lease for a year certain with a growing interest during every year thereafter, springing out of the original contract and parcel of it. *Legg v. Strudwick,* 2 Salk. (Eng.) 413; Bac. Abr., Leases, L. 3, 621. See, also, *Oxley v. James* (1844) 13 M. & W. (Eng.) 208. If the identical terms, which appellants contend are implied by law, were actually expressed in the formal provisions of the five-year lease, even conceding arguendo that the extension agreement in this case rests wholly on parol, it may not be doubted that the mutual rights of the parties would be determined by its terms, notwithstanding the statute of frauds. This court is committed to the view that, "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." *Bowman v. Wright,* 65 Neb. 661. True, "Where * * * the contract is one required to be in writing by the statute of frauds, there must be consideration for a modification by waiving some of its requirements, or else such new agreement must be executed." However, where the lessee has not covenanted, and is not bound, to remain in possession for any purpose, continuing in possession at the

request of the lessor may be a valid consideration for a modification by waiving some of the requirements of his lease or changing the obligations thereof. See *Bowman v. Wright, supra.* In the instant case the renewal agreement was fully performed, and in reliance on the new agreement and in compliance with what was tantamount to a request of the lessor, defendant continued in possession of the leased premises after all possible duty so to do had expired under the five-year lease on February 28, 1929. It would seem that the power to thus change the terms of a written lease by parol undertakings would necessarily include the power to terminate or modify the incidents growing out of the same which spring out of the original contract and are a parcel of it.

But, is plaintiffs' position in this transaction such as permits them to invoke the protection of the statute of frauds as an essential element of their cause of action? In February, 1929, prior to the renewal agreement, defendant was charged with no duties to plaintiffs with reference to the demised premises, save to surrender it by midnight of February 28. Its five-year lease ended at that time, and its obligations would terminate with the seasonal delivery of possession thereof. However, it was induced by the request of plaintiffs, made orally and in writing, to enter into this contract of extension, and in reliance thereon, "amid the silence of plaintiffs," to remain in possession and pay rent as stipulated therein, after the termination of the five-year lease. Defendant remained in occupancy of the premises for the entire period of extension agreed upon, paid all rent accruing therein, kept its covenants created thereby, and surrendered or tendered the surrender of its leasehold in prompt conformity with the terms of its undertaking.

Plaintiffs now challenge this contract of extension as contravening the statute of frauds, and void; and by this action seek to impose upon defendant the burden of continued payment of rent as a tenant from year to year holding over under the terms of the five-year lease. This

liability was expressly negatived by the terms of the renewal contract, and its existence would have been utterly impossible without the continued possession of the leasehold by the defendant after February 28, 1929, which the contract now challenged induced.

In this connection it is to be remembered that this court is committed to the view that "The statute of frauds does not render a contract void, but voidable at the option of either party. But it does not require a party to ignore considerations of moral obligation, equity, and good faith, by pleading the same." *Bodie v. Robertson,* 113 Neb. 408. See, also, *Cresswell v. McCaig,* 11 Neb. 222.

Obviously, the plaintiffs are seeking to employ the statute of frauds as a sword, and are not attempting to make use of it as a shield. The circumstances here presented invoke the application of the following well-established principles:

"The statute of frauds, designed to prevent fraud and perjuries, will not be allowed to operate as a means of fraud either in permitting one guilty of fraud to shelter himself behind it, or in allowing its use as a means of perpetrating fraud." 27 C. J. 302.

"The statute of frauds can only be invoked to avoid an oral contract in case one is free from deceit and false representations." *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419. See, also, *Norton v. Brink,* 75 Neb. 566.

But the facts before us suggest another consideration. If this tenancy, due to the invalidity of the renewal lease, is to be deemed from year to year, still the right to terminate such a tenancy is an inseparable incident thereof. *Doe v. Browne* (1807) 8 East. (Eng.) 165; *Holmes v. Day,* 8 Ir. R. C. L. 235; *Western Transportation Co. v. Lansing,* 49 N. Y. 499. The approved method in accomplishing this result is by agreement of the parties, express or implied, or by notice given six calendar months ending with the period of the year at which the tenancy commenced. *Critchfield v. Remaley,* 21 Neb. 178. The six

months' notice may be either in writing or verbal. 2 Taylor, Landlord and Tenant (9th ed.) 482; *Lord Macartney v. Crick*, 5 Esp. (Eng.) 196; *Timmins v. Rowlinson*, 3 Burr. (Eng.) 1603; *Eberlein v. Abel*, 10 Bradw. (Ill.) 626; *Thamm v. Hamburg*, 7 Phila. (Pa.) 266. And such notice may be served so as to afford the party notified six months before the expiration of the next or any following year. *Right ex dem. Flower v. Darby* (1786) 1 T. R. (Eng.) 159.

It appears in the case of *General Assurance Co. v. Worsley* (1895) 64 L. J. Q. B. (Eng.) 253: "On the 11th of January, 1892, a tenant wrote to his landlord's agents as follows: 'I hereby give you notice that I wish to terminate my tenancy of the offices. Will you kindly let me know when my tenancy will expire?' The reply, dated the 13th of January, was: 'On referring to your agreement we find that six months' notice must be given to terminate on the 1st of July in any year; you therefore hold the rooms till July, 1893.' Held, that a valid notice to quit had been given and accepted, and that the tenant was not liable for rent after the 1st of July, 1893."

Under this rule it would seem that the letter of February 1 plainly discloses an intent on the part of the tenant to terminate the tenancy commencing on March 1, 1929, on the 28th day of February, 1930, and ample as a six months' common-law notice to accomplish that purpose.

However, it will be remembered that this jurisdiction is committed to the rule that the presumption arising from the continuance of a tenant in possession after termination of his term and the payment of rent may be rebutted by proof of "facts inconsistent with the presumption." *West v. Lungren*, 74 Neb. 105. As to the payment of rent, it was early determined that "The receipt of rent by the landlord is not conclusive as to the continuance of the term, but it is an equivocal act to be determined by the *quo animo*." *Pusey v. Presbyterian Hospital*, 70 Neb. 353.

In a case involving a question similar to the one here considered, the supreme court of Alabama, after pronouncing the rule as to presumption in terms similar to the one here adopted, further say: "Presumption of renewal of lease by tenant merely holding over is rebutted by proof of a new contract materially different from the original lease, and this, notwithstanding the new contract is void by the statute of frauds, because verbal, and not to be performed within a year from the making thereof." *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499.

In *West v. Lungren*, 74 Neb. 105, where the facts were that a tenant from year to year held possession for the agricultural year of 1902 (March 1, 1902, to March 1, 1903) under an oral agreement made November, 1901, for that period, this court, notwithstanding the reference to the statute of frauds in the briefs, held in effect that the oral lease followed by possession thereunder obviated the necessity of service of the six months' notice to terminate the tenancy.

It is obvious that the express determination of the force and effect of the statute of frauds in this case, and the validity of the contract of renewal as such, may not be required in the proper disposition of this case. We are convinced that the facts established by this record are at least wholly inconsistent with the presumption on which plaintiffs' cause rests, and are ample to rebut the same.

The judgment of the district court is correct, and is

AFFIRMED.

VERNON LEWIS, APPELLEE, V. RAPID TRANSIT LINES, APPELLANT: KENNETH PFLUG, APPELLEE.

FILED FEBRUARY 16, 1934. No. 28740.

1. **Appeal.** Assignments of error not made or discussed in appellant's brief will not be considered in the determination of an appeal.

2. **Trial.** The trial court properly denied appellant's motion for a directed verdict in its favor.
3. **Automobiles:** DUTY OF GUEST. Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented.

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

Ziegler & Dunn and *George W. Becker,* for appellant.

Wear, Garrotto & Boland and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This is an appeal from the district court for Douglas county wherein the action was one to recover damages for personal injuries alleged to have been sustained by the plaintiff in a collision which occurred between the automobile in which he was riding as a passenger, and which was driven by Kenneth Pflug, and a passenger bus being operated by the employees of the defendant Rapid Transit Lines.

The verdict of the jury was in favor of plaintiff and against defendant Rapid Transit Lines in the sum of $4,250, and was in favor of the defendant Kenneth Pflug.

The plaintiff alleged negligence on the part of Kenneth Pflug, driver of the car in which plaintiff rode, in operating his car at a speed greater than was reasonable and proper taking into consideration the condition of the highway and the circumstances at the time and place, and also in the failure to keep a proper lookout and to have his automobile under proper control; and alleged negligence on the part of the driver of the bus in that the bus, a grey-colored vehicle, was parked with all four wheels upon the paved portion of the highway in the

nighttime and without display of any lights or warnings. Plaintiff alleged that the negligence of the two defendants concurred to cause his injuries.

The defendants answered separately. Each denied negligence and, without any specific allegation of contributory negligence, made the general allegation that any injuries sustained by plaintiff were due to his own carelessness and negligence. The reply was a general denial, and upon these issues the case went to trial. The defendant Rapid Transit Lines is the sole appellant here.

The appellant, on the submission of the case by oral argument, undertook to present for the consideration of the court an alleged error of the trial court in sustaining an objection to an offer of proof on the part of appellant. It was at the time asserted on behalf of the appellee that this question was not assigned in the motion for a new trial. It was not specifically assigned therein, and whether any of the more general assignments might be construed to cover it we do not need to inquire at this time for the reason that this particular error is not included in the assignments of error in the brief, nor in any wise discussed therein. The court cannot be expected to search the record to determine questions not raised according to the well-established procedure in this court, and that matter will not be further considered.

The assignments of error on this appeal are (1) that the court erred in overruling the motion of appellant for a directed verdict, and (2) that the court erred in failing to instruct the jury that it was the duty of plaintiff in looking out for his own safety to protest against the driving of defendant Pflug at such a speed that he could not stop to avoid hitting objects on the highway within the radius of his lights.

Upon the first proposition it is sufficient to say that, as to the actual conditions at the time and place of the accident, the testimony is sharply and hopelessly in conflict. The four witnesses who were in the car in which plaintiff rode all testify to the effect that the night was

rather chilly, the weather was misty so that moisture gathered on the windshield, and there was considerable fog, especially in the lower places, which obstructed the vision, it being so damp that the windshield wiper on the driver's side was working all the time. They further testify that the appellant's bus was parked or stopped on the paved portion of the highway, which was 18 feet in width, without lights; that it was painted in yellow and black, and that it was considerably covered with mud so as to render it almost invisible without lights; and that, although the lights of the automobile cast their beams some 35 feet ahead, yet they were not able to see the bus until within approximately 10 feet of it, at which time the driver undertook to cut off to his left, the car was sideswiped and the plaintiff's arm injured. Plaintiff was riding in the front seat and on the right of the driver.

The testimony of the defendant's two witnesses was to the effect that the bus was not stopped, but that with a disabled engine it was moving at approximately 15 miles an hour, the lights were on, the night was not foggy or misty and the pavement was dry.

In this state of the testimony it is plainly apparent that the court would not have been justified in directing a verdict.

Upon the second proposition, as to the failure to instruct the jury concerning the duty of a guest passenger to keep a lookout and to either warn the driver or protest concerning his driving, the trial court might well have been more definite in its instructions as to the rules of the road and as to the violations thereof or other acts proper to be considered as evidence of negligence. In this respect, however, the court was fully as definite in its instructions as the parties had been in their pleadings. The instructions given properly covered the general features of the case with definitions of negligence in its different degrees and the other terms used, and, as stated, might have well been more specific in reference to some features; but the complaint here on this appeal is par-

ticularly and only as to the lack of more definite instructions concerning the duty of the plaintiff as a passenger to protest against the speed of the driver, Kenneth Pflug. This criticism may be answered in two ways: First, that the evidence tends to show that it was a misty, foggy night, the fog being heavier in the lower places; that the windshield wiper was operating in front of the driver; that there was none in front of the plaintiff on his side; that there was no way in which the plaintiff could see as well as the driver on account of his vision being obstructed, and, under the circumstances as shown, anything that came or could have come within his knowledge or observation, was better and more clearly within the knowledge and observation of the driver. The speed of the car, as estimated, varies from 20 to 30 miles an hour and the court could hardly do more than say to the jury, which it did, that it was for them to say whether under the circumstances then and there existing such speed was negligent. It seems obvious that with better opportunity existing for observation and the like with the driver, and plaintiff's opportunities in that regard being much limited, there would be no occasion to instruct the jury as to any warning that plaintiff should have given. In addition, it should not be overlooked that, according to defendant's theory of the case, there was no mist, no fog, and no wet pavement. In such circumstances there would be no occasion for any one to be concerned about the visibility of things or a speed of 20 to 30 miles an hour at that time on the paved highway, and the testimony does not disclose a situation wherein the plaintiff might reasonably have been expected or required to protest or to warn the driver.

The assignment of error might also have greater weight were it not for the fact that by the verdict of the jury the defendant Pflug has been exonerated of negligence. The jury evidently took the view that the plaintiff had established his case and that the operator of defendant's

bus was negligent in stopping the same at night, under the circumstances then existing, on the 18-foot strip of paved highway and without lights. We cannot say that the jury were wrong and, in that view of the evidence, the finding against the appellant was fully justified. It is possible that, before the submission of the case to the jury, its aspect would have warranted some further instruction than was given as to the duties of a guest passenger, but such omission must now be regarded, if erroneous, as harmless error, because the jury have found that there was no negligence of the defendant Pflug, as to which the plaintiff himself would have been under duty to protest.

In this view of the record, we do not believe it necessary to undertake a discussion of the cases cited in the briefs or the particular distinctions to be made between them. They are the rules applied to the particular facts of the respective cases. Our statute provides that all questions of negligence are for the jury. Comp. St. 1929, sec. 20-1151. This is all inclusive except as to such instances where the court can say as a matter of law that no negligence has been established as against some certain party. The rule seems to be well-settled in this state that it is not the province of the court to tell the jury in its instructions that a certain thing is negligence if found in that case, but may refer to matters which find support in the evidence and advise the jury that those things may or should be considered by the jury in determining the fact of negligence. The court finds no occasion to recede from the rule announced in *Roth v. Blomquist,* 117 Neb. 444, and considers the propositions in this case more closely covered by the cases of *Giles v. Welsh,* 122 Neb. 164; *Johnson v. Mallory,* 123 Neb. 706; *Monasmith v. Cosden Oil Co.,* 124 Neb. 327, and *Adamek v. Tilford,* 125 Neb. 139.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

JOHN MISCHO, APPELLEE, V. HENRY VON DOHREN, APPELLANT.

FILED FEBRUARY 16, 1934. No. 28792.

1. Instructions examined and the giving thereof *held* not prejudicial to appellant.
2. Evidence. The admission in evidence of the Carlisle table of expectancy, and the references in testimony to liability insurance carried by defendant, *held* to be without error.
3. Damages. Verdict *held* not to be excessive.

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

Votava & McGroarty, for appellant.

Paul I. Manhart, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This action is to recover for personal injuries alleged to have been sustained by plaintiff, a pedestrian, who, in crossing St. Mary's Avenue in Omaha at its intersection with Leavenworth street, on November 30, 1931, was struck by an automobile driven by defendant. The plaintiff claims to have suffered injuries principally to his head and the lower region of his back. The case was tried in December, 1932, and the jury awarded him a recovery in the sum of $1,900.

The defendant, appellant, complains (1) that the court erred in submitting to the jury by instruction No. 15 the question of the permanency of plaintiff's injuries and, incident thereto, in admitting in evidence the Carlisle table of expectancy; (2) that there was error in the giving of instruction No. 11 on the subject of comparative negligence; (3) that the verdict is excessive; and (4) that there was misconduct of counsel in proving that the defendant carried insurance.

There was testimony tending to show that the plaintiff

was a farmer, 54 years of age, and prior to the accident in good health, weighing 196 pounds, and doing his own work on his farm of 117 acres; that the blow by which he was injured threw him approximately eight feet from the automobile to the pavement; that he was under medical observation and treatment from that time until the following June, after which he received home treatment. He was examined and treated by two physicians. X-rays were taken. He was reexamined in June, 1932, and again in December shortly before the trial. He constantly complained of pain in his head and back and of soreness and inability to bend the body or stoop, and so continued up to the time of trial. He lost from 25 to 27 pounds in weight and became nervous and much depressed, occasionally giving way to spells of crying. He did not, and claimed he could not, do any of the heavier farm work, and worried much concerning his condition. The physicians, three in number, stated that they had found no organic basis for the complaint of pain, no bones, muscles or ligaments broken, torn or misplaced, no satisfactory reason or explanation why there was not a reasonably prompt and full recovery or why he should now complain of pain, and doubted whether there was any permanent injury "from the physical examination standpoint." There was further testimony by his wife and son and sister-in-law who had all been in contact with him and had part in his care throughout the period. There is neither statement nor intimation that he was consciously or intentionally faking injury or pain.

The foregoing is a brief outline of the import of the testimony covering that feature of the case from the bill of exceptions, consisting of a total of 213 pages, upon consideration of which we find adequate basis for the submission by the court to the jury of the question of permanency, to the extent to which it was actually submitted. The part of the instruction criticized is herein italicized:

"If you find from the evidence that the plaintiff is entitled to recover in this case, it will be necessary for you

to determine the amount of damages he has sustained as the direct and proximate result of the accident, *and in arriving at these damages, if any the plaintiff has sustained, you will take into your consideration the character and extent of the injuries, if any, whether the same are permanent and will continue to exist in the future to the fullest extent, or only partially, or whether his injuries were only transient and ones from which he will recover.*

"You will also take into consideration any pain and suffering which was the direct result of the accident, and such expenses as were incurred for medical attention as shown by the evidence, and award him such damages, but only such as will fairly compensate him, or make him whole.

"You are not permitted to allow the plaintiff any damages by way of punishment or through sympathy, or any prejudice against either of the parties, as the law recognizes only compensatory damages, that is, such damages as will fairly make the plaintiff whole for the injuries which he has sustained."

It will be noted that the court did not authorize recovery for future pain and suffering, nor for expenses except medical attention; but only for that "which was the direct result of the accident," and "for the injuries which he has sustained."

In the case cited by appellant, *Lowe v. Armour Packing Co.*, 148 Minn. 464, the injured person was taken to a hospital and received first aid, the next day called a physician who found a bruise on the forehead, two teeth loosened, a bruise on her right knee, and one on her hip. She complained of pain, nervousness, and inability to sleep. The doctor gave her a sedative and a lotion with which to bathe the knee. He called once or twice afterwards and communicated with her a few times by telephone. From an examination before the trial, two physicians testified that in their opinion plaintiff had suffered no structural, functional or permanent injuries and that no abnormal condition then existed. There is not shown to have been

other testimony to this phase of the case than that of plaintiff and the two physicians. The court did not grant a new trial but required the recovery of $2,500 to be reduced to $1,500.

In another case cited by appellant, *McGowan v. Dresher Bros.*, 106 Neb. 374, the objection was upon the submission to the jury of the question of the permanency of the injury. The case rested upon the statements of plaintiff as to how his injured foot affected him and of two physicians called by defendant who testified to the complete healing of the fracture, leaving all bones of the foot in normal size, shape, and position, and no indication of anything in the bones, nerves or muscles that would cause a disability. The court holds that the question of permanent diability should not have been submitted to the jury, but plaintiff, having sustained a severe injury and having been incapacitated for several months, and previously earning $110 a month, was entitled to substantial damages. It further held, however, that the amount of $3,500 was probably enhanced somewhat by a speculative view of a permanently disabled foot and required the plaintiff to remit $1,000 therefrom, leaving the judgment to stand at $2,500.

As is said in the opinion in that case, so in this one, we cannot find that the verdict was the result of passion and prejudice. When we pause to realize that plaintiff was unexpectedly struck in the region of the lower back by an unyielding weight of more than a ton, moving at a speed, as the defendant himself states, of from 12 to 15 miles an hour and that he was thereby incapacitated for several months, it requires no imagination to conclude that he sustained substantial injuries. The verdict in this case of $1,900 does not indicate an enhancement by a speculative view of the result, nor appear to be more than adequate compensation for the injury and suffering already sustained.

It follows from these observations that the complaint as to instruction No. 15 must be overruled, the admission of

the Carlisle table in evidence was not prejudicial, and the amount of the verdict is not found to be excessive.

Upon the objection raised to the language of instruction No. 11, as to comparative negligence, that particular language has been many times approved by this court and, although criticized in a recent case and doubtless susceptible to improvement, we do not think the use thereof was prejudicial or could have misled the jury in this case. We are inclined to hold with the syllabus in *Kelso v. Seward County,* 117 Neb. 136: "When an instruction is substantially correct, a case will not be reversed because it is possible to improve the phraseology thereof."

The record does not disclose any wilful or undue overstepping of proper bounds in the references during the trial of the matter of insurance carried by defendant. The trial court has a reasonable discretion therein, and properly instructed the jury thereon. This assignment must, therefore, under the well-established rule of this court, be overruled.

Having examined all the errors assigned on this appeal and finding nothing prejudicial to appellant therein, the judgment of the district court is

AFFIRMED.

JOHN J. WILSON, TRUSTEE, APPELLANT, V. NEBRASKA STATE BANK, APPELLEE.

FILED FEBRUARY 16, 1934. No. 28620.

1. **Bankruptcy**: "GOING CONCERN." An insolvent manufacturing corporation which has sold its factory building, grounds and part of its machinery, for the purpose of liquidating its affairs, is no longer a "going concern."
2. ———: "DEPOSIT." A deposit in a bank, by an insolvent manufacturing corporation which has ceased to be a "going concern," of the proceeds from the sale of its factory building, grounds and a part of its machinery is not a deposit made "in the ordinary course of business" of the insolvent.

3. ———: "SET-OFF." To entitle a bank of deposit, which is also a creditor, to set off a checking account of the insolvent debtor against a note of the insolvent owned by the bank, under section 68a of the United States bankruptcy act, such deposit must have been made "in the ordinary course of business" of the insolvent.
4. ———: PREFERENCES. Where an insolvent manufacturing company, with the advice and approval of the officers of its bank of deposit, which was also a creditor, has sold its factory building, grounds and a part of its machinery for the purpose of liquidating its affairs, the act of said bank in appropriating the deposit as a set-off to its claim against the insolvent within four months prior to the filing of a petition in bankruptcy is voidable at the suit of the trustee of the bankrupt estate, under section 60a of the United States bankruptcy act, as an unlawful preference over other creditors of the same class.
5. ———: ———. *Held*, under the evidence in this case, the defendant bank was not entitled to set off the checking account of the bankrupt against the note of the bankrupt owned by the defendant bank, and that, by so doing, the defendant bank received a preference over other creditors of the same class voidable at the suit of the trustee of the bankrupt estate.

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

Burkett, Wilson, Brown, Wilson & Van Kirk and *George E. Hager*, for appellant.

Beghtol & Foe and *J. Lee Rankin, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

HORTH, District Judge.

On March 29, 1928, an involuntary petition in bankruptcy was filed in the district court of the United States for the district of Nebraska, Lincoln division, against the Lincoln Box and Manufacturing Company, hereinafter called the company, and on April 19, 1928, the company was adjudged a bankrupt, and by this action the trustee of the bankrupt estate, hereinafter called the plaintiff, seeks to recover from the Nebraska State Bank of Lincoln, Ne-

braska, hereinafter called the defendant, the sum of $9,745.93, with interest thereon, which amount the defendant on February 21, 1928, charged to the checking account of the company and credited on the $16,250 demand note of the company owned by defendant; plaintiff asserting that the defendant thereby received a preference in payment over other creditors of the same class of the bankrupt, under the provisions of the bankruptcy laws of the United States. The defendant answering, admitted the filing of the petition in bankruptcy against the company, that the company was adjudged a bankrupt, and that plaintiff was elected and appointed trustee of the bankrupt estate; denied all other allegations of plaintiff's petition; and as an affirmative defense pleaded the right to set off the amount of the company's deposit against the company's note owned by it.

The cause came on for trial in the district court and, when all the evidence had been presented, each party moved for an instructed verdict. The trial court discharged the jury, found that the act of the defendant in setting off the company's deposit against the note owing to the defendant by the company did not constitute a preference under the bankruptcy law, and further found, generally, in favor of the defendant and dismissed plaintiff's petition. Plaintiff's motion for a new trial having been overruled, plaintiff appeals, urging that the trial court erred in refusing to enter judgment in favor of the plaintiff and in dismissing plaintiff's action.

It appears from the evidence that for several years prior to February 20, 1928, the company had been engaged in a general woodwork and box manufacturing business in the city of Lincoln, owning its own factory building, the machinery necessary for the conduct of its business, and the grounds occupied by the factory building; that during all of said years the company had borrowed money from and had maintained a checking account with the defendant; that on February 20, 1928, the company, with the knowledge, advice and approval of the managing officers

of the defendant, sold its real estate together with the factory building situated thereon and a portion of its machinery for the sum of $9,908.04, and deposited the check representing the sale price in its checking account with the defendant; stored the unsold portion of its machinery and ceased to do any manufacturing business. In the morning of February 21, 1928, the defendant charged the company's checking account with the sum of $9,745.93 and credited said amount on the $16,250 demand note of the company.

Two major questions present themselves for determination, namely: (1) Did the defendant, under the facts in this case, have the right of set-off under the provisions of section 68 of the United States bankruptcy act; and (2) did the defendant receive a preference over other creditors of the same class, voidable at the instance of the plaintiff, under the provisions of sections 60a and 60b of said bankruptcy act?

1. Section 68 of the United States bankruptcy act provides:

"a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." 30 U. S. St. at Large, ch. 541, p. 565.

In 1904 the supreme court of the United States, in interpreting section 68a of the bankruptcy act, in *New York County Nat. Bank v. Massey,* 48 L. Ed. 380 (192 U. S. 138) said:

"Insolvents, by depositing money in a bank upon an open account, subject to check, do not thereby make a

transfer of property amounting to a preference, which, under the bankruptcy act of 1898 (30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445), sec. 60a, will deprive the bank of its right under section 68a to set off the amount of such deposit remaining to the depositors' credit on the date of their adjudication in bankruptcy and to prove its claim against the bankrupt estate for the balance."

In 1913 the court again had the question under consideration in *Studley v. Boylston Nat. Bank,* 57 L. Ed. 1313 (229 U. S. 523) and the court there said:

"The enforcement by a bank of its lien or right of set-off by applying deposits, honestly made *in due course of business,* and without intent to prefer the bank, to the payment of the depositor's notes in the bank's favor as they matured, does not, though within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the act of July 1, 1898, there being nothing in section 68a of that act which prevents the parties from voluntarily doing before the petition is filed what that section itself requires to be done after the proceedings in bankruptcy are instituted." (The italics are ours.)

It will be observed, in the *Studley* case, the court limits a bank's right of set-off to deposits made by the insolvent *in due course of business.* The following inquiry, therefore, suggests itself: Was the deposit of $9,908.04, representing the sale price of the company's factory building, grounds and a part of its machinery, made in due course of business?

In *Walbrun v. Babbitt,* 83 U. S. 577, Mendelson, a retail merchant of a miscellaneous stock of goods, was insolvent and sold his stock of merchandise in bulk to one person. The court said:

"The 35th section of the bankrupt law condemns fraudulent sales equally with fraudulent preferences, and declares that if said sales are not *made in the usual and ordinary course of business of the debtor* that fact shall be *prima facie* evidence of fraud. The usual and ordinary

course of Mendelson's business was to sell at retail. * * * It was to conduct a business of this character that the goods were sold to him and, as long as he pursued the course of a retailer, his creditors could not reach the property disposed of by him, even if his purpose at the time were to defraud them. But it is wholly different when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business."

As a going concern, the business of the company was the manufacture and sale of boxes and woodwork, and as incidents thereto the company borrowed money from the defendant upon its promissory notes, contracted indebtedness for materials purchased from others, maintained a checking account with the defendant and, as funds were received by the company, they were deposited in its checking account with the defendant. Such deposits were deposits made in the ordinary course of business. After the company disposed of its factory building, grounds and a part of its machinery and removed and stored the unsold portion, its usual course of business was thereby interrupted. It was incapacitated from conducting the corporate enterprise in which it had been engaged. It was insolvent and unable to extricate itself from its financial difficulties. It had ceased to be a "going concern," and at this stage in the company's history the deposit in controversy was made.

In *Oliver v. Lansing*, 59 Neb. 219, Justice Norval, in writing the opinion, said: "A 'going concern' is, as we understand it, some enterprise which is being carried on as a whole, and with some particular object in view."

In *White, Potter & Page Mfg. Co. v. Pettes Importing Co.*, 30 Fed. 864, in defining the term "going concern" as applied to a corporation, the court said that it means that it continues to transact its ordinary business.

In *American Woodworking Machinery Co. v. Agelasto*, 136 Fed. 399, defining when a manufacturing plant is a "going concern," the circuit court of appeals, fourth cir-

cuit, said: "Our opinion is that the site, the structure, the motive power, and the machinery, whether the last be movable or immovable, combine to constitute the manufacturing plant, and the operations as manufacturer cannot begin until the plant is thus complete, or, in common parlance, until the plant is a 'going concern.'"

If, at the time of making the deposit of February 20, 1928, the company was not a going concern, then the deposit was not made in the ordinary course of business of the company.

In *Merrimack Nat. Bank v. Bailey*, 289 Fed. 468, the circuit court of appeals of the United States for the first circuit held: "Where the business of an insolvent was being liquidated by its creditors, its business being shut down, and the proceeds of liquidation were deposited in various banks, with an agreement and understanding as to the *pro rata* distribution among the creditors generally, the action of a bank of deposit, which was also a creditor, in appropriating the deposit as a set-off to its claim against the insolvent, was void, under the bankruptcy act, section 60a (Comp. St. sec. 9644), as an unlawful preference, and not within the rule that, where a deposit is made in good faith and *in the usual course of business* within four months before the petition in bankruptcy, the bank is allowed to credit the amount on notes of the bankrupt held by it." In the body of the opinion it is said: "We recognize, of course, the soundness of the rule stated in such cases as *American Bank & Trust Co. v. Coppard*, 227 Fed. 597, 142 C. C. A. 229, that: 'When an insolvent customer makes a deposit in his bank, in good faith and *in the usual course of business,* at any time within four months before the petition in bankruptcy is filed against him the bank is allowed to credit the amount on notes of the bankrupt held by it.' (Italics ours.) But in this case the deposits were not made 'in the usual course of business.' There was no 'usual course of business' after November 1. The insolvent's business was then shut down; it was being liquidated by its creditors; naturally enough, the proceeds of

liquidation were deposited in various creditor banks. *The understanding that no preferences should be given was, in effect, nothing but a recognition of the requirements of the law.*" (Italics ours.)

In 263 U. S. 704, certiorari in the *Merrimack Nat. Bank* case was denied.

In *Gates v. First Nat. Bank of Richmond,* 1 Fed. (2d) 820, it is said: "Where vice-president of bank, who was chairman of creditors' committee, knew that debtor could not continue business unless creditors extended time for payment of debts, that creditors had not agreed to moratorium, and that debtor had suspended operations before it made deposits in bank, the bank had reasonable cause to believe, when it charged such deposits to the debtor's indebtedness in bank, that effect thereof would be to give it a preference." In the body of the opinion it is said: "The company was not, it is true, being operated by its creditors' committee; therefore the deposits in the bank were made by the company itself, rather than as in the *Merrimack* case. But the deposits were made after the suspension of operations, and the bank knew this. So I do not think the deposits were made in the ordinary course of business."

In *Union Bank & Trust Co. v. Loble,* 20 Fed. (2d) 124, the circuit court of appeals of the ninth circuit said: "Where bank, with knowledge of bankrupt's failing circumstances, suggested that bankrupt conduct a special sale to raise money to pay certain creditors, with a view to reorganizing and continuing the business, the fund realized on such sale and deposited in the bank *held* impressed with character of trust fund, so as to exempt it from bank's claim to right of set-off against debt owing it from bankrupt."

We conclude that the deposit by the company on February 20, 1928, was not made in the due course of business, that the defendant was not entitled to set off such deposit, or any part thereof, against the indebtedness due it from the company, and the act of the defendant in crediting

$9,745.93 of such deposit upon the note of the company was a "transfer" within the meaning of the bankruptcy act.

2. Did the defendant receive a preference, voidable at the instance of the plaintiff, under the provisions of sections 60a and 60b of the bankruptcy act?

We quote so much of sections 60a and 60b as is necessary to the discussion of the question under consideration:

Section 60a. "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." 32 U. S. St. at Large, ch. 487, p. 799.

Section 60b. "If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." 36 U. S. St. at Large, ch. 412, p. 842.

In *Emporia Loan & Investment Co. v. Rees*, 66 Fed. (2d) 225, the circuit court of appeals of the tenth circuit hold:

"'Voidable preference' within bankruptcy law implies intent or willingness on creditor's part to deplete insolvent fund in order to obtain satisfaction in whole or in part of claim."

The burden of proof rested upon the plaintiff to establish by a fair preponderance of the evidence: (1) A transfer of the company's property to the defendant within four months prior to the filing of the petition in bankruptcy; (2) that the company was insolvent at the time of the transfer; (3) that the enforcement of the

transfer would enable the defendant to secure a greater percentage of its claim than other creditors of the same class; and (4) that the defendant knew this or had reasonable cause to believe it.

(1) and (2) of the above requirements may be disposed of by the statement that it satisfactorily appears from the evidence and admissions of the defendant that the transfer of the $9,745.93 from the checking account of the company to the defendant was made February 21, 1928, that the company was insolvent at that time, and that the petition in bankruptcy was filed March 29, 1928.

Does the evidence show the enforcement of the transfer (meaning a finding that the act of the defendant in appropriating the company's deposit was not a voidable preference) would enable the defendant to secure a greater percentage of its claim than other creditors of the same class?

The record and evidence disclose that on February 20, 1928, the company's assets amounted to approximately 60 per cent. of its liabilities; that by appropriating the company's deposit the defendant received a sum approximating 60 per cent. of its entire claim, and that other creditors of the same class have received nothing upon their claims. Such evidence as there is tends to show that on February 21, 1928, the remaining assets of the company, consisting of a broken stock of merchandise, detached parts of machinery, office equipment, all in storage, and books of account were of the value of $6,200. Deducting the $9,745.93 received by the defendant, the company's liabilities remained about $15,700 made up of the $6,545, the balance of defendant's claim, and about $9,155 due to other creditors of the same class. Assuming that the remaining assets of the company produce $6,200, it would mean a dividend to all creditors of approximately 40 per cent. upon such remaining liabilities.

If, *at the time,* the defendant appropriated the checking account of the company, its act in so doing was lawful, and did not constitute a voidable preference, it carried

with it, as a part of the same transaction, the right to the defendant to share, *pro rata,* with other creditors of the same class, in the distribution of the remaining assets of the bankrupt, and thus in the final analysis the defendant would have received approximately 77 per cent. of its entire claim, while other creditors of the same class would receive only about 40 per cent. of their respective claims. It necessarily follows that the validation of the act of the defendant, in appropriating the company's deposit, would secure to the defendant a greater percentage of its claim than other creditors of the same class.

In *Commerce-Guardian Trust & Savings Bank v. Devlin,* 6 Fed. (2d) 518, it is said: "Though bankrupt's liabilities were about twice amount of assets, a creditor who was paid 48 per cent. of its claim shortly before bankruptcy received a preference, since if preference were upheld, creditor could still claim balance of debt and share with others in distribution." In the body of the opinion it is said: "We see no merit in the suggestion that the bank got no greater percentage on its own claim (about 48 per cent.) than creditors generally would have had, if we accept the estimate of 50 per cent. made by the bankrupt's bookkeeper. The bank actually received 100 per cent. on $6,300 of its claim, and, if the preferences were upheld, would be entitled to receive upon the balance of its claim the same percentage as other creditors of the same class."

In *Armour & Co. v. Callahan,* 25 Fed. (2d) 584, the circuit court of appeals of the fourth circuit said: "Creditor of a bankrupt corporation may not, on eve of bankruptcy, take possession of assets of the estate * * * and thereby virtually secure a part payment of his claim."

Did the defendant know, or have reasonable cause to believe, the enforcement of the preference it received, by appropriating the company's deposit, would enable it to receive a greater percentage of its claim than other creditors of the same class?

Mr. Charles Thornberry, a witness, testified he was president and manager of the Lincoln Box and Manufac-

turing Company at the time it quit the business of manufacturing and selling goods, and so on, *in February,* 1928, and had been such president and manager for three or four years; that on February 20, 1928, he sold the real estate, building and some of the equipment of the company; that he told both Beaumont and Coe, he thinks, to deposit proceeds of sale in the bank together with whatever he could collect and build up a fund for the benefit of creditors.

Mr. F. M. Beaumont, another witness, testified that from 1911 to July, 1928, he was an officer of the defendant bank—vice-president for a number of years—then cashier for a number of years; that he knew of the financial difficulties of the Cushman Motor Company, that the Lincoln Box and Manufacturing Company was then a subsidiary corporation of Mr. Sawyer in connection with the Cushman Motor Company; that the Lincoln Box and Manufacturing Company was then indebted to the defendant bank; that we insisted that this loan be cut down, it was an excessive loan; that it was in financial difficulties; that from that time on the defendant tried to keep pretty close supervision over the business matters of the Lincoln Box and Manufacturing Company; that as an officer of the bank during those years he consulted with Mr. Thornberry frequently in reference to the matters; that Mr. Coe, also an officer of the Nebraska State Bank during those years, was in constant consultation with Mr. Thornberry with reference to the business; that the matter of the sale of the property was discussed on a number of occasions prior to the time the actual sale was made; we allowed him to go ahead and pay off small outstanding foreign accounts; we gave our consent for him to issue checks to do that; had several talks with Mr. Thornberry at the bank with reference to a sale of the property; and on one or two occasions at the factory; we wanted to get the line reduced and were anxious to have a sale; Mr. Coe and Thornberry discussed the matter several times in my presence; that we would never have given our consent

that the amount received for the plant would be applied on the liquidation of the indebtedness of the corporation, as we held the stock as collateral for our notes we didn't think he had a right to sell the property and leave us sitting high and dry; I don't recall the date of the sale, I do know that Mr. Thornberry came in after the regular banking hours and the tellers were all out of their cages at that time and I was in my office, and Mr. Thornberry says, I want to make a deposit, and I personally handed him a deposit slip and he filled it out and took credit for it; I consulted with Mr. Coe that night or the next morning with reference to the deposit and what should be done with it; consulted with attorney Stout about the matter; we turned down some checks he had issued on the deposit and we simply told Mr. Thornberry we had applied the money on his indebtedness; he said he would have to pay the taxes, he had given a check to the county treasurer for the taxes and if the check was not paid it might upset the deal, so we paid that check to the county treasurer; do not recall that Thornberry contended that I had promised if this sale went through the money would be applied in liquidation of indebtedness, we would never have promised anything like that, we felt that we had the first right to that money over everybody else.

In *Schoenbrod v. Central Trust Co.*, 238 Fed. 775, the circuit court of appeals of the seventh circuit held: "Under Bankr. Act July 1, 1898, c. 541, sec. 60b, 30 Stat. 562 (Comp. St. 1913, sec. 9644), making void a transfer within four months before the filing of the petition in bankruptcy, if the bankrupt was then insolvent, and the transfer operated as a preference, and the person receiving it had reasonable cause to believe that it would effect a preference, it is not necessary that the creditor actually knew that the debtor was insolvent, but the preference is void if he had information sufficient to have put an ordinary business man on inquiry as to facts which would show insolvency, and his failure to make such inquiry is no excuse."

In *In re Putterman,* 46 Fed. (2d) 175, the court said: "Bank receiving deposits to apply on debts, knowing that bankrupt was insolvent, had reason to believe that the act created preference of itself."

In *Mechanics & Metals Nat. Bank v. Ernst,* 58 L. Ed. 121 (231 U. S. 60) the court said: "Deposits made by an insolvent customer after the bank cashier has forbidden the payment of checks against the deposit account, and but a few hours before an involuntary petition in bankruptcy was filed against the customer, constitute a voidable preference, and cannot be allowed to the bank by way of set-off against the customer's indebtedness to the bank."

From all the facts and circumstances proved, and the natural and reasonable inferences to be drawn from the close supervision maintained by the officers of the defendant over the affairs of the company, and their opportunity and duty to learn its financial condition, the conclusion is inevitable that such officers not only had reasonable cause to believe, but knew, the enforcement of the preference the defendant received by appropriating the company's deposit would enable it to receive a greater percentage of its claim than did other creditors of the same class, and that in appropriating such deposit the officers of the defendant were acting upon such knowledge and belief.

This is not a trial *de novo,* but an inquiry to ascertain whether the findings and judgment of the trial court are supported by sufficient competent evidence, and if we find they are not so supported, after giving to such findings and judgment the presumptions to which they are entitled under the decisions of this court, then to ascertain whether the plaintiff sustained the burden of proof upon all questions necessary to have entitled him to recover upon the trial of this action. Our findings are that the findings and judgment of the trial court are not supported by sufficient competent evidence and that the plaintiff did sustain the necessary burden of proof to entitle him to recover.

In reaching these conclusions, we have given consideration to the cases of *Peck & Co. v. Whitmer,* 231 Fed. 893,

Mansfield Lumber Co. v. Sternberg, 38 Fed. (2d) 614, and *Latrobe v. Cross Co.*, 29 Fed. (2d) 210, cited by counsel for defendant. The proposition that, if a transfer or preference is enforced, the creditor receiving the same will be entitled to share *pro rata* with other creditors of the same class in the distribution of the remaining assets of the bankrupt estate, to the extent of the balance due such creditor, was either not an issue, or, if an issue, it was not passed upon in those cases, and therefore they are not helpful in determining this case.

It follows that the trial court erred in not entering judgment in favor of the plaintiff for $9,745.93, together with interest thereon at the rate of 7 per cent. per annum from the date the petition was filed herein. *Plymouth County Trust Co. v. MacDonald*, 60 Fed. (2d) 94.

The judgment of the district court is reversed, with instructions to enter judgment in favor of the plaintiff for $9,745.93, together with interest thereon at 7 per cent. per annum from the filing of the petition herein.

REVERSED.

IN RE ESTATE OF JOHN O'CONNOR. ADAMS COUNTY, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED FEBRUARY 16, 1934. No. 28640.

1. **Escheat.** By "escheat" is meant the lapsing or reverting to the state as the original and ultimate proprietor of real estate, by reason of a failure of persons legally entitled to hold the same.
2. **Property.** What is commonly termed ownership of real estate is in fact tenancy, whose continuance is contingent upon legally recognized right of tenure, transfer, and of succession in use and occupancy.
3. **Escheat.** When the tenancy of ownership expires or is exhausted by reason of the failure of the law or the state to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back

upon its original and ultimate proprietor, or, in other words, escheats to the state.

4. ———. When there is a failure of heirs, the title to real estate vests immediately or at once in the state.

5. ———. In the case of failure of heirs, the state does not take as a successor under the laws of descent and distribution, but as a reversioner.

6. Taxation. When the state takes real estate on account of failure of heirs or by "escheat," such estate is not subject to an inheritance tax, since inheritance tax is assessed upon succession and not upon reversion.

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

Paul F. Good, Attorney General and *William H. Wright,* for appellant.

Herman G. Schroeder, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is an appeal by the state of Nebraska from the judgment of the district court for Adams county, Nebraska, in which county the estate of John O'Connor was probated. The estate escheated to the state of Nebraska for want of heirs. The county of Adams contends that the state is liable for the payment of an inheritance tax. This is the only question in the case. The county of Adams was successful in the action in district court and the state of Nebraska has appealed to this court.

It appears that this case must be determined on the true meaning of the term "escheat." In early England or during the feudal period, escheat meant the falling back or reversion of lands to the lord of the fee upon the failure of heirs capable of inheritance under the original grant. In both England and the United States now, by escheat is meant the lapsing or reverting to the crown or the state as the original and ultimate proprietor of real

estate, by reason of a failure of persons legally entitled to hold the same.

Clearly the theory of the law in the United States, then, is that first and originally the state was the proprietor of all real property and last and ultimately will be its proprietor, and what is commonly termed ownership is in fact but tenancy, whose continuance is contingent upon legally recognized rights of tenure, transfer, and of succession in use and occupancy. When this tenancy expires or is exhausted by reason of the failure of the state or the law to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back upon its original and ultimate proprietor, or, in other words, escheats to the state.

This state has never departed from the accepted meaning and interpretation of escheat in the United States. In our first Constitution (Const. 1866, art. VI, sec. 3) it was provided: "All lands, the title to which shall fail from defect of heirs, shall revert or escheat to the people." This provision is no longer to be found in our Constitution, but in section 3, art. VII, escheat is recognized. Though the above quoted provision has been taken out of the Constitution, it has never been removed from the statutes, where it has remained unchanged since 1875. Section 76-501, Comp. St. 1929, being the provision referred to, is as follows: "Upon failure of heirs the title shall vest at once in the state, without an inquest or other proceedings in the nature of office found." It then becomes apparent that in this state by "escheat" is meant a reversion of title to the state upon failure of heirs.

Section 6622, Rev. St. 1913, contained the law providing for taxes upon inheritances. On account of its length we will not quote it here, but an analysis of its provisions clearly shows that what was intended was a tax upon a right of succession to property by inheritance, will, or by transfer made in contemplation of death, which is clearly distinguishable from a reversion, which can only take place where the title holder dies without will, without

heirs, and without having made a transfer of the property in contemplation of death.

The appellee urges that, since escheat is mentioned in the seventh paragraph of the statutes providing the order and method of distribution of real estate in intestate estates (Comp. St. 1929, sec. 30-102), the legislature must therefore have intended to classify the state as a beneficiary. With this contention we cannot agree. The effect of such a theory would be the restriction and abridgement of the right of reversion which it had from earliest times, which right has been declared by Constitution and statute in such manner as to leave no doubt of the intention to retain it unimpaired. Escheat is one of the incidents of our state sovereignty and it cannot be surrendered unless the intention so to do is clearly and unequivocally expressed.

There are other questions suggested in the record of this case; but, since this one is decisive of the issue presented, no useful purpose would be served in their discussion. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ANNA HARRISON, APPELLANT, V. CARGILL COMMISSION COMPANY, APPELLEE.

FILED FEBRUARY 21, 1934. No. 28986.

1. **Marriage.** In Nebraska a common-law marriage was recognized as valid prior to the act of 1923, requiring a public license and a solemnization by an authorized person. Comp. St. 1929, sec. 42-104.
2. **Master and Servant: WORKMEN'S COMPENSATION LAW: DEPENDENTS.** Under the workmen's compensation law, a wife living with her husband at the time of his death in an accident arising out of and in the course of his employment is conclusively presumed to be wholly dependent upon him for support. Comp. St. 1929, sec. 48-124.
3. ———: ———. The workmen's compensation law should be

liberally construed to give effect to its purposes.

4. ———: ———. "An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418.
5. **Husband and Wife.** Public support of a wife in an asylum for the insane does not release her husband from his legal obligation to support her.
6. **Master and Servant: WORKMEN'S COMPENSATION LAW: DEPENDENTS.** A wife who has not forfeited or otherwise lost any marital right may be "living" with her husband at the time of his death in an industrial accident, within the meaning of the workmen's compensation law, though then involuntarily confined in an asylum for the insane.

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

Smith & Schall, Gerald M. Vasek and *Howell & Wright*, for appellant.

Gaines, McGilton, McLaughlin & Gaines, contra.

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

ROSE, J.

This is a proceeding under the workmen's compensation law. William T. Harrison was employee and Cargill Commission Company, a corporation operating a grain elevator near Omaha, was employer. Employee was smothered in grain in his employer's elevator February 17, 1931, as the result of an industrial accident arising out of and in the course of his employment. Anna Harrison, an incompetent person, by her guardian, Harry Heinrickson, plaintiff, filed with the compensation commission a claim for compensation as the dependent widow of the deceased employee. The claim was allowed by the compensation commissioner, and the employer, defendant, appealed to the district court for Douglas county.

The defenses to the claim for compensation were that

claimant was not the widow of the employee, never having been his lawful wife; that they were not living together at the time of the employee's death, and that she was not then dependent upon him for support.

Upon a trial in the district court the award of the compensation commissioner was vacated and the proceeding dismissed. Claimant, plaintiff, appealed.

It is shown by a preponderance of the evidence that claimant became the common-law wife of the employee prior to the enactment of 1923, providing in effect:

"A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages." *Collins v. Hoag & Rollins,* 122 Neb. 805. Laws 1923, ch. 40, Comp. St. 1929, sec. 42-104.

This statute did not invalidate prior common-law marriages. They were previously recognized as valid. Claimant did not abandon her husband or seek a divorce or agree to a separation or forfeit her rights as a wife. The marriage relation between her and her husband was first severed when the latter lost his life in the service of his employer. In this view of the law she was his lawful wife.

Was claimant "living" with her husband at the time of his death within the meaning of the workmen's compensation law? Was she wholly dependent upon him for support? The answers to these questions depend on the law and the facts. The statute provides:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she is living at the time of his death." Comp. St. 1929, sec. 48-124.

To avoid the payment of compensation, defendant, the employer, contends that claimant was not living with her husband at the time of his death, because she was then living apart from him in an asylum for the insane, where

she had been confined for years, and that she was not dependent upon him for support, because the public supported her where she was confined, without any aid whatever from her husband. These propositions are skilfully presented, but they rest on technical construction of statutory language or on literal legislative terms. It has often been held that the workmen's compensation law should be liberally construed to give effect to its purposes, one of them being:

"An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418.

This purpose would be defeated to some extent at least, if public support of a wife in an asylum would release her husband from his legal obligation to support her. By the use of the expression "with whom she is living," as it appears in the workmen's compensation law, the legislature did not intend to deny compensation to a widow who was dependent upon her husband for support, merely because she was temporarily absent from him at the time of his death, where there had been no estrangement, or divorce, or purpose to separate, or agreement to live apart, or wrong-doing, or violation of martial relations or duties. Without losing the right to the support of a husband, the wife, with his consent, may properly be away from home for long periods of time, when justified by circumstances. A faithful wife may retain her marital rights though involuntarily separated from her husband for a time. In such contingencies they are still "living together" in the sense contemplated by the legislature and in the common understanding of those words.

The duty of a husband to support his wife is imposed by law. *Acton v. Schoenauer*, 121 Neb. 62. Claimant was committed to a hospital for the insane January 19, 1929. By process of law she was detained there continuously

except at intervals when she was temporarily paroled to her husband. She was in the hospital at the time of his death, and was received there as employee's wife. Her husband maintained a home for her. To his home she had returned when paroled. She was permitted to attend his funeral. She was incapable mentally of agreeing to a separation or of waiving her rights as a wife. Insanity was not a ground for a divorce. If she had been restored to mental competency at any time, her place of abode would have been her husband's home, with her marital rights unimpaired, including support. The word "living" was not limited by the legislature to physical presence in the home, but extended to proper or unavoidable absences during the existence of the marriage relation. In this sense claimant was not only living with her husband, but he was morally and legally bound to support her at the time he was fatally injured in an industrial accident. She was then dependent upon him for support within the meaning of the workmen's compensation law. Mere violation of the duty of the husband to pay for the support of his wife, if she retains her right thereto, does not prevent recovery for compensation. *Parson v. Murphy,* 101 Neb. 542. These views have often been announced in no uncertain terms. In construing statutory provisions like those under consideration the supreme court of Wisconsin said:

"Proof of total dependency is dispensed with under the statute where the husband and wife are 'living together' at the time of the death of the injured employee. It seems, therefore, quite obvious that the legislature intended by the use of the words to include all cases where there is no legal or actual severance of the marital relation, though there may be physical separation of the parties by time and distance. The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There

must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute. This seems to be the reasonable and practical construction of the law, and the one which we think the legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would in many cases be defeated, because in many cases the spouse may be absent from home for long intervals, although there is no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relation or change the relations or obligations created by the marriage contract." *Northwestern Iron Co. v. Industrial Commission of Wisconsin,* 154 Wis. 97. See, also, *T. J. Moss Tie Co. v. Tanner,* 44 Fed. (2d) 928; *Pykosz v. Koehler & Streng Co.,* 105 Pa. Super. Ct. 605; *Jones v. George R. Cooke Co.,* 250 Mich. 460; *Conway v. County of Todd,* 187 Minn. 223; *Woods v. American Coal & Ice Co.,* 25 S. W. (2d) (Mo. App.) 144; *Birmingham Slag Co. v. Johnson,* 214 Ala. 131.

A wife who has not forfeited or otherwise lost any marital right may be living with her husband at the time of his death in an industrial accident, within the meaning of the workmen's compensation law, though then involuntarily confined in an asylum for the insane. The following conclusion was reached in a recent case:

"In a proceeding under the workmen's compensation act, evidence held to show that the deceased employee's widow, whose mind had been impaired for years and who had spent much time in various hospitals but was living temporarily with a son in another city when her husband was killed, was living with her husband at the time of his death, within St. 1917, sec. 2394-10, subd. 3." *Belle City Malleable Iron Co. v. Industrial Commission,* 174 N. W. 899 (170 Wis. 293). See, also, *Kelly v. Hopkins* (1908) 2 Ir. R. 84.

In view of the law and the facts as outlined, plaintiff made a case for compensation. For the specific purpose of

allowing it on the record as it now stands, the judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED.

JAMES ZAJIC, ADMINISTRATOR, APPELLANT, V. ELMER JOHNSON ET AL., APPELLEES.

FILED FEBRUARY 21, 1934. No. 28724.

1. Trial: DISMISSAL. Evidence examined, and *held* to sustain the determination of the trial court, made at the close of plaintiff's proof, that the Omaha Bee-News Publishing Company and the World-Herald Publishing Company, defendants, each possessed the status of an independent contractor in the transaction complained of and each was without liability for the damages in suit; further, the evidence justifies the dismissal of the cause as to these defendants then made.
2. Negligence. Instruction of the trial court, stating in effect that, deceased and the driver of the automobile in which deceased was riding at the time of the collision being then engaged in a joint enterprise or undertaking, the negligence of the driver in the operation of the automobile, if any such negligence was proved, in view of the facts established by undisputed evidence, is imputable to deceased, is approved.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Wear, Garrotto & Boland, Kennedy, Holland & DeLacy and *Wells, Martin, Lane & Offutt, contra.*

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

EBERLY, J.

This action was brought by the administrator of the estate of James F. Zajic to recover damages for the latter's death. This fatality was caused by the colliding of a Packard sedan, wherein deceased occupied a rear

seat, with a truck owned by one defendant, of which another defendant was driver, and which truck was then transporting the property of the defendant publishing companies. At the close of plaintiff's evidence the trial court sustained the separate motions to dismiss of the defendants Omaha Bee-News Publishing Company and the World-Herald Publishing Company, for the reason that these defendants were independent contractors in the instant transaction. Thereafter further evidence was adduced and the cause was submitted to the trial jury who returned a verdict for Elmer Johnson and Chester A. Eager, the remaining defendants. From the order overruling his motion for a new trial the plaintiff appeals.

As to the first question, the facts disclosed by the evidence are not in serious dispute. The truck involved at the time of the accident was the property of the defendant Chester A. Eager. It was being driven by the defendant Johnson, who was then employed in that capacity by Eager, from whom he received his compensation. The route followed went from Omaha to Lincoln, to Nebraska City, and to Louisville, all in Nebraska. The truck was one of a number of trucks then owned and operated by Eager in the prosecution of a general trucking business, carried on under the trade-name of the Louisville Motor Transfer Company, with headquarters at Louisville, Nebraska. This business had been continuously carried on for a period of about 14 years. During this period Eager held himself out to the public as ready to engage in the transportation of goods for hire for any one who offered merchandise to be hauled.

The plan followed in carrying on the general business by this defendant was to keep one of his trucks hauling freight on a scheduled run between Omaha and Louisville. The other trucks owned by the defendant were employed in hauling from one town to another as the calls for service might require. It was a daily business of trucking for hire, in performance of which the trucks were owned by defendant Eager, who employed, paid, discharged, and

controlled his drivers and other employees, as the exigencies of the traffic might require.

Up to six years prior to the accident in suit, the Sunday editions of the newspapers published by the defendant publishing companies had been delivered to their patrons in part by railway train service and in part by other means of transportation. The defendant Eager then entered into negotiations to secure this business. Some test runs were made and the results submitted to these publishing companies. Finally an oral agreement for the transportation of the Sunday editions of the Omaha Bee-News and the Omaha World-Herald was entered into whereby these papers, prepared in bundles, labeled, and weighed by the publishers at their respective places of business in Omaha, were delivered to the trucks of the Louisville Motor Transfer Company at Omaha on Saturday night or early Sunday morning, accompanied by lists showing the destination of each bundle of papers thus turned over. The employees of the defendant received these bundles, loaded the same in the trucks and thereafter cared for the same, and deposited each at the place directed. These trucks, exclusively in charge of the motor transfer company's operators and driven to definite places where delivery of papers was required, proceeded in accord with a definite time schedule agreed upon by the parties in interest. The routes followed from one scheduled stop to another were for the determination of the transfer company. It seems that, in the event of an accident to truck or cargo occurring, the fact was to be at once reported to the publishing companies. We infer that the selection of the particular truck for each trip on each route, as well as the employees to man the same, and the furnishing of necessary oil, grease, gasoline and repairs of the fleet of trucks thus engaged, was wholly performed by the defendant Eager. He hired and fired the men engaged. He settled all indebtedness incurred in the transaction, and gave all necessary directions to the employees concerned in, and apparently assumed full responsibility

for the successful completion of, each of the runs made. We have searched the record and find no evidence of control over these movements of the transportation agency either reserved by the publishing companies in this oral understanding, which is controlling, or exercised by them pursuant to its terms. Considering all the evidence, we are impressed with the view that, as a matter of fact, the weekly delivery of these papers, though made pursuant to a special understanding and agreement, was but an incident of the general business carried on by the defendant, and essentially no different in its inherent qualities from that of which it formed a part.

This general business was the undertaking "for hire or reward, to transport the goods of such as choose to employ him from place to place" (10 C. J. 39)—that of a common carrier. *State v. Union Stock Yards Co.*, 81 Neb. 67.

"Persons who engage in the business of draymen, carters, truckmen, wagoners, or public moving van companies for the transportation of goods and merchandise, and who hold themselves out as willing to serve all who apply and pay their charges, are common carriers in respect to the carriage of such goods and merchandise as they make a business of carrying, and it is immaterial what mode of transportation is employed, or that there is no regular tariff of charges." 10 C. J. 49.

Obviously the relation of a public common carrier with its patrons is not ordinarily that of "master and servant." It may be generally conceded "that a common carrier may * * * act as a private carrier, and it has been held that a common carrier may become a private carrier when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry." 10 C. J. 39. Plainly the facts in the instant case do not invoke the application of the principle last quoted.

The appellant relies upon *Showers v. Lund*, 123 Neb. 56, *Cole v. Minnick*, 123 Neb. 871, *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197, and *Bowen v. Gradison Construction Co.*, 236 Ky. 270. In none of these cases is the

relation of a public common carrier to its patron considered; hence, the doctrine announced therein can have no application to the instant case.

However, conceding *arguendo* that the status of the motor transfer company is that of a private carrier or contractor, still the facts outlined herein differentiate the instant case from those cited on this point by appellant. Support for this conclusion may be gained from the discussion which the opinions referred to contain. Thus, in *Bowen v. Gradison Construction Co., supra,* the Kentucky court, on the ground of essential difference of the facts involved, distinguished, and in distinguishing approved, two cases, as to which it makes use of the following language:

"This court is not alone in making a distinction between a servant working as Givans was in *Berry v. Irwin* and men working as Owen Richards was in this case; for example in *Paquet v. Pictorial Review,* 130 Misc. Rep. 389, 223 N. Y. 686, Sheridan & Duncan were employed to deliver to the Pictorial Review concern certain paper for which their pay was based upon the weight of the material delivered. The Pictorial Review had a man in charge of the unloading, to check the weight of the material delivered and to tell the men where to put it. In such unloading Paquet was injured. He sued the Pictorial Review Corporation. It was held the plaintiff had no cause of action against the Pictorial Review.

"We could show this same distinction is made by the courts of other states, but we will content ourselves by showing how the United States supreme court does it. * * * In *Standard Oil Co. v. Anderson,* 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480, these were the facts: A stevedore named Terrence was loading with case oil the steamship Susquehanna. He had contracted with the Standard Oil Company for the use of its steam winch and its winchman to do the hoisting, and for this he was to pay the Standard Oil Company $1.50 per thousand. This winchman negligently and rapidly lowered a draft of cases into the hold of the Susquehanna and injured Anderson, for

which injuries he received a judgment against the Standard Oil Company, which was affirmed.

"Let us take another look at these cases. Berry & Kelly had a definite lot of stone to haul and were hauling it, Sheridan & Duncan had a certain lot of paper to haul and they were hauling it, and the Standard Oil Company had a definite amount of case oil to hoist and they were hoisting it. In all these cases it was held these parties were independent contractors."

Obviously the controlling principle in the two cases thus referred to by the Kentucky court is applicable here. The conclusion follows that the publishing companies here had certain papers to haul, and they were having them hauled by "independent contractors," at the time of the accident in suit.

However, even on the basis that the Louisville Motor Transfer Company in this transaction possesses the status of a private carrier, the facts involved remove this from the scope of the controlling principle announced in *Showers v. Lund, supra,* and bring it squarely within the doctrine of the following authorities, which determine in principle that the status of the publishing companies here involved is that of independent contractors: 39 C. J. 1315; 2 Meecham, Agency (2d ed.) sec. 1870; 2 Cooley, Torts (3d ed.) 1092; *Neff v. Brandeis,* 91 Neb. 11; *Bodwell v. Webster,* 98 Neb. 664; *Barrett v. Selden-Breck Construction Co.,* 103 Neb. 850; *Knuffke v. Bartholomew,* 106 Neb. 763; *Petrow & Giannou v. Shewan,* 108 Neb. 466; *Potter v. Scotts Bluff County,* 112 Neb. 318.

It must be admitted that the transaction under scrutiny is not novel in the newspaper world, and that courts of high standing have confirmed the right of newspaper publishing companies to employ private truckers, as independent contractors, to deliver their publications. *Gall v. Detroit Journal Co.,* 191 Mich. 405, 19 A. L. R. 1164; *Schickling v. Post Publishing Co.,* 115 Ohio St. 589; *Abate v. Hirdes,* 9 La. App. 688.

The controlling facts being undisputed, the question

presented was one of law for the court to determine. It follows that its action in dismissing the cause as to the publishing companies was correct and is approved.

With reference to the submission of the issues to the trial jury, complaint is made as to certain instructions given, which, in effect, informed the triers of fact that the negligence of the driver of the Packard sedan, in which the deceased was riding at the time of the accident, if any such negligence was established by the evidence, was imputable to the deceased.

In support of this contention certain decisions of this court are cited, commencing with *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539. In this case the rule is announced in the following language: *"Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like,* the doctrine of imputed negligence is not in vogue in this state." (Italics ours.)

It will be noticed that the exceptions, as well as the general rule, are substantially reiterated in each of the cases cited by the appellant.

The evidence discloses that James F. Zajic, a musician, for whose death recovery is sought in this action, some time previous to this accident, organized an orchestra of seven men, of which he was one. It was, as disclosed by the record, an unincorporated musical organization for the financial profit of those who comprised it, and adopted as its name the Golden Prague Orchestra. It was the business of this orchestra to furnish orchestral music for balls, dances, and other like entertainments, for monetary consideration, in Omaha and other places in the eastern part of Nebraska. For use in connection with this business, the membership of this organization purchased the Packard sedan in May preceding the accident, had this vehicle overhauled, and had a special contrivance constructed thereon in which to carry their musical instruments. Each of the seven members owned a share in this Packard car. The financial proceeds of the musical en-

gagements filled by this organization were in part divided among the membership and in part devoted to the expenses connected therewith, including gasoline, oil, and repairs for their automobile. So far as disclosed by the record, this automobile was intended to be used solely for the purpose of transporting the membership to and from the engagements filled by the Golden Prague Orchestra. It was thus a necessary part of the equipment made use of in the business they carried on. On the night of the accident it was returning from an engagement at Lincoln, Nebraska, and was in the charge of a member of the orchestra as driver who, it may be inferred from the record, acted in that capacity with the approval, if not as the selection, of the membership of the orchestra, and who was so acting at the time of the collision with the Eager truck, from which the death of plaintiff's intestate resulted, which is now here in suit.

Obviously the Golden Prague Orchestra, in view of the facts stated, was either a copartnership, or an unincorporated association. The latter term may be defined to be a body of persons acting together without charter, but upon methods and forms used by incorporated bodies, for the prosecution of some common enterprise. The common enterprise in the instant case was to carry on a business in which property jointly owned by the membership was employed, in connection with their personal services, for the financial advancement of the membership.

Regarded as a voluntary unincorporated association, it would be "liable in tort for the wrongful acts of its members when acting collectively in the prosecution of the business for which it is organized. * * * So it may be held liable for the tort of an individual member when, in respect to the act complained of, the association occupies the relation of principal." 5 C. J. 1345, 1346.

In any event, in view of the admitted relations between the membership of the Golden Prague Orchestra at the time of the accident and the nature of the business in which it was then employed, its membership present and

participating must be deemed to have been then engaged in a joint enterprise within the meaning of that term as employed in the law of negligence.

There is no substantial conflict in the evidence as to this point, and the question presented as to the legal effect of the conceded relations of the parties was one of law for the decision of the trial court. In this view of the situation, the instruction of the court as to imputed negligence was correct. *Judge v. Wallen,* 98 Neb. 154; *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627.

No error affirmatively appearing in the record, the judgment of the trial court is correct, and is

AFFIRMED.

ROY LEHNHERR, APPELLANT, V. NATIONAL ACCIDENT INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 21, 1934. No. 28771.

1. **Pleading**: CONDITIONS PRECEDENT. "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Comp. St. 1929, sec. 20-836.
2. ———: ———. In this jurisdiction, where it is sufficient for plaintiff to allege generally the performance of all conditions precedent, it is incumbent upon the defendant to deny specifically the performance of the particular condition relied on as a defense.
3. ———: DEFENSE. "A defense not pleaded cannot be considered in the decision of the case." *World Mutual Benefit Ass'n v. Worthing,* 59 Neb. 587.
4. **Insurance**: PLEADING: WAIVER. If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived.
5. **Evidence** demurred to examined, and *held* to establish the cause of action pleaded.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

F. A. Hebenstreit, for appellant.

J. H. Falloon, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

EBERLY, J.

This action was originally commenced by Roy Lehnherr in the county court of Richardson county upon a policy of accident insurance issued by the defendant to plaintiff. It appears that from a judgment entered in the county court of Richardson county an appeal was prosecuted to the district court for the same county. Here, by stipulation of the parties, the cause was tried to the court on the original pleadings as filed in the county court, a jury being expressly waived. The petition, it may be said, pleaded according to legal effect the issuance, delivery, and terms of the policy, the happening of the accident insured against, the damages occasioned thereby, and the refusal of the company to pay, followed by an appropriate prayer. As to the performance of the conditions of the policy, it is alleged in the petition: "That the said plaintiff has performed all the conditions and provisions as set out in said policy." To this the defendant filed a general denial, the only allegation contained therein being: "Comes now the defendant and denies each and every allegation contained in the petition of the plaintiff."

At the opening of this trial in the district court a further stipulation was entered into, with reference to the insurance policy in suit, in the following form, viz.: "It is further stipulated that the defendant company made and issued to Roy Lehnherr policy No. 23,647 and that the same was in full force and effect at all times during the controversy and that the said policy may be received in evidence." Thereupon the original policy in suit, identified as exhibit 1, was received in evidence. The plaintiff then proceeded with the introduction of evidence, at the close of which the defendant, by its attorney, demurred

to the evidence, "on the ground the testimony offered by the plaintiff does not prove a cause of action under the terms of the policy which they have introduced in evidence." The trial court sustained this demurrer, and dismissed the action, expressly on the ground "that the conditions of the policy were not complied with by the plaintiff in that no notice of the injury was given by the plaintiff to the defendant company within twenty days or within a reasonable time after the injury to the plaintiff occurred." Thereupon plaintiff filed his motion for a new trial, which was overruled, and he now prosecutes his appeal.

It may be said in passing that the policy in suit contained two provisions relative to notice of injury, which are therein set forth in the following terms:

"Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury.

"Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the company at its home office, Lincoln, Nebraska, or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

Thus, the ultimate question here presented is: Does the evidence adduced establish the cause of action set forth in the petition, in view of the issues submitted by the pleadings of the respective parties to the trial court for determination?

The defendant, in effect, contends that the giving of notice of injury within twenty days, or a reasonable time thereafter, as provided by the terms of the policy in suit already quoted, constituted an express condition precedent to the liability of the insurer; and that, due performance

of all conditions contained in the policy having been alleged generally by plaintiff, defendant's general denial thereof made up an issue and imposed on plaintiff the burden of establishing the affirmative, which the latter had failed to sustain.

Conceding that the duty to give notice of the injury is imposed on plaintiff by the terms of his insurance contract, and that the same constitutes a condition precedent, still the contentions of defendant are not well founded. By statute in this state the rule of pleading on this subject is: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Comp. St. 1929, sec. 20-836.

It is not questioned but that plaintiff in the instant case has substantially complied with this provision. But the only issue tendered by defendant to meet plaintiff's allegation was in the terms of a general denial. This was insufficient to make up the issue on which it now relies, or to support the judgment of the trial court.

"In jurisdictions where it is sufficient for plaintiff to allege generally the performance of all conditions precedent, it is incumbent upon defendant to deny specifically the performance of the particular condition relied upon as a defense." 14 Standard Ency. of Procedure, 59. See, also, Ostrander, Fire Insurance (2d ed.) sec. 415; 3 Bancroft, Code Pleading, sec. 1597.

It will be remembered that the purpose of the statute is to simplify pleading, and only by requiring the defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to meet, and the trial court informed as to the exact issue to be determined. Accordingly, under statutes similar in terms to our own, the practice seems to be that "The facts constituting the breach of condition relied on as a defense must be alleged with sufficient particularity and certainty to show *prima facie* a breach." 14 Standard Ency. of Procedure, 59.

See, also, *United States Casualty Co. v. Hanson,* 20 Colo. App. 393; *Hoffecker & Bro. v. New Castle County Mutual Ins. Co.,* 5 Houst. (Del.) 101; *Tillis v. Liverpool and London and Globe Ins. Co.,* 46 Fla. 268; *Allen v. Phoenix Assurance Co.,* 12 Idaho, 653; *Gilkey v. Sovereign Camp,* W. O. W., 178 S. W. (Mo. App.) 875; *Dimick v. Metropolitan Life Ins. Co.,* 67 N. J. Law, 367; *Elliott v. Agricultural Ins. Co.,* 3 Atl. (N. J.) 171; *Fischer v. Metropolitan Life Ins. Co.,* 167 N. Y. 178; *Evarts v. United States Mutual Accident Ass'n,* 16 N. Y. Supp. 27; *Queen Ins. Co. v. Excelsior Milling Co.,* 69 Kan. 114; *Johnson v. Woodmen of the World,* 119 Mo. App. 98.

And when the defendant relies upon a breach, which by the terms of the policy works a forfeiture, all the essential facts of the breach must be distinctly stated in the answer and be strictly proved. *Farmers & Merchants Ins. Co. v. Newman,* 58 Neb. 504; *Sharpe v. Grand Lodge,* A. O. U. W., 108 Neb. 193.

In the construction of the Nebraska statute quoted, this jurisdiction was early committed to the rule that, "Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard,* 59 Neb. 451.

The case of *Stratton v. Service Life Ins. Co.,* 117 Neb. 685, is instructive on the question now under consideration. This was an action at law on a life insurance policy. The plaintiff's petition may be said to be in the usual form, with a copy of the policy attached as a part thereof, and contained the general allegation that all conditions of the contract had been performed. The answer admitted the issuance of the policy, the death of assured, and proofs of loss, and then contained the further allegation: "Defendant denies each and every allegation and averment in plaintiff's petition except as herein expressly admitted to be true." The defendant actually relied upon an alleged breach of one condition contained in the policy in suit, but failed to plead his defense except as indicated. The

district court thereupon sustained plaintiff's motion for judgment on the pleadings, which, on appeal, was affirmed in this tribunal. One of the reasons on which this decision proceeds was: "Where the issuance of a policy of insurance is admitted, and the insurer relies upon a breach of a condition thereof as a defense, the facts showing such breach must be specially pleaded in the answer."

In the instant case we have essentially the same controlling principle involved. We find a general denial only as defendant's pleading, but accompanied by a specific admission in the record of the issuance of the policy in suit, and that it was in full force and effect at all times during the controversy. The proof in the record is that the accident actually occurred, and that the plaintiff sustained a compensable injury, the result of which, entitling the assured to reimbursement, is fully established. The defendant actually relies upon failure to perform a condition which amounts to a breach of the policy, as constituting his defense, but he has failed to comply with the rule that "the facts showing such breach must be specially pleaded in the answer." This defense therefore may not be considered. Obviously, on the issue in fact made by the pleading, the evidence plainly sustained the right of plaintiff to recover, and the district court erred in sustaining the demurrer to the evidence.

The defense on which the defendant relies was not pleaded, and "a defense not pleaded cannot be considered in the decision of the case." *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587.

In view of the technical nature of the proceeding now before us, the rule applicable to the situation presented by this record is: "If the defendant fails to set up a condition precedent and its breach by the plaintiff, this defense is waived." 11 Standard Ency. of Procedure, 1019. See, also, *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. 483; *Philip Schneider Brewing Co. v. American Ice-Machine Co.*, 77 Fed. 138; *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408.

We have not overlooked plaintiff's contention that the instant case is within the provisions of section 44-322, Comp. St. 1929, and that the evidence wholly fails to show that the breach of the condition contributed to the loss. Obviously, the determination that the claimed breach of the condition has not been pleaded, as required by our statute, and is therefore waived, wholly eliminates this contention from consideration. The question involved in the statute last referred to is not presented by the record now before us, and as the case will necessarily be retried on the same issues that were originally submitted to the county court, any expression of opinion thereon would accomplish no legitimate purpose.

It follows that the district court erred in sustaining the demurrer to the evidence. Its judgment is therefore reversed and the cause remanded for further action in harmony with this opinion.

REVERSED.

BELVA STANLEY, APPELLEE, V. SUN INSURANCE OFFICE, APPELLANT.

FILED FEBRUARY 21, 1934. No. 28725.

1. Witnesses. If one has been surprised, misled, or entrapped into calling a witness, who testifies against him, because of his statements, either oral or written, made before trial, which were favorable to and relied upon by the party calling him, and relate to a material point in issue, counsel should be permitted to inquire and show such contrary statements in an honest attempt to repair this damage.
2. ———. Counsel should be allowed to interrogate his own witness as to such inconsistent statements, for the purpose of refreshing his memory, probing his conscience, and thus inducing him to correct his mistake, if any.
3. ———. Counsel should be allowed to show such previous inconsistent statements of his own witness, for the reason, if for no other, that he may show the court and jury the circumstances which induced him to call and vouch for such a witness.

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

Cook & Cook and *Henry Mencke,* for appellant.

Patrick & Smith, contra.

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

PAINE, J.

This is an action to collect damages upon a fire insurance policy on the contents of a dwelling-house destroyed February 21, 1932. The jury returned a verdict for plaintiff in the sum of $1,800.

The petition alleges that the defendant issued a $2,000 fire insurance policy September 1, 1930, through its agent at Blair, against damage by fire to household furniture, jewelry, and wearing apparel while located in a dwelling-house on a farm in Washington county, Nebraska; that immediately after the fire the plaintiff notified the agent writing the policy, and sent notice by registered letter to the defendant at its office in Chicago; later filed proof of loss and demanded payment, and the company refused to pay the same. After certain preliminaries were disposed of, the defendant filed answer, denying that the property destroyed was of the value of $2,000, admitting the receipt of proofs of loss, and charging that the plaintiff and her husband, George Stanley, wrongfully and fraudulently entered into an unlawful conspiracy to burn said dwelling-house, and that the husband, with her consent and connivance, wilfully, unlawfully, and intentionally, set fire to said dwelling, thereby forfeiting all rights to the policy; that the statements contained in the proof of loss were false and untrue, and that the property destroyed by fire was worth not to exceed the sum of $1,000. To this the plaintiff filed a general denial.

In the absence of the jury, Mr. Patrick, of plaintiff's counsel, moved for an order excluding Henry Mencke, county attorney, from acting as an assistant attorney for

the defense, citing section 26-906, Comp. St. 1929, and several witnesses were called in support of the motion, and Henry Mencke, county attorney, was called as a witness in resistance of the motion. Arguments were then made, and the motion to exclude the county attorney from so acting was overruled by the court, and the jury duly impaneled and the opening statements made. Thereupon, the jury were excluded from the room, and it was brought to the attention of the court that two witnesses called by the defendant had been tampered with and were assuming a hostile attitude towards the defense. These two matters are stated in this record to show somewhat of the strain and bitterness existing at this trial. The trial of the case consumed several days, and the jury returned a verdict for $1,800 for the plaintiff.

One of the principal assignments of error charged is that the court erred in refusing to permit counsel for defendant, while its witness Orwin L. Miller was testifying, to interrogate him in regard to a former sworn statement which had been made by him to the deputy state fire warden regarding what he observed at the time of the fire, which statement was absolutely contradictory to his sworn testimony on the trial, and counsel for the defendant being taken entirely by surprise, and, further, that the court erred in not allowing the defendant to make a proper record in order to predicate error upon this erroneous ruling.

The bill of exceptions discloses that Orwin L. Miller testified that he was 20 years of age, was living at Goodwin, Dakota county, now, but that for about a year he had lived with his parents in the little brick house on the Stanley farm, and his father was a tenant of Dr. Stanley, husband of plaintiff, and that they were living there on the day of the fire; that on the Sunday morning when the fire occurred he was out in his yard working on his car, two or three hundred yards from the Stanley house. He and his father saw smoke coming out around the chimney when they got over there, and his father

knocked out a window on the screened porch. The smoke had the smell of oil, which could have been from waxed floors or composition board. That he then broke in the door with an axe, as it was locked; that they cleared out the contents of some of the downstairs rooms.

Mr. Cook then asked this witness, Orwin L. Miller, whether he had made a statement before the deputy fire warden of this state. Objection was made, and the ruling of the court was this: "I don't think we care." Again Mr. Cook started to ask the question: "And at that time were you asked by the deputy marshal"—to which Mr. Patrick objected as an attempt to cross-examine his own witness; and Mr. Smith, also of counsel for plaintiff, added the objection that it was an attempt to impeach his own witness; but the court permitted him to finish the question, and he completed the question already started by adding—"certain questions relative to what you saw and what you observed as you reached the Stanley home, and what you smelled when the window was knocked in?" Without further objection, the court said: "I think we will stop there. We have two questions now." Then an objection was made that it was an attempt to cross-examine and impeach his own witness and improper redirect examination, and the court said: "I think, Mr. Cook, you should not attempt to introduce the statement made by this witness in that examination." Mr. Cook then asked to make a record, and asked that the jury be excused, and the court said: "Put it in right as you are required to do, if called for." Then Mr. Cook dictated a long statement to the reporter, stating in brief that the plaintiff was taken by surprise by the testimony of the witness and desires to direct the attention of the witness to a statement in writing made by this witness to the deputy fire marshal, which answers are contrary to the statements made by the witness now on the stand, and he desires to direct witness' attention to the statement made at that time, which statement is not offered for the purpose of impeaching the witness, but to show that he

has made contrary statements, or to refresh his memory, and that counsel has undertaken to lay the proper foundation for that purpose, but has been prevented from doing so by the ruling of the court. The reporter then identified the statement made May 23, 1932, in writing to Horace M. Davis, the deputy fire marshal, and signed by the witness, Orwin L. Miller, and consisting of four pages; and Attorney Cook then stated, in brief, that, if permitted to do so, he would have directed the witness' attention to the statement therein made when he was asked if he detected the odor of anything, and that said witness in reply to said question stated that he detected a strong odor of gasoline or of coal-oil, and that the explosion, which occurred when his father kicked in the window, knocked his father back on the ground. Attorney Cook stated that he desired, if permitted to do so, to direct the witness' attention to his signature on the statement and refresh his recollection, but if witness denies that he made such a statement, he does not propose to attempt to offer the same in evidence to impeach his own witness, as that would be violative of the rules, and that no further foundation can be laid for the reason that counsel, as shown by the record, has been foreclosed by the orders of court. "The Court: You have a written statement there signed by the witness? Mr. Cook: Yes. The Court: Submit it, please; I would like to look at it. (Mr. Cook hands exhibit 4 to the court.) Mr. Smith: To all of which offer and each and every part thereof, together with exhibit 4, the plaintiff objects for the reason that the same is incompetent, irrelevant, and immaterial, and not proper redirect examination, and an attempt by the defendant and its counsel to impeach its own witness by an alleged statement made upon another occasion. The Court: I think the objection will be sustained, and the jury will not consider any of this matter which is rejected, in making up their verdict." Thereupon, the witness, Orwin L. Miller, was excused from the stand.

This action of the trial court is set out at length as the

fifth assignment of error, in that the statements of fact of the witness Orwin L. Miller, made to the deputy fire warden in writing, were diametrically opposed and contradictory to his sworn testimony at the trial; that said witness was unfriendly and counsel for defendant was taken by surprise; that the court erred in refusing to allow defendant to even make a proper record in said matter.

The general rule in Nebraska in relation to this matter was for many years, as elsewhere, that a person who calls a witness thereby recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach said witness. *Nathan v. Sands,* 52 Neb. 660; *Blackwell v. Wright,* 27 Neb. 269. One is not permitted to prove contradictory statements of his own witness and thereby discredit him, and it is improper for counsel in argument to assert contradictory statements of the witness. *Merkouras v. Chicago, B. & Q. R. Co.,* 101 Neb. 717; *Masourides v. State,* 86 Neb. 105.

In *Crago v. State,* 28 Wyo. 215, it is shown that, under the Code Justinian, one was not allowed under the Roman law to generally impeach his own witness, and then there is shown the gradual change to the modern rule.

In 6 Jones, Commentaries on Evidence, 4794, it relates that the first time this rule appears in England it simply recites that "Holt, C. J., would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him. * * * Still later the principle is said to have been adopted in Warren Hasting's case, June 11, 1789, when Thurlow, Lord Chancellor, refused, without giving any reason, to allow the prosecution to establish that a certain portion of a paper which they had introduced was untrue." *Adams v. Arnold,* Holt K. B. 298, 90 Eng. Reprint, 1064.

This matter is also treated historically to the length of 45 pages in 2 Wigmore, Evidence, 252-297. This text shows that in the earliest times, in the primitive modes

of trial, witnesses were merely "oath helpers," gathered into a band to "swear him off" against another band swearing the other way. The article shows the injustice of this rule, and that it was changed in England by statute in 1854, and later in some of our states. A summary of this complete analysis by Wigmore is set out at some length by Judge Letton in the case of *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, concluding that the rule as to the contradiction of one's own witness, as stated in the last three Nebraska cases cited above, is set aside on the grounds, briefly condensed from Wigmore, that the rule is a mischievous one and cannot promote justice, while in many cases it promotes injustice, for if a witness betrays the party who calls him and falsifies in every statement which he makes, the jury has no alternative but to accept and find an unjust verdict on evidence which both the parties know to be the rankest perjury.

The general rule that a party, who is surprised by unfavorable testimony given by his own witness, may inquire concerning previous inconsistent statements made by him, is subject to several limitations. One is that the testimony must be a definite statement of fact, and not a mere conclusion, as shown in *Lewis v. Miller,* 119 Neb. 765, 70 A. L. R. 532, where Judge Hastings found that, aside from conclusions contained in the statement, there was very little in the statement that might be deemed contradictory of the testimony given by the witness when testifying in behalf of the defendant, and that the conclusions contained in the statement would not have been admissible if she had been a friendly and willing witness, and decided there was no error in the trial court in refusing to receive in evidence written statements under those conditions.

Judge Eberly had occasion to examine the case of *Penhansky v. Drake Realty Construction Co., supra,* and held that, where it was shown that the facts were fully known to counsel when he called the witness to the stand, and

he could not have been misled or entrapped by statements appearing in the first deposition, and it is incredible that he could in any manner have relied upon or been deceived by the testimony, then the rule does not apply. *Blochowitz v. Blochowitz,* 122 Neb. 385.

Other exceptions to the rule occur when a party is compelled to call the adverse party as his own witness, or in those cases when one is bound by law to call a certain witness, even though he may be unfriendly or hostile, such as a subscribing witness to a will; and in *State v. Alexander,* 89 Kan. 422, it was held that the prosecution might prove that the witness called by it was drunk at the time of observing the occurrences to which he testified. The general tendency of the later decisions appears to be towards liberality in permitting impeachment of one's own witness in order to prevent an injustice.

But, aside from these and a few other reasonable limitations, if one has been surprised, misled, or entrapped into calling a witness because of his statements, either oral or written, made before trial, which were favorable to and relied upon by the party calling him, and relate to a material point at issue, and, when called, has testified contrary thereto, counsel should be permitted to show the statements which had been made before the trial. In most cases such departure from his original testimony will relate to only one or two items in the whole story of the witness, and there is no good reason why the party calling him should not get the benefit of his testimony on all the other points and yet be able to show that he is mistaken, or has changed his testimony on certain definite points. For the court to forbid this is to impose a captious and purposeless restriction, which suppresses a portion of the truth, and when the counsel calling such witness is not at fault, he should be permitted to repair this damage as far as possible. This may be done for the purpose of refreshing the memory of his witness, as well as for the purpose of probing the conscience of the witness and inducing him to correct his testimony.

It is proper to allow the party who called this witness to inquire concerning his previous inconsistent statements, for the purpose of showing the jury the circumstances which induced such party to call this witness.

Abundant citations covering the several phases of this question will be found in the long note in 74 A. L. R. 1042. The following cases will support this discussion of this troublesome question: *Hickory v. United States,* 151 U. S. 303; *Cady Lumber Co. v. Wilson Steam Boiler Co.,* 80 Neb. 607; *People v. Marsiglia,* 52 Cal. App. 385; *Arine v. United States,* 10 Fed. (2d) 778; *Estate of Dolbeer,* 153 Cal. 652, 15 Ann. Cas. 207.

It is the opinion of the court that in the case at bar the defense was clearly entitled to show that its own witness had changed his testimony as to a material fact in a manner harmful to the defense. Many other errors are argued in the briefs, but as a reversal is warranted because of this error which has been discussed at length, the others will not be set out in this opinion. For the reasons stated, the judgment of the trial court is reversed and new trial ordered.

REVERSED.

JAMES W. ELWOOD, APPELLANT, V. PEARL F. SCHLANK ET AL., APPELLEES.

FILED FEBRUARY 21, 1934. No. 28767.

1. **Appeal.** Where a verdict of a jury is counter to the physical facts it will be set aside on appeal.
2. **Evidence** examined, and *held* that the verdict of the jury is contrary to the undisputed physical facts shown by the record.

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

Kennedy, Holland & De Lacy and *Charles Matson,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

CHASE, District Judge.

This is an action to recover damages for personal injuries growing out of the alleged negligent operation of the automobiles operated by the plaintiff and the defendant Jacob Schlank.

The plaintiff for his cause of action alleges that about 10 o'clock on the night of April 2, 1931, he was driving his automobile eastward on the paved highway near the village of Waverly in Lancaster county, Nebraska; that, while so driving at a reasonable rate of speed, the defendant Jacob Schlank, who was driving his automobile westward at or near the same point, suddenly turned his car to the left to pass a truck that was going in the same direction immediately ahead of this defendant, and while passing the truck, defendant drove his car to the left, crossing the black line in the middle of the pavement, into the plaintiff's proper lane of travel, and while in that location, the defendants' car collided with the car of the plaintiff. The defendant Jacob Schlank answered denying the allegations of negligence in plaintiff's petition, and by way of cross-petition alleged that he was driving his automobile traveling westward at the point set forth in plaintiff's petition at a careful and lawful rate of speed, traveling on the right side of the center line of the pavement; that he at the point in question approached a large truck proceeding in the same direction; that while he was driving close to the rear of the truck, it suddenly turned to the right and proceeded partly onto the right shoulder of the highway, as he thought to avoid being hit by the automobile being driven by the plaintiff, which at that time was being driven at a high rate of speed in excess of 50 miles an hour; that the plaintiff at this point was driving his automobile on the wrong side of the paved highway; that while operating his automobile in such a position, his car collided with

the car driven by the defendant Jacob Schlank. The defendant Pearl F. Schlank also answered by way of cross-petition alleging that she was the owner of the automobile driven by her husband Jacob Schlank, and because of plaintiff's negligence her automobile was damaged. Both defendants prayed judgment against plaintiff on the cross-petitions.

The cause was submitted to the jury upon the issues of fact presented by plaintiff's petition and the answers and cross-petitions of the defendants, and a verdict was returned against the plaintiff upon his petition and in favor of both defendants on their cross-petitions. From the overruling of a motion for new trial, the rendition of a judgment upon the verdict, the plaintiff has appealed to this court.

The appellant bases his appeal upon two assignments of error: First, that the evidence is insufficient to support a verdict; and, second, the court erred in failing to submit to the jury the question of contributory and comparative negligence.

An analysis of the first proposition necessarily involves a careful consideration of the evidence as shown by the record. It appears that at this point the highway is paved with a concrete slab approximately 24 feet in width. There is practically no dispute as to the physical facts as they appeared immediately following the collision of the two automobiles. All of the witnesses agree that neither car was turned over; that the plaintiff's automobile was found with the right front wheel and fender across the ditch and up against the bank on the south side of the road considerably off the pavement angling somewhat to the southeast, the left front wheel being down off the shoulder of the grade with the left hind wheel resting upon the shoulder of the grade a short distance off the pavement. The defendants' car stopped three or four feet immediately north of plaintiff's car angling from northeast to southwest; that both cars had the left front wheel, fender and front corner badly

crushed; that the truck driver stopped his truck between 75 and 100 feet to the west of where the cars stopped and on the north side of the pavement with the right front wheels on the shoulder of the grade. The plaintiff testifies that he was driving eastward, and when the front end of his car approached to a point within 20 or 25 feet of the front end of the truck, a car shot out from behind the truck very fast and was on him in a second; that the plaintiff decided to take the ditch and pulled his car sharply to the right off the pavement, and while the right wheel was down at the ditch the defendants' car struck the car of plaintiff; that in so doing the defendants had driven their automobile across the pavement to the extreme south side thereof, and while at that point the collision occurred; and that the truck was then just opposite or directly north of the cars when they collided. He also testifies that immediately following the accident, just after the defendant Jacob Schlank had emerged from his car, he had a conversation with him; that he was reluctant to talk, but finally did speak and told plaintiff that he lived at Albion, Nebraska; that he was driving 40 or 45 miles an hour and that he suddenly came up behind the truck which was without rear signal lights and was so close to him that he had to swing out and go around in order to avoid a collision with the truck, and that while he was swinging around the truck his car collided with plaintiff's car.

An adjuster for an indemnity company testified that he investigated the facts concerning the case under the erroneous belief that his company had compensation insurance upon the defendant Jacob Schlank; that while making an investigation he took a written statement from him, and in this statement (which was offered in evidence) he stated that he suddenly discovered a truck in front of him without lights, moving in the same direction, and in order to avoid a collision with the truck, "I swung to the left and was going to pass around this truck when I discovered a car coming from the opposite direction and

before I could get in the clear I collided with a car driven by Doc Elwood."

Dr. Alexander Young, Schlank's attending physician, who also made a report for the Royal Indemnity Company, wrote out a statement and testified that according to his best recollection he received the information either from Mr. or Mrs. Schlank, he was not sure which, in which it was stated that the accident occurred from a head-on collision of automobiles as the patient (Jacob Schlank) was attempting to pass a truck going in the same direction, speed 40 to 45 miles an hour.

The defendant Jacob Schlank denies that he had the conversation detailed by plaintiff immediately following the accident; also his mind is somewhat hazy as to whether he made the statement to the insurance adjuster as stated in his report, and finally claims that it was not his language but that of the adjuster, and he has no recollection of making such a statement; that he made no such statement as recorded by the adjuster.

As we have before observed, the witnesses practically all agree that immediately following the collision both cars stopped on the right-hand side of the paved highway, plaintiff's car a short distance off the pavement and defendants' car to the north of it on the pavement very close to the south line of the paved slab. It seems to us these undisputed physical facts ought to be regarded as controlling in establishing how the accident occurred. Giving due consideration to the immutable laws of force and motion, we must conclude that the accident could not possibly have occurred as claimed by the defendant Jacob Schlank. Had the plaintiff been driving eastward on the north side of the painted line describing the middle of the paved slab of the highway at the rate of speed claimed by the defendants, and while in that position the plaintiff's car was driven against the car of the defendants, the force of the plaintiff's car would have either stopped the defendants' car in that position or forced the defendants' car toward the edge of the pavement on the north side

of the highway. In other words, it appears to us that it would be an impossibility for the plaintiff's car to have been in the ditch on the south side of the highway had the collision occurred north of the middle line of the pavement as the defendants describe it. However, the physical facts do not stand altogether uncorroborated. We find both the insurance adjuster and Doctor Young, who are each disinterested and thus could have no motive to tell an untruth, testifying that they wrote down a description of this accident as given them by the defendant Jacob Schlank that the accident occurred substantially as detailed by plaintiff. We cannot believe that either the insurance adjuster or Doctor Young, neither of whom appear to have known anything about the accident except what someone told them, had created these statements out of their own imagination. We are not unmindful that this court on many occasions has announced that it will not disturb the verdict of a jury based merely upon conflicting evidence; and in considering that question the truth or falsity of the testimony becomes immaterial. This verdict, however, is assailed for the reason that the record discloses that there is not sufficient evidence to support it. In an investigation of that character it becomes the duty of the appellate court to analyze the testimony of the witnesses and the physical facts in connection therewith. Thus, in disposing of such a contention the truth or falsity of the testimony then becomes a very proper subject of investigation. Another rule is well established in this state, and that is, where the verdict of the jury is opposed to the undisputed physical facts shown to exist, this court will set the verdict aside. *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692; *Oliver v. Union P. R. Co.*, 105 Neb. 243; *Calnon v. Fidelity Phenix Fire Ins. Co.*, 114 Neb. 53. We find nowhere in the record where the trial court was given an opportunity to instruct the jury to return a verdict in favor of the plaintiff on defendants' cross-petitions. Had counsel for plaintiff given the trial court an opportunity to have passed upon

the sufficiency of the evidence to support a verdict in favor of the defendants on their cross-petitions, in all probability such a motion would have been sustained.

Since the verdict must be set aside for insufficiency of evidence to support it, it becomes unnecessary to discuss the other contention that the trial court upon its own motion should have submitted the question of contributory and comparative negligence to the jury.

For reasons heretofore stated, the judgment is reversed and the cause remanded.

REVERSED.

JAMES P. MOONEY ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1 OF RICHARDSON COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 21, 1934. No. 28633.

1. **Constitutional Law**: DRAINAGE ACT. *Held*, that article 4, ch. 31, Comp. St. 1929 (sections 31-401 *et seq.*) is constitutional in so far as it provides for the organization of drainage districts and the construction, maintenance, and repair of drainage systems. *Barnes v. Minor*, 80 Neb. 189.
2. **Statutes**: DRAINAGE ACT: CONSTITUTIONALITY. *Held*, that the provisions of section 31-456, Comp. St. 1929, are not of such vital importance that they formed an inducement to the remainder of the law. Its invalidity would not operate to avoid the whole, and could not be relied upon to excuse a duty enjoined by the valid portion of the act. *State v. Malone*, 74 Neb. 645.
3. ———. A consideration of the constitutionality of section 31-456, Comp. St. 1929, is not necessary to a decision in this case, and we express no opinion thereon.
4. **Drains**. It was the intent of the legislature in the enactment of the provisions of article 4, ch. 31, Comp. St. 1929, to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits.
5. ———. The performance of the power delegated to a drain-

age district by section 31-463, Comp. St. 1929, involves the protection of public and private interests and "may" as used therein should be construed as mandatory. *Doane v. City of Omaha*, 58 Neb. 815; *Greb v. Hansen*, 123 Neb. 426.

6. ———. The enlargement of the outlet of defendant's drainage system is improvement and repair within the meaning of the terms as used in section 31-463, Comp. St. 1929, and under the authority of said section, the defendant may make such improvement and finance the same by an assessment on the basis of the original assessment of property in the district. *Richardson County v. Drainage District No. 1*, 113 Neb. 662.

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

Wiltse & Wiltse and *W. J. Courtright*, for appellants.

J. B. Cain and *Hall, Cline & Williams, contra.*

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

CLEMENTS, District Judge.

This is an action brought by the plaintiff, James P. Mooney, for himself and all others similarly situated, asking for an order requiring the defendant, a drainage district organized under article 4, ch. 31, Comp. St. 1929 (sections 31-401 *et seq.*) to increase the carrying capacity of the outlet of a drainage canal constructed by it, to an extent sufficient to drain the plaintiff's land of water brought to it by the ditches and laterals constructed by the district.

The outlet to defendant's drainage canal is common to it, and eight other drainage districts that have been organized in the same watershed and along the same stream, "The Great Nemaha river."

When the action was commenced, all these other districts were made parties defendant on the theory that the court, in this action, could order them to contribute to the cost of the proposed enlargement of the outlet.

Demurrers filed by these other districts to the petition were sustained, and the action dismissed as to them.

The cause was tried before the Honorable John B. Raper, of the first judicial district, resulting in a finding for plaintiff and an order requiring the defendant district to increase the carrying capacity of the outlet of the canal to approximately 11,500 cubic feet of water per second.

Both parties appeal; the defendant from the entire finding and judgment of the court; the plaintiff from the order that the increase in carrying capacity shall be only to 11,500 cubic feet per second, plaintiff claiming that such carrying capacity is entirely inadequate and not based upon any evidence in the case.

An examination of the pleadings leads to the conclusion that, in preparing them, the parties entirely overlooked the admonition of the statute that they shall be "in ordinary concise language without repetition." The petition consists of 23 pages. The answers originally contained 51 pages. Twenty-eight paragraphs of the answers were stricken out by the trial court as immaterial. The trial of the case seems to have been conducted in the same expansive spirit in which the pleadings were framed. The bill of exceptions contains approximately 1,000 pages of evidence, much of which it is entirely unnecessary to consider.

From this mass of evidence, we gather the following facts which seem to be pertinent to the issues: On February 14, 1906, the defendant Drainage District No. 1 of Richardson county was established by decree of the district court of that county. This district occupies about 30 miles of the lower part of the valley of the Great Nemaha river, and consists of about 31,000 acres of land. The district was organized for the purpose of constructing a system of drainage for the land. After the establishment of the district, and in conformity with the law under which it was organized, an appraisement of the benefits to this land to be expected from the construction and maintenance of a suitable drainage system was made. These benefits were shown to be in the aggregate the sum of $1,190,387.66.

A drainage system was then constructed at a cost of approximately $285,909. Since the construction of this drainage system, the district has expended for improvements, repairs, and maintenance, the further sum of $275,127. To meet these expenditures assessments have been made aggregating the sum of $561,036. Of this sum, Richardson county has paid $35,718, and the Burlington and the Missouri Pacific railroads have paid as benefits the sum of $36,104, the balance, being approximately the sum of $459,654, was assessed to and paid by the landowners of the district. Just how much of the total expenditures should be charged against the appraised benefits the record does not disclose, but, assuming that it should be all so charged, it will be seen there is still $629,351 of unassessed benefits upon which the district can draw by assessments for legitimate purposes.

The plaintiff and the others, in whose interest he sues, are owners of approximately 6,000 acres of land within the district. This land lies in the extreme lower part of the Great Nemaha river valley, between a point on said river designated in the pleadings and evidence as bridge 64 and the Missouri river. The location of this bridge is between seven and eight miles from the junction of these rivers. This 6,000 acres of land has little elevation above the river, and before the construction of the drainage system was low, wet land. It was appraised as 100 per cent. land; that is, it was appraised as receiving the maximum benefit from the drainage. Of the $459,654 assessed against the 31,000 acres of land in the district, this 6,000 acres was assessed the sum of $137,310.

When the drainage system was constructed, nearly all the work was done and money expended above bridge 64. Some work was done between this point and the Missouri river, in removing brush and logs from the Great Nemaha river, but its channel was not enlarged or deepened. It seems to have been assumed that the natural channel of the river below bridge 64 would be sufficient to take care of the run-off from the entire watershed. This assump-

tion proved correct for a time, and during some years after the construction of the drainage system, it operated satisfactorily and the land of the complaining landowners was drained and received the benefits expected. However, as years passed, improvements were made in the upper part of the district. The channel of the river was straightened, erosion increased the size and carrying capacity of the ditches and laterals, other drainage systems were constructed higher up on the river, and the run-off of the watershed was emptied into the main stream and by it brought to bridge 64 so rapidly that the channel of the river below that point was, and now is, entirely inadequate to take care of it; the consequence being that, whenever there is any considerable rain over the watershed, the water overflows the banks of the river below bridge 64, inundates the plaintiffs' land, ruining their crops, and rendering their situation as farmers intolerable. It is shown by the evidence that, owing to this cause, one to three floods occur each year which cover the valley below bridge 64 from bluff to bluff a depth of one to three or four feet. In this condition of affairs, the plaintiffs petitioned the officers of the district to take steps to increase the carrying capacity of the outlet of the drainage system to take care of this influx of water, and, their petition being refused, they brought this action asking that a mandatory injunction issue directing the defendant to take such steps for their relief.

The defendant district seeks to justify its refusal to afford relief to the plaintiffs on several grounds:

1. That the law under which the district was organized is unconstitutional, and the court has no jurisdiction to order or decree to plaintiffs any relief. It is argued that the whole act under which the district is organized is unconstitutional and void because it purports to give legislative power to the courts. The answer to this is the act does not purport to, nor does it, confer upon the court any powers other than its ordinary judicial functions. This matter was considered by us in the case of *Barnes*

v. Minor, 80 Neb. 189. In that case the constitutionality of the act was attacked upon the same ground as in this. The law was held to be constitutional, the court saying:

"Manifestly, as it seems to us, the court in such a proceeding is called upon to exert no other than its ordinary judicial functions. The statute prescribes that, if certain steps have been taken and certain facts exist, a governmental corporation shall be deemed to have been created, not otherwise, and the court by the exercise of its usual powers and by the observance of judicial methods ascertains and determines that such steps have or have not been taken, or that such facts do or do not exist, and from these premises draws an inference or reaches a conclusion which it pronounces in a form of a judicial order or judgment in like manner and in like effect as in ordinary cases."

We are entirely satisfied with our holding in *Barnes v. Minor, supra,* and with the reasoning upon which it is based. However, if we were not, we would have no hesitation in refusing to hold the organization of this district invalid at the behest of the district itself, after it has functioned for 28 years, has made and collected assessments, built and improved a drainage system, borrowed money, issued bonds, invoked the powers of the courts, sued and been sued, all as a public corporation organized under the law it now claims is void because unconstitutional.

It is also contended that the law is unconstitutional because section 31-456, Comp. St. 1929, permits assessments beyond benefits as a possibility, and its application would result in an arbitrary apportionment contrary to benefits. This question does not arise in this case unless it is found that section 31-456, Comp. St. 1929, is of such vital importance to the whole act that it was an inducement to the passage of the remainder.

"Whether any specific power which the act undertakes to confer upon the board is constitutional or not, can only be tested when the board assume to exercise it, and

the other portions of the act could not be defeated by its invalidity, unless the nature of such unconstitutional power was such as to render it of vital importance to the whole." *People v. Mahaney,* 13 Mich. 481.

"Invalid provisions of an act, not operating to avoid the whole, cannot be relied on to excuse the performance of a duty enjoined by the valid portions of the act." *State v. Malone,* 74 Neb. 645.

We are satisfied that the provisions of section 31-456, Comp. St. 1929, are not so vital to the act that the law would not have been passed without its inclusion. The act seems to be complete and capable of enforcement without reference to this section. When assessments are attempted to be made under the provisions of this section, its validity can be tested. We express no opinion as to its constitutionality, leaving that to be determined in a proper case.

2. The defendant's second contention is that the drainage board has exclusive power to determine what drainage work shall be done, and the court is without power to direct what the board shall do.

We think that the situation of the complaining landowners, as shown by the record in this case, leads to the conclusion that they are entitled to the relief asked for; that their land having been appraised as receiving the maximum benefit from the drainage system, and having paid assessments for the construction and maintenance of the system on the basis of such benefits, they should be protected in the enjoyment of these benefits. We are met, however, with the bald statement by the defendant district: "We admit that we have the right and power to make the improvement required to effectuate the relief of plaintiffs, but deny that it is our duty to do so, and therefore the court is without authority to order us to act in the matter." (Reply Brief.)

This then is the crux of the situation. If the district owes a duty to the landowners, whose land was assessed, to build the drainage system, to maintain it, and keep it

in repair, so that they may enjoy the benefits for which the land was assessed, and the district, without sufficient justification, refuses to perform this duty, then the court, in a proper case, has the authority to order it to act in the line of its duty. On the other hand, if the district owes no duty to these landowners, but, as contended by defendant, it has the absolute arbitrary discretion to refuse to maintain all or any portion of the system, then a minority of the landowners who have contributed to its construction may, by a selfish majority, be denied any benefit from the improvement, their property may be taken without just compensation, and their despoilers may defy the courts to afford them any redress. The defendant's theory is so repugnant to the spirit of right and justice that pervades our laws that we approach the subject confident that the act under which this district was organized cannot be so construed.

Both plaintiff and defendant contend that the question has been settled by former decisions of this court. Each maintains that it was settled in his favor. We think both are mistaken, and that we have no controlling precedent upon which to base a decision in this matter. In several former decisions of this court, notably *Bunting v. Oak Creek Drainage District,* 99 Neb. 843, *Hopper v. Elkhorn Valley Drainage District,* 108 Neb. 550, *Miller v. Drainage District,* 112 Neb. 206, and *Flader v. Central Realty & Investment Co.,* 114 Neb. 161, we have said or implied in argument that it is the duty of a drainage district such as the defendant to maintain its drainage system, and that its failure to do so renders it liable in damages to a person injured by its negligence. In some of the cases this thought found its way into the syllabi. However, as pointed out in *Compton v. Elkhorn Valley Drainage District,* 120 Neb. 94, a determination of this question was not necessary to the decision in any of these cases. The statements that it was the duty of drainage districts to maintain their ditches may therefore be regarded as dicta

and not binding as a precedent in the determination of this case.

In *Compton v. Elkhorn Valley Drainage District, supra,* language was used in argument which seems to imply that the court was then of the opinion that the law does not make it the duty of drainage districts to maintain their ditches or keep them in repair. This idea was not, however, reflected in the syllabus. It was used by the court in argument rather than as a vital proposition of law. It was not necessary to the decision in the case, and cannot therefore be considered as a precedent binding upon the court in the instant case. This is true for other reasons. The *Compton* case was an action for damages based upon the common-law liability of a public corporation for an injury caused by the negligence of its officers. It was not, as is this, an action by landowners, whose money has been taken by the district to construct an improvement on the theory that their land would be benefited, to compel repairs necessary if such benefits are to be realized.

Again, in the *Compton* case, the court was not considering the act under discussion here. Elkhorn Valley Drainage District is organized under article 5, ch. 31, Comp. St. 1929. Some of the provisions of this article are similar to provisions in article 4, but the section of article 4 that provides for repairs and improvements is entirely omitted from article 5.

Section 31-463, Comp. St. 1929, provides: "If at any time after the final construction of such improvement the same shall become out of repair, obstructed, inefficient, or defective from any cause, the board of supervisors may order an assessment upon the lands and property benefited by the drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes, using the original assessment upon the property in the district as a basis to ascertain the ratio that each separate tract or lot of land or property bears to the whole amount to be levied."

The interpretation of this section depends entirely upon the construction to be given to the word "may" as used therein. This court has consistently construed "may," when used in a statute to delegate a power, the performance of which involves the protection of public or private interests, as mandatory, and not merely permissive. "Whenever a statute requires the performance of an act for the sake of justice or the public good, the word 'may' is the same as 'shall' and imposes a positive and absolute duty." *People v. Commissioners of Buffalo County,* 4 Neb. 150. When used in a statute, the word "may" is construed as imperative "whenever the public interests or individual rights call for its exercise." *State v. Buffalo County,* 6 Neb. 454. "Where it is plain that the legislature intended to impose a duty rather than confer a privilege" the act is mandatory. *State v. Farney,* 36 Neb. 537. "The word 'may,' when used in a statute or enactment to impose a duty or delegate a power, the performance of which involves the protection of public or private interests, will be read as 'must,' and construed as mandatory." *Doane v. City of Omaha,* 58 Neb. 815. "The word 'may' in public statutes should be construed 'must' whenever it becomes necessary to carry out the intent of the legislature." *Greb v. Hansen,* 123 Neb. 426.

The law under which the defendant is organized conferred upon it the power to collect great sums of money from landowners upon the basis of benefits to be derived from the drainage of their land and its protection from floods and overflows. Was it the intention of the legislature that this money could be spent in the building of a costly drainage system which might through the neglect or obstinacy of drainage officers be permitted to become so defective or inefficient that it would be an injury rather than a benefit to the landowners whose money was taken to construct it and who are ready and willing to pay for needed improvements? The intent of the legislature must be gathered from the whole act. A careful examination of this act leads us to the conclusion that it was the in-

tent of the legislature to make it the duty of the district to maintain its drainage works, within the limits of its power, to the end that the benefits assessed against the land should become and remain effective to the landowners. Again, it is plain that the performance of the power granted to the district by section 31-463, Comp. St. 1929, involves the protection of both public and private interests and that "may," as used in such section, should be construed as mandatory. We therefore hold that it is the duty of the district to take such steps, within the limits of the power conferred upon it by the law, to make such repairs to its drainage system as may be necessary to drain the land within the district, including the land of the plaintiffs, and to protect such land from overflows and floods.

While this holding is based upon a construction of the statute under which the defendant is organized, it is in consonance with general principles as laid down by textwriters, and the decisions of other courts. In 2 Farnham, Water and Water Rights, 1032, sec. 208, it is said: "An owner of land within the drainage district, who has been assessed for the cost of the drain, may compel the officers, by mandamus, to alter an outlet which has proved to be insufficient to drain his property so as to afford the drainage for which he has paid."

In *Stoddard v. Keefe,* 278 Ill. 512, the court said: "Where the landowners of a district have been assessed and taxed for the construction of drains and ditches for their lands and the ditches or drains as constructed have proved inadequate for the purpose for which they were intended, the landowners have a right to require the commissioners to adopt and construct a system of drainage which will provide main outlets of ample capacity to take care of the waters of the district." See, also, *Peotone & Manteno Union Drainage District v. Adams,* 163 Ill. 428.

3. The defendant contends, in effect, that even if the court should find the law constitutional, and that a duty devolved upon the district to maintain the drainage sys-

tem and keep it in repair, still it cannot be compelled to enlarge the outlet of its canal because the work involves new construction and cannot be considered as repairs. This question was before this court in a former case involving this same defendant. In that case, identical in principle with this, the district took a position exactly opposite to that urged here. The question was disposed of in an able opinion by Judge Shepherd in *Richardson County v. Drainage District No. 1*, 113 Neb. 662. It seems that, as the drainage canal of the district was originally constructed, it followed the lower course of Muddy creek to the Nemaha river. For some distance below the junction of the canal with this river, no excavating was done and the channel of the river was not improved except to remove some obstructions. It was assumed that the river channel would be effective to take care of the water brought to it by the canal. This proved to be correct for some years, but in 1925 the river channel, owing to a number of bends below the junction, to the angle at which the canal entered it, and to a greater influx of water brought to the canal by new drainage works above, became inefficient to provide sufficient drainage and floods resulted. (It will be noted this condition exactly parallels the situation that is responsible for the present action.) The district determined that, to correct this condition, it was necessary and advisable to carry the water to a point below the bends in the Nemaha. This involved the construction of a new ditch two miles long in a different location and at a cost of $35,000. A supplemental assessment to raise this sum was therefore ordered on all the land in the district, based on the original appraisement of benefits. Richardson county, being one of the parties against whom the assessment was made, protested and, its protest being denied, brought an action to enjoin the district from making the proposed improvement. This action was based and the relief asked urged on the same theory advanced by the defendant in the instant case, viz., that the proposed improvement is new work, goes beyond

the limit of repair, and the district is without power to make it. The trial court found against this contention and refused the injunction. The case reaching this court on appeal, we held: "The right of the supervisors to keep a ditch in repair is not limited to making good its defects in the precise place of its original construction, when the nature of the soil and the general topography do not admit of successful operation there, but it includes the right to make the ditch effective to the use for which the license to construct the same was granted, and hence to straighten its channel or to lengthen and better its outlet." We think this is a correct statement of the law. It is buttressed by the holdings of many other courts (see *Lee v. County of Jackson,* 151 Minn. 310; *Board of Supervisors v. Paine,* 203 Ia. 263; *Petersen v. Sorensen,* 192 Ia. 471; *Yeomans v. Riddle,* 84 Ia. 147) and is decisive of this question.

The defendant argues that, as it is undisputed that lands in the upper portion of the district will receive no benefit from the proposed enlargement of the outlet, an assessment against such land would be void because made in excess of benefits. The district has changed its position since it successfully defended in *Richardson County v. Drainage District No. 1, supra,* assessments made for an improvement that not only did not benefit individual tracts of land in the lower part of the district but was a detriment to such tracts by the more rapid influx of water to the land caused by the straightening of the channel of the ditch in its upper reaches. This question was also settled in the former case where we said, speaking of the inefficient condition of the ditch in the upper portion of the district:

"This condition affected every owner in the district, much as a loss of function in the human body affects the whole man, and became a matter of moment to all. * * * The portion of the statute upon which the district depends is found in section 1806, Comp. St. 1922, which provides that, if a ditch of this kind shall become 'out of

repair, obstructed, inefficient, or defective,' the board of supervisors may order an assessment for the purpose of placing the same in proper condition, using the original assessment upon the property of the district as a basis for so doing. * * * It would seem that the statute should be construed liberally for the purpose of giving effect to the intent of the legislature, which undoubtedly was to make the drainage contemplated by the act effective."

Little attention need be given other contentions of defendant, viz.: (1) "No new drainage plan can be carried out until the plans are submitted to, and authority obtained from, the department of public works." The law in question is found is section 81-6329, Comp. St. 1929, and provides: "All plans for proposed drainage districts shall be approved," etc. It is evident this refers to plans for a new drainage system, proposed by a district in process of organization, and has no reference to plans for the improvement or repair of ditches that, after construction, have become inefficient and defective.

(2) "Upper riparian owners, separately or by association in a drainage district, may * * * accelerate the flow of water through natural streams, without being liable to the lower riparian owners." This may or may not be the law, depending largely on whether section 31-456, Comp. St. 1929, is held valid or not. It may be of importance if, and when, an attempt is made to force contribution from other districts for the cost of the improvement. It can have no application in a controversy between the district and landowners whose land has been assessed on the basis of benefits which they are not enjoying because the drainage system has become defective and inefficient.

In view of the foregoing, we hold:

(1) That article 4, ch. 31, Comp. St. 1929, is constitutional in so far as it affects the organization of the drainage district and the construction, maintenance, and repair of a drainage system; that the defendant is duly

organized under said law, and has all the powers and duties conferred thereby.

(2) That an examination of the constitutionality of section 31-456, Comp. St. 1929, is not necessary to the decision of this case.

(3) That a district organized under this act has the power to construct a drainage system and to maintain, improve, and repair it, within the limit of the appraised benefits to the land within the district; that whenever such drainage system becomes out of repair, defective, or inefficient for any reason, it is its duty to improve and repair it, within the limit of its power, so that it may serve the purpose for which it was constructed, and to the end that the landowners may receive the benefits for which the land is assessed.

(4) That the drainage system of the defendant district has become defective and inefficient because the outlet below bridge 64 is too small to properly care for water brought down by the ditches and canals of the district, and to prevent the flooding of plaintiffs' land; that such condition can be remedied and proper improvements and repairs can be made by the district within the limit of its powers.

(5) That the general finding of the trial court for the plaintiff was correct.

We have now to consider plaintiff's cross-appeal.

It is shown by the evidence that the carrying capacity of the outlet of the defendant's drainage system below bridge 64 is 8,440 cubic feet per second, and that this outlet has to take care of the entire run-off of the watershed consisting of an area of 1,875 square miles located in that part of Nebraska having the greatest rainfall. It is conceded by all parties that the outlet is entirely inadequate for such purpose. Four civil engineers were called as witnesses and examined as to the extent to which the outlet should be enlarged to properly care for the water. These men were experts in drainage matters. Their testimony ranged from 18,000 to 25,000 cubic feet per

second. We think the conclusion to be drawn from the evidence is that the minimum capacity of the outlet should be 20,000 cubic feet per second. The trial court first found the figure 20,000 cubic feet to be correct for the enlargement. He later changed this to 18,000 cubic feet, and still later to 11,500 cubic feet, which became the final figure for his decree.

No one is satisfied with this finding. The plaintiff appeals from it. The defendant, in its brief, p. 19, says: "All of the attorneys are agreed that the decision is entirely unsupported by any engineering testimony (or any other testimony)."

We have carefully examined all the testimony in an endeavor to find therein a basis for the trial court's finding. It is true that, in some cases, conditions and circumstances are shown that justify a court in findings not supported by any direct evidence. This does not seem to be such a case. The question of the capacity of an outlet to care for the run-off of a great watershed such as we are considering is peculiarly a problem for experts, and depends upon computations made from a knowledge of the average rainfall, the quality of the soil, the slope of the land, and many other factors not known to laymen. We do not think the court's finding that the outlet should be increased to a capacity of 11,500 cubic feet per second is supported by any evidence, or that such an enlargement is sufficient to afford the complaining landowners the relief to which they are entitled. We therefore hold that the findings and decree of the district court should be modified to require the defendant district to enlarge the outlet of its drainage system between bridge 64 to the Missouri river to a minimum carrying capacity of 20,000 cubic feet per second, and that, as so modified, the finding and judgment should be affirmed.

The defendant complains that such improvement will involve the outlay of a large sum of money which the district, at this time, will be entirely unable to raise. We think it is too pessimistic in this regard. The consensus

of the evidence of the experts is that to enlarge the outlet of the system to a capacity of 20,000 cubic feet would cost approximately $50,000. This, in the aggregate, is a large sum of money. However, when spread by an assessment over 31,000 acres of land, it amounts to about $1.65 an acre. This does not seem to be unduly oppressive, especially when it may be paid in instalments covering a period of years. It must also be remembered that the complaining landowners, whose land will be assessed as 100 per cent. land, will, on their 6,000 acres of land pay 30 per cent. or $15,000 of the cost, leaving but $35,000 to be assessed against the remaining 25,000 acres, being approximately $1.40 an acre.

The method of financing the proposition and the plan for accomplishing the improvement lie within the discretion of the district board. The district court did not, nor will this court, attempt to interfere with this discretion, but the district must act and its acts must be commensurate with its duty.

AFFIRMED AS MODIFIED.

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

FILED FEBRUARY 21, 1934. No. 28756.

1. Jury. The constitutional right to a trial by jury in a civil case provided by section 6, article 1 of our Bill of Rights, is a mere personal privilege which the litigant may waive.
2. ———. Failure of counsel to again inquire of juror, incompetent and ineligible, because of his age, *held* not waived, where trial court has asked the qualifying questions and the juror failed to disclose his ineligibility, when that fact is unknown to counsel or parties.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

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

John C. Mullen, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

Plaintiff brought this action to recover damages alleged to have been sustained by her because of the defendant's negligence in the operation of his automobile. A jury was impaneled and sworn to try the case and returned a verdict in favor of the plaintiff. A motion for a new trial was filed in due time, and about a month later a supplemental motion for a new trial was filed, in which the additional assignment of error was made that one Rudolph Watzke, Jr., who served as a juror in the case, was not a competent and eligible juror to serve as required by law, in that he was under the age of 25 years at the time; and this fact was unknown to the defendant or his attorneys until after the verdict was rendered; that the attorneys for the defendant relied upon the qualifying questions as to the competency of the juror which were put by the court at the commencement of the trial and that said attorneys were deceived and misled by the failure of Rudolph Watzke, Jr., to advise the court upon said questioning that he was under the age of 25 years. It is undisputed that the juror in question was but 22 years of age at the time of the trial. This appears from the affidavits filed and from a certified copy of his birth certificate. It also appears from the affidavits of defendant's counsel and from another juror and the affidavit of the court reporter that, when the jury were impaneled and counsel on both sides were present, the court directed a series of qualifying questions to the jurors; that the juror Rudolph Watzke, Jr. was seated with the rest of the jurors; that among the questions asked by the court was this: "Are any of the members of this panel under the age of 25 years?"; that none of the jurors responded to the inquiry, either by word or sign; that the court then said: "I take it, then, that you are all over the age of 25 years?"

and that none of the jurors made any response to this question.

The principal error relied upon for reversal by appellant is that the court erred in overruling defendant's motion for a new trial because of the incompetent and ineligible juror. Section 3, art. I of the Bill of Rights, Constitution of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law." And section 6, art. I thereof, provides: "The right of trial by jury shall remain inviolate." There are three sections of the statute defining who are competent to serve as jurors in the district court. They are all uniform as to the minimum age limit being 25 years. Richardson county, in which this case was brought, is a county of less than 30,000 population, and section 20-1601, Comp. St. 1929, is the section which applies. This provides: "All males residing in any of the counties of this state, having the qualifications of electors, over the age of twenty-five years, and of sound mind and discretion * * * are and shall be competent persons to serve on all grand and petit juries, within their counties respectively." Section 20-1623, Comp. St. 1929, provides: "It shall be the duty of the court to discharge from the panel, all jurors who do not possess the qualifications provided in this article as soon as the fact is discovered." The above seems to set forth the statutory law applicable to this case.

No case in this state or elsewhere has been cited to the court that is exactly in point. In none of the cases cited to us does there appear to have been an examination made by the court for the express purpose of determining the competency of the jurors making up the panel. The rule is well settled that, where the attorneys fail to interrogate the juror in his examination on his *voir dire,* the objection has been waived. *Hickey v. State,* 12 Neb. 490; *Wilcox v. Saunders,* 4 Neb. 569; *Rockwell v. Elderkin,* 19 Wis. 388; *Eastman v. Wight,* 4 Ohio St. 156. In all these cases the objection seems to go to the residence of the juror and is a matter which could have been discovered by counsel in

the *voir dire* examination, if reasonable diligence had been exercised.

The latest analogous case in this state is that of *Marino v. State,* 111 Neb. 623. In this case it was urged that Herbert M. Jackson, one of the jurors who sat in the case, was not a qualified and competent juror under the Constitution and laws of the state; that, at the time of the trial and for a long time prior thereto, the said Jackson was not a resident or elector of Douglas county; that this fact was not known by the defendant or his counsel until after the rendition of the verdict. True, this was a criminal case and a prosecution for murder in the first degree, but this court has held that the rule is the same in criminal as in civil cases. *Hickey v. State, supra.* The record in the case of *Marino v. State, supra,* discloses that the juror Jackson had been a resident of Douglas county, Nebraska, for some years; that more than six months prior to the trial of the case he had removed with his family to Aurora, Hamilton county, Nebraska, where he was engaged in business; that he voted in the city election in Aurora; that he was drawn for jury service in Douglas county and a subpœna was sent to his former address in Omaha by registered mail; the letter was forwarded to him at Aurora, Nebraska; that he responded to the notice and appeared and served upon the jury in the case. There is some dispute as to whether or not the general question was asked of the jurors, as a whole, whether they were residents and electors of Douglas county; if not, to so signify. It was undisputed, however, that the county attorney elicited from the juror on his *voir dire* examination that he was a resident of Omaha, Douglas county, Nebraska, and that he had lived at No. 8409 Thirty-first street. The court concluded from all the evidence introduced in support of the motion for a new trial that the juror was not a resident of Douglas county at the time he served on the jury. This court in that opinion said:

"The next question presented is whether the defendant waived the disqualification of the juror by failing to inter-

rogate him upon his *voir dire* as to his qualifications. Considering all of the circumstances presented in the record, we think he did not. It is shown by the affidavits of the defendant and his attorneys that they had no knowledge of the disqualifications of the juror until after the verdict was rendered. When the juror answered that he lived in Douglas county, in response to the inquiry of the county attorney, we think the defendant's counsel might well have relied upon his statement, but the testimony indicates that they went further and inquired as to his qualifications as an elector. We think that due diligence was exercised by the defendant in ascertaining the qualifications of the juror, and that the court, as well as counsel for the state and the defendant, were misled and deceived."

In this case, after the court had asked the qualifying questions as to the age of the jurors and the juror Watzke failed to disclose his incompetency to act on account of his age, no duty rested upon counsel to repeat the inquiry and they cannot be held to have waived that objection.

Justice Maxwell in *Hickey v. State, supra,* quoting from *Eastman v. Wight,* 4 Ohio St. 156, says: "It is certainly clear that all jurors must have the qualifications of electors; and if one not having such qualifications is retained upon the panel without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain that fact, when the jury is impaneled, a new trial should for that cause be granted. But it is equally clear that the proper time to take the objection is at the inpaneling of the jury; and it must be taken to have been waived, unless the party is able to show to the court, upon the hearing of the motion, that with the exercise of diligence he could not have taken the exception at the proper time."

In the trial of this case counsel had a right to rely upon the answers given by the jurors in response to the questions put by the trial court and the inferences to be drawn from their failure to respond. It is clear from the record that the learned trial court relied upon their failure to respond to his first question and assumed that they were

all over the required age, when he stated: "I take it, then, that you are all over the age of 25 years."

Complaint is also made that the verdict of the jury is excessive, but as the case must be retried, it is unnecessary to express an opinion upon that question.

For the reasons above stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

HILDEEGARD FREDRIKSON, APPELLEE, V. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 21, 1934. No. 28788.

1. Death. "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238.
2. ———. The evidence examined and *held* sufficient to warrant the presumption of death from the absence shown.

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

Brown, Fitch & West, for appellant.

Edith Beckman, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

The defendant and appellant, Massachusetts Mutual Life Insurance Company, is a corporation and engaged in the general life insurance business. On the 6th day of January, 1923, it executed and delivered to Robert Fredrikson a policy of life insurance. The policy provided that on the death of the said Robert Fredrikson the defendant would pay to Hildeegard Fredrikson, the plaintiff herein, the

sum of $2,000. The plaintiff and her husband were married on April 16, 1917, and resided in Omaha, Nebraska. For some time prior to the 14th day of May, 1924, the husband was employed by the Trans-Mississippi Grain Company as bookkeeper and cashier. On the morning of the 14th of May, 1924, Mr. Fredrikson left home for work as usual. Fredrikson did not return that night and up to date he has failed to return. The plaintiff commenced this action in the district court for Douglas county on the 5th day of August, 1931, against the defendant, Massachusetts Mutual Life Insurance Company, for the sum of $2,000, with interest and the costs of suit. At the conclusion of the evidence the defendant moved the court to instruct the jury to return a verdict in its favor. The plaintiff also moved the court to instruct the jury to return a verdict in her favor. The court discharged the jury and sustained the motion of the plaintiff, overruled the motion of the defendant, and entered judgment in favor of the plaintiff for $2,163, together with interest thereon at the rate of 7 per cent. from the 6th day of December, 1932. The court also allowed the plaintiff an attorney fee of $250, to be taxed as part of the costs. The motion for a new trial was overruled and the defendant appeals.

The defendant makes four assignments of error. The first relates to the admission of evidence and the last three are in effect that the evidence is insufficient to sustain the judgment. There is no question of fact involved in the case, as the defendant did not introduce any testimony. The evidence shows that Robert Fredrikson, the insured, was a German by birth; that he came to the United States about the year 1911 and had received his first papers. He married the plaintiff in 1917, when he was 25 years of age. His domestic life appears to have been happy. He was a home loving man and never stayed away from home. He appears to have been a man of good habits and character, industrious and ambitious, and had been promoted by his employers. From the time of the marriage of the plaintiff, she and her husband had lived in Omaha, except

for a period of 15 months when they lived in Germany. He was a member of the Y. M. C. A. of Omaha and of St. Mary Magdalene Church. During all his Omaha residence he was employed by the Trans-Mississippi Grain Company as bookkeeper and cashier. He corresponded regularly with some members of his family in Germany. The morning following his disappearance the plaintiff received a note from him by registered mail, which read as follows:

"Honey Dear:

"I have gone wrong down in the office and have lost my job. I am not strong enough to face you so I must wander into the world and make good again. I know it will be hard for you, yet it is even more hard for me to leave the best wife on earth. Why I have done this I do not know. I will certainly make good again and I shall always take care of you.

"You will hear from me soon. I am ruined in Omaha. * * * Please destroy card. I shall write you soon. I am looking for a job. I have to make good or living will be worth nothing to me.

"Mr. Boyd will explain. $10 is all I have to spare till later.

"With love and broken hearted,

"Yours, Bob."

Shortly after the disappearance of Robert Fredrikson and after appellee had failed to locate her husband or hear from him, she notified the appellant of his disappearance. Three witnesses testified for the plaintiff, the plaintiff herself, Mrs. Rose Stefan, a sister of the plaintiff, and who had accompanied the plaintiff and her husband on their trip to Germany, and Sigmund Bauer, who is described as Fredrikson's closest friend. In addition to the evidence above set forth, the record shows that the plaintiff inserted an advertisement in a daily paper in Omaha, ran it for several days, and then, after a few weeks, repeated the advertisement. She did this several times. She also had their friend, Mr. Bauer, broadcast over the radio. She also corresponded with his family in Germany in an at-

tempt to learn of her husband's whereabouts, or if they had heard from him.

The first assignment of error is that the court permitted the plaintiff to answer the following question. "Q. And in all of their correspondence (referring to the correspondence received from his relatives in Germany) with you, have they ever stated that they have heard or seen of him?" Defendant objected to this as incompetent, irrelevant, hearsay, and not the best evidence. After some discussion the court permitted the witness to answer it. The witness answered: "They stated that they never heard of him." This answer was stricken and the court put the question to her: "Did they ever say in the letters that they heard from him or of him? A. No." Appellant argues that the reception of this evidence amounted to giving parol testimony as to the contents of certain letters without proof of the loss of the originals and also that it was not the best evidence. As to the objection that the question called for the contents of certain letters, we think it is not well taken. The witness did not state what the letters said, but merely stated the negative, that she did not get any information from the letters concerning the whereabouts of her husband. The court, in ruling upon defendant's objection, stated: "If you want the letters you can call for them." Defendant made no demand for the production of the letters.

The second, third and fourth assignments of error are argued together in defendant's brief, and, as stated, they are directed toward the sufficiency of the evidence to sustain the judgment.

In *Holdrege v. Livingston,* 79 Neb. 238, this court held: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." In that case it was further said: "Where a party leaves his domicile with the avowed intention of establishing some

specific new abode, the inquiry must follow him to such new domicile, but * * * there is a total lack of any evidence that Elijah Noyes * * * did in fact establish any new residence or place of abode."

In the case of *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, after quoting from *Holdrege v. Livingston, supra,* this court further held: "In such case the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period."

The holding of this court in the case of *Rosencrans v. Modern Woodmen of America,* 97 Neb. 568, is: "Where absence of the person insured is shown to have continued for seven years or more, unaccompanied by circumstances which reasonably account therefor on a theory not involving death, it is sufficiently strong to cast the burden of rebutting it on the party who asserts the continuance of life."

Appellant cites and relies upon the cases of *Thomas v. Thomas,* 16 Neb. 553, and *Maxwell v. Maxwell,* 106 Neb. 689. The facts in both these cases differ from the case at bar, in that there was domestic trouble to such an extent as might well explain the absence of the husband. The appellant seriously contends that the note sent to the plaintiff by registered mail is sufficient to explain the absence of the plaintiff's husband. It contends that the statement, "I have gone wrong down in the office and have lost my job," can mean nothing except that he was short in his accounts and was, therefore, guilty of the commission of a crime. We cannot agree with the construction placed upon that sentence. It might mean any of a number of things that would not be criminal. If, in fact, Fredrikson had been short in his accounts, it had ample opportunity to offer proof of that circumstance. It chose not to do so, but to rely upon the statement above quoted. In fact, counsel for appellant objected to any inquiry as to

whether or not there was a shortage in Fredrikson's accounts. This objection was sustained by the court.

Complaint is also made that plaintiff did not call all of Fredrikson's intimate friends or some member of the Y. M. C. A. and of St. Mary Magdalene Church, of which organizations he was a member, to show that nothing had been heard of Fredrikson. We cannot agree that it was necessary for plaintiff to do this or to take the depositions of the living members of his family in Germany. When it was shown that his wife, his sister-in-law, and one of his best friends had not heard from him for a period of more than seven years, this was sufficient to make out a *prima facie* case. Plaintiff was not required to produce all the cumulative evidence available. Defendant elicited the names and whereabouts of the witnesses it complains were not called and was in a position to procure their testimony, if it would avail anything to the defense. It is quite apparent that the appellee made as intensive a search as her limited funds would permit and the same limitation undoubtedly accounts for the restricted number of witnesses called by her.

The judgment of the trial court appears to be sustained by the evidence and is affirmed. Upon application appellee is awarded an additional attorney fee for services in this court in the sum of $200.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF DESHLER, APPELLEE: SCHOOL DISTRICT NO. 60, INTERVENER, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28807.

1. **Schools and School Districts.** School district treasurer may lawfully deposit school district funds in a bank, duly designated as a depository, pursuant to the provisions of sections 77-2525 and 77-2526, Comp. St. Supp. 1933.
2. **Banks and Banking.** Deposit of school district funds in a duly

designated depository, in the absence of special agreement to the contrary, constitutes a general deposit.

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

P. I. Harrison and *W. T. Thompson,* for appellant.

F. C. Radke, Barlow Nye, Grady Corbitt and *Thomas J. Keenan, contra.*

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

GOOD, J.

This is a proceeding to have a deposit in a state bank, now insolvent, adjudged to have been held by the bank as a trust fund and entitled to be paid out of the assets of the insolvent bank prior to the claims of general depositors.

The Farmers & Merchants Bank of Deshler became insolvent, and proceedings were instituted in the district court for Thayer county for winding up its affairs. A receiver was appointed. At the time the bank closed School District No. 60 of Thayer county had a deposit in said bank of $7,808.89. The receiver of the bank classified the deposit as entitled to the status of a general deposit. The school district intervened in the proceeding and filed a petition asking to have the deposit adjudged to be a trust fund. The trial court denied the prayer of intervener, and it has appealed.

There are numerous decisions rendered by this court holding to the effect that there is no authority of law for the deposit of school funds in a bank, and that, if a deposit of such funds is made in a bank, with knowledge by it of the character of the funds, it will be held to hold the funds in trust for the school district, and, upon insolvency of the bank, the deposit shall be treated as a trust fund. *State v. Midland State Bank,* 52 Neb. 1; *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538; *State v. Bank of Otoe,* 125 Neb. 414.

The basis for those decisions was that there was no statutory or other authority which permitted school district officers to deposit school funds in a bank. However, in 1931, sections 77-2525, 77-2526, and 77-2527, Comp. St. Supp. 1933, were enacted. These sections provide:

"77-2525. That any school district treasurer or township treasurer may deposit the money received or held by him by virtue of his office in some state or national bank situated in such school district or township or in some nearby city or village which has been approved as such depository by the governing body of such school district or township.

"77-2526. Any such banks may apply for the privilege of keeping such moneys. All such deposits shall be subject to payment on check when demanded by the district or township treasurer. It shall be the duty of the school district board or township board to act upon such application.

"77-2527. No such treasurer shall be liable on his bond for money on deposit in a bank and by direction of the proper legal authority."

The record discloses that the Farmers & Merchants Bank of Deshler made application to the school board of School District No. 60, Thayer county, for the privilege of becoming a depository for the school district funds, and that the school board, by resolution, designated the bank as a depository for its school district funds. It appears that the deposit was made in strict accordance with the sections of the statute above quoted.

Intervener contends that the sole purpose of those sections was to relieve school district and township treasurers from liability upon their official bonds, where funds in their custody had been deposited in a bank pursuant to the authority of the governing body of the district or township. We cannot concur in this view. Prior to the enactment of the sections quoted, it was unlawful for a school district treasurer to deposit school funds in a bank. After the enactment of those sections it became lawful

for him so to do, provided the bank was first designated as a depository.

Intervener contends that, notwithstanding the sections quoted, the funds still retained their character as trust funds and that the bank held the funds only for safekeeping, and, upon its insolvency, the district was entitled to a return of the funds. This contention seems to be untenable. There was nothing in the nature of an agreement to show that the deposit was special or made for a specific purpose. It was subject to check from time to time, as the treasurer of the district might demand. Under these circumstances, it seems clear that the deposit was general and not special, nor one for a specific purpose.

We conclude that school district treasurers may lawfully deposit school district funds in a bank, duly designated as a depository, pursuant to the provisions of sections 77-2525, 77-2526, and 77-2527, Comp. St. Supp. 1933, and that a deposit of school funds in a duly designated bank, in the absence of special agreement to the contrary, constitutes a general deposit.

It follows that the judgment of the district court is right and it is

AFFIRMED.

GEORGE C. LYONS, APPELLEE, V. HARMON B. AUSTIN, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28833.

1. **Exemptions.** Exemption from execution or attachment of wages of a judgment debtor is controlled by section 20-1559, Comp. St. 1929.
2. ———. Ninety per cent. only of the wages due a judgment debtor is exempt from garnishment in aid of execution on a judgment rendered for other than necessaries.
3. **Appeal.** A defense, not submitted to the trial court nor disclosed by the record, cannot be considered by this court on appeal.

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

Allen G. Fisher, Charles A. Fisher and *J. E. Porter,* for appellant.

E. D. Crites and *F. A. Crites, contra.*

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

GOOD, J.

This appeal arises out of an order in a garnishment proceeding in aid of execution. The order found that 10 per cent. of the amount of wages owing the debtor by the garnishee was not exempt and was applicable to the judgment of plaintiff. Austin, the judgment debtor, has appealed.

From the record it appears that some time previous to the present proceeding plaintiff had obtained a judgment against the defendant; that execution had been issued thereon and returned unsatisfied; that he then filed an affidavit for garnishment in aid of execution which was served upon the Chicago & Northwestern Railway Company. That company answered that it had in its possession certain sums as wages due the defendant for services as an engineer. The defendant filed an inventory of his personal property, showing that the total amount of his personal property, other than the wages due him, did not exceed $25, and alleged that he owned neither land, town lots, nor houses subject to exemption as a homestead, and claimed the total amount of his wages as exempt from attachment or garnishment. It was stipulated that the judgment in favor of plaintiff was not rendered for necessaries furnished the defendant or his family.

The trial court found that the debtor was the head of a family, but, nevertheless, that his wages, to the extent of 10 per cent., were subject to garnishment and should be applied towards the payment of plaintiff's judgment,

but that 90 per cent. of the wages were exempt and should be applied according to the direction of the defendant debtor. The only question is whether the 10 per cent. of the wages was exempt from attachment or garnishment.

Plaintiff cites and relies upon *Jones v. Union P. R. Co.*, 84 Neb. 121, and *Woolfson v. Mead*, 96 Neb. 528. Those cases were decided on the statute as it then existed. Section 521 of the Code then provided: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." Comp. St. 1909, sec. 7092. But subsequently that section was amended and now appears as section 20-1553, Comp. St. 1929, and reads as follows: "All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property, except wages: * * * The provisions of this section shall not, in any manner, apply to the exemption of wages, that subject being fully provided for by section 546 of this Code." Section 546 of the Code now appears as section 20-1559, Comp. St. 1929, and is as follows: "The wages of all persons who are heads of families, in the hands of those by whom such persons may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution and garnishee process to the extent of ninety per cent. of the amount of such wages."

It is apparent that the cases cited above and relied upon by defendant are not applicable under the present provisions of the statute. It appears that the 500-dollar exemption in lieu of a homestead may include wages due, or to become due, to the extent of 90 per cent. thereof only, and wages in excess of 90 per cent. are not exempt from garnishment.

Defendant contends that plaintiff's judgment was discharged by an adjudication of defendant's bankruptcy.

There is attached to the record what purports to be a certificate by the clerk of the United States district court for the district of Nebraska, certifying to an order, entered in that court, adjudicating one, named Harmon B. Austin, bankrupt; but such certificate is not contained in, nor any part of, the transcript in the district court or in the bill of exceptions. Whether plaintiff's judgment was extinguished by bankrupt proceedings was a matter that should have been submitted to the trial court. Not having been submitted to the trial court, it cannot here be considered, since the cause is here for review only of the proceedings of the district court.

The finding and judgment of the trial court appear to be in strict conformity with the present law applicable to the facts presented by the record.

The record seems to be free from prejudicial error. Judgment

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. J. E. PAINE ET AL., APPELLEES.

FILED FEBRUARY 27, 1934. No. 28843.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS. Constitutional double liability of stockholders in banking corporations was, prior to the amendment of 1930, a secondary liability to be enforced only after assets had been exhausted and the amount due on liability had been judicially determined.
2. ———: ———. Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof.
3. **Constitutional Law**: CONTRACTS: IMPAIRMENT. State Constitution changing procedure in suit on contractual liability does not impair obligations of contract and is applicable to existing contracts.
4. **Banks and Banking**: LIABILITY OF STOCKHOLDERS. The nature and extent of bank stockholders' double liability is determin-

able under constitutional provisions extant when stock is purchased.

5. ———: SUIT AGAINST STOCKHOLDERS: DISMISSAL. Suit against stockholders to recover double liability on bank stock purchased prior to 1930 amendment (Const. art. XII, sec. 7), brought before corporate assets exhausted and exact amount justly due judicially ascertained, is premature and should be dismissed.

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

F. C. Radke, Barlow Nye, G. E. Price and *Bert L. Overcash,* for appellant.

Squires, Johnson & Johnson and *Henry E. Dress, contra.*

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

DAY, J.

This is a suit to collect the constitutional double liability of stockholders in the Farmers State Bank of Stapleton. The trial court decreed that the suit was prematurely brought, because the assets of the bank had not been exhausted, and dismissed the cause of action. The receiver appeals.

The Stapleton bank was organized in 1925, when all the capital stock was subscribed and purchased. None of the stock has been held by the bank since organization. At the time of the purchase of the stock, the constitutional stockholders' double liability was provided as follows:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," etc. Const. art. XII, sec. 7.

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall

have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Const. art. XII, sec. 4.

These provisions have been construed together for the determination of the stockholders' liability in banking corporations. The constitutional double liability of stockholders in banking corporations was, prior to the amendment of 1930, a secondary liability to be enforced only after assets had been exhausted and the amount due on liability had been judicially determined. *State v. German Savings Bank,* 50 Neb. 734; *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353; *Bodie v. Pollock,* 110 Neb. 844; *State v. Farmers State Bank,* 113 Neb. 497; *Rogers v. Selleck,* 117 Neb. 569.

Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof. *Allen v. White,* 103 Neb. 256; *Brownell v. Adams,* 121 Neb. 304; *Bourne v. Baer,* 107 Neb. 255; *Rogers v. Selleck,* 117 Neb. 569. This has been the holding in so many cases that it is impractical to cite all of them. It is the general rule. 14 C. J. 843.

In 1930, section 7, art. XII of the Constitution, was amended to read as follows (the change is shown in italics): "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing *or existing* while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities. *The stockholder shall become individually responsible for the liability hereby imposed, immediately after such banking corporation, or banking institution shall be adjudged insolvent, and the receiver of said corporation or institution shall have full*

right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liability; and the provisions of section 4, article XII, of the Constitution of the state of Nebraska shall not be construed as applying to banking corporations or banking institutions." Comp. St. Supp. 1933.

It is argued that this merely changes the remedy for an existing substantive right. In *Luikart v. Bunz,* 125 Neb. 867, we held that the receiver could bring a suit to recover stockholders' liability for the benefit of all the creditors; that the provision authorizing the receiver to maintain the suit was remedial. But it was also held that, prior to the 1930 amendment, stockholders' liability could not be enforced until the assets had been exhausted and the amount of the debts had been judicially determined. In that case, the assets had been exhausted and the amount then due creditors had been judicially determined.

The precise question presented here is the nature of the obligation created by the purchase of bank stock in 1925. The contractual obligation created was with respect to then provisions of the Constitution. It requires drawing a line of demarcation between substantive and adjective law. Provisions for the enforcement of an existing substantive right do not of course impair vested rights. Examples of such provision relate to who shall bring suit for benefit of all creditors; to which court jurisdiction shall be given; and other matters of procedure. State Constitution changing procedure in suit on contractual liability does not impair obligations of contract and is applicable to existing contracts.

However, amendment to the Constitution, changing the substantive rights of stockholders in banking corporations where the obligation was created by the purchase of stock prior to the adoption of the amendment, is not applicable. The contractual obligation was determined by the constitutional provision existing at the time of purchase. To permit such a change of contract would violate section 10,

art. I of the Constitution of the United States. The nature and extent of bank stockholders' double liability are determinable under constitutional provision extant when stock is purchased.

When the defendants in this case purchased their stock in 1925, their liability was a secondary obligation which could only accrue after the corporate assets had been exhausted and the amount then due creditors had been judicially determined. The obligation cannot be changed by subsequent constitutional amendment changing the obligation to a primary one imposed immediately upon adjudication of insolvency. But this amendment, if applicable to stock purchased prior to its adoption, would materially change the contractual liability. Therefore, the liability in this case must be determined under the Constitution as it existed prior to the amendment of 1930. The assets had not been exhausted in the instant case, and the amount necessary to pay all the creditors had not been judicially determined. The suit was prematurely brought.

The trial court made comprehensive and exhaustive findings of fact which it is unnecessary to review and a discussion of which is here unnecessary and improper, since the suit is dismissed as prematurely brought, and no other fact is here determined.

AFFIRMED.

BERTHA THOMAS, APPELLEE, V. ALBERT HASPEL, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28790.

1. **Pleading:** AMENDMENT. It is usually a matter within the sound judicial discretion of the district court to allow, or to refuse to allow, a pleading to be amended to conform to the evidence; and, in order to predicate error in allowing such amendment, prejudice to a party as a result thereof must appear from the record.
2. **Negligence:** INSTRUCTIONS. Where, in an action to recover for

personal injuries, the jury are properly instructed as to the burden of proving the negligence charged as a proximate cause of the injury, failure to further instruct on unavoidable accident not error in the absence of request therefor.

3. Trial: INSTRUCTIONS. Requested instruction, giving undue prominence to a portion of the testimony by special reference thereto and commenting on its weight, properly refused.
4. Evidence: NONEXPERT EVIDENCE: PERSONAL INJURY. Nonexpert witnesses are competent to testify as to circumstances and conditions that any person of ordinary intelligence might observe, and such witnesses may testify whether a person who has been injured, and with whom they were familiar, appeared to be suffering pain, or nervousness, the appearance of her injuries and similar matters observed by them tending to show the nature and extent of the injuries. *Struble v. Village of DeWitt*, 89 Neb. 726.
5. Appeal. Verdict based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Anderson v. Lotman*, 124 Neb. 795.
6. Damages. Evidence examined, and *held*, verdict of $3,000 not excessive.

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

E. H. Evans, J. T. Keefe and *Urban Simon*, for appellant.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

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

ELDRED, District Judge.

Action to recover for injuries sustained by plaintiff, Bertha Thomas, due to the alleged negligence of the defendant, Albert Haspel, in the operation of his automobile. There was a verdict for plaintiff for $3,000. Motion for a new trial was overruled, and judgment entered on verdict. Defendant appeals.

Error is assigned in permitting appellee to amend her petition during trial to conform to the proof. The al-

legations of the petition, as originally filed, with reference to injuries, were: "That she sustained an incised wound over the left eye, several inches in length, that her nose was broken, that she suffered a cut through her lower lip, received a severe injury to the back of her neck and to her right shoulder and suffered a broken left hand, * * * that she suffered an attack of traumatic neurosis." During the trial, and after appellee had rested her case, she asked permission to amend her petition by adding thereto the following: "Plaintiff further alleges and says that she suffered a permanent, lasting and severe injury to her lower back and hip which has resulted in her having a condition known as traumatic arthritis."

The plaintiff, appellee, testified fully as to her injuries, including injuries to her back, hip and spine, and no objection was made thereto by appellant. It was not until during the examination of Dr. Willis, called as a witness by appellee, that the appellant first objected and raised the question that "evidence as to injuries to the back is not within the issues made by the pleadings." The presiding judge, when amendment was requested, announced that he would refrain from ruling thereon at that time, and wait until further along in the case to see to what extent the defendant has been permitted to meet the issues raised relative to the injuries to the back. The court, at the same time, ordered "that the plaintiff (appellee) submit to a further physical examination, not only as to the back, but any other examination of her injured parts." A recess was thereupon taken for several hours and appellee submitted herself to an X-ray examination by doctors selected by appellant. On behalf of appellant the doctors making the X-ray examination were called and testified, and it appears from the record that two of said doctors in April, 1932, after the commencement of suit, at procurement of the appellant, and consent of attorney for appellee, examined appellee as to the injuries to her back. They were given full and free opportunity to make such examination by appellee, and in their opin-

ion she was suffering from injuries thereto at that time. The trial was in December, 1932.

After appellant had offered his evidence and rested, he moved for an order that he be permitted to have a further X-ray examination made of appellee. The court, in ruling on this request, announced: "The record discloses that the defendant made an examination of the plaintiff some time last April, which was at that time performed through the doctors that were sent for the examination by the defendant. There being some kind of complaint about the back being injured during the trial, the court has taken a recess of four or five hours, and the plaintiff has submitted herself to X-ray examination. Under the condition of the record, * * * the motion for any further continuance is overruled."

Rebuttal evidence having been offered and both parties having rested, the court announced: "In view of the facts shown in the record relative to the doctors acting on behalf of the defendant having been notified of the claim of the plaintiff that she had suffered an injury to her back at the time of their examination in April, of 1932, and in view of the opportunity that has been given during the trial to the defendant to make X-ray plates of the lumbar region of the plaintiff's back and spine, the evidence as given relative to any injuries thereto, and in view of the fact that the petition as it was originally drawn having made a claim for damages on account of traumatic neurosis that might arise from injuries to various portions of the body, the request of the plaintiff to amend her petition, heretofore made, * * * is allowed."

It seems, under the allegations of the petition before amendment, that, as a result of the injuries pleaded, the plaintiff "suffered an attack of traumatic neurosis," evidence of that condition in any portion of the body might have been admissible, and an amendment may not have been necessary for that purpose. However, the permitting of the amendment was well within the limits of judicial discretion and in furtherance of justice. The

court cautiously refrained from granting the request until it appeared that appellant would not be prejudiced thereby. The ruling not appearing prejudicial to the rights of the appellant was not erroneous.

Our Code provides that the court may, either before or after judgment, in furtherance of justice, permit an amendment to any pleading correcting a mistake in any respect, or by asserting allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading to the facts proved. Comp. St. 1929, sec. 20-852.

The granting of permission to amend a pleading during trial to conform to the proof is a matter within the sound judicial discretion of the trial court, and unless it clearly appears from the record that there was an abuse of discretion, and a party has thus been deprived of the opportunity to make his case or defense and thereby damaged, this court will not, on appeal, interfere with such ruling. *Blakeslee v. Van der Slice,* 94 Neb. 153; *Miller Rubber Products Co. v. Anderson,* 123 Neb. 247; *Omaha & R. V. R. Co. v. Moschel,* 38 Neb. 281.

Complaint is made that the trial court erred in failing to instruct jury on theory of unavoidable accident. No instruction to that effect was requested. The court fully and correctly instructed the jury as to the issues, the burden of proof on plaintiff, and that if not satisfied by a preponderance of the evidence of negligence on the part of defendant, as a proximate cause of injury, plaintiff could not recover; or if evidence evenly balanced, or preponderated in favor of defendant, then verdict should be for the defendant. Also the rule governing contributory and comparative negligence was correctly stated to the jury. This was sufficient as to that phase of the case. If further instruction as to mere accident or unavoidable accident was desired, they should have been requested.

Complaint is also made of failure of court to give instruction No. 3, requested by defendant, "That the mere skidding of an automobile is not an occurrence of such

uncommon or unusual character that, unexplained, it can be said to furnish evidence of negligence in the operation of a car;" and further, "If you find that the defendant skidded in this case without any other act of negligence on his part, then your verdict will be for the defendant." Skidding of automobile was not an element of negligence charged in the petition; but the skidding of an automobile would be a circumstance which might be considered by the jury along with all the other circumstances disclosed by the evidence in determining whether the defendant was guilty of negligence in the particulars charged. By special reference to such testimony it would have been given undue prominence. It was for the jury to say what weight should be given to the circumstance of skidding when considered with all the other facts and circumstances shown by the evidence bearing upon the question of negligence.

Complaint is made of the refusal of the trial court to strike out all of the evidence relating to neurosis, for the alleged reason that no competent evidence was offered tending to prove the same. No reference is made to the pages of the bill of exceptions where the evidence complained of will be found. Some evidence that might bear on that subject was given by a doctor called as a witness by the appellee; also by doctors who testified on behalf of appellant. Why their evidence was not competent is not pointed out. Several nonexpert witnesses were also called by the appellee and testified as to the general physical condition of appellee; her suffering pain and her nervous condition. Much of this testimony, if not all, was competent. *Struble v. Village of DeWitt,* 89 Neb. 726; *Kubicek v. Slezak,* 119 Neb. 542. If some specific portion of the evidence was objectionable, particular attention of the trial court and this court should have been directed thereto.

Insufficiency of the evidence to sustain verdict is urged. On November 26, 1931, appellee, Bertha Thomas, while driving east on Lincoln highway, at a point between Max-

well and Brady, had some difficulty in the handling of her car, which resulted in getting her car into the ditch on the north side of the grade. One King, driving west, whom appellee had just met, observing appellee's accident, backed his car up and stopped it on the north edge of pavement, headed west, nearly due south of appellee's car. Jerry Snyder, also traveling west, drove up at about the same time and also stopped his car on north edge of pavement, about fifteen feet to the rear of the King car. Mr. King got out of his car and the appellee got out of her car and, coming onto the grade, was talking to King about where she could get help to get her car out of the ditch. She had been in no manner injured up to that time. She and King were standing between the King car and the Jerry Snyder car; appellee to the south of King was facing in a northerly direction standing directly back of the left fender of the King car, about a foot north of the south side of the car. About that time another car came up from the east, driven by one R. G. Snyder. He testified that, as he drove up, the car in the ditch was headed toward the grade, the back end down in the ditch, just about between the two cars that were up on the paving; observed a man and woman there, behind the west car; further stated, "Well, I was coasting to a stop there, and about the time I had got even with the east car, another car appeared from the east coming quite rapidly, and about the time, or a little before, he got to where I was, he just kind of headed toward me and I whipped into the shoulder to get in the clear all I could. * * * It whipped back the other way, and by that time it was by me and I heard this crash then." As witness passed, appellee was standing a foot or two north of the south side of the King car. Appellee testified, as she stood there talking to King she heard no horn sounded or signal of any kind of approaching car; that she was hit from the back some way and knocked down. King testified Mrs. Thomas was standing right behind his (King's) car; to the north of the south side of the car; the car

came from the east, hit her and knocked her down. Swiped alongside of his car and jimmied the hub on left rear wheel, and on spare wheel on running board; rear fender was bent in and broken to the body; jimmied the running board. It was Haspel's (appellant's) car that struck the plaintiff. Haspel's car ran 150 feet after it struck King's car. Haspel told witness, in order to keep from hitting another car head-on, he had to turn in that direction. He did not see the other car coming until he turned around these cars. Witness saw car from the east that went by at that time.

Appellant in his own behalf testified: Saw the cars stopped about a quarter of a mile down the road; slowed down and came to a stop behind Mr. Snyder's car. There was one truck and three cars coming from the east and I was compelled to stop; after they had passed I went on south side of both cars, to come west. Just about by Mr. Snyder's car I hit an icy spot and my car swayed over and hit Mr. King's car, my right front fender on his left rear fender; then I slipped sidewise along his car; did not see any people about there at that time; did not know of striking any person with automobile; going eight or ten miles an hour, with car in intermediate gear. Other circumstances were shown by witnesses called by parties to this suit.

Sufficient has been shown to indicate that the evidence was conflicting; and its weight was for the jury. If the evidence offered on behalf of appellee was believed by the jury, they could well have concluded that, under the existing conditions, the appellant was not, in the operation of his car at the time and place in question, exercising care commensurate with the danger and injury reasonably to have been apprehended from a lack of proper prudence. Where a verdict is based on conflicting evidence, it will not be disturbed as against the weight of evidence, unless clearly wrong. *Anderson v. Lotman,* 124 Neb. 795; *Cotten v. Stolley,* 124 Neb. 855; *Schwerin v. Andersen,* 107 Neb. 138; *Bainter v. Appel,* 124 Neb. 40.

Finally, it is contended that the verdict is excessive. There is evidence that appellee received the injuries alleged in her petition, which have heretofore been set out. This is mostly uncontroverted, except as to the injuries to her back and spine, and the effect thereof; some of the injuries are of a permanent nature; left a deformity of the nose; she has suffered much pain and at the time of the trial still complained of pain from the injuries received; was nervous; unable to sleep well nights; had difficulty in climbing stairs; unable to use injured hand, without pain, and her physical activities are interfered with. We conclude the evidence as to injuries sufficient to sustain the amount of the verdict. No prejudicial error appearing, the judgment of the trial court should be, and is

AFFIRMED.

ETHYL LAFLEUR, ADMINISTRATRIX, APPELLANT, V. WILLIAM POESCH ET AL., APPELLEES: WESTERN PUBLIC SERVICE COMPANY, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28678.

1. **Trial**: DIRECTION OF VERDICT. "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40.
2. **Automobiles**: NEGLIGENCE. It is required by sections 39-1122 and 39-1165, Comp. St. Supp. 1931, that, during the period of one-half hour after sunset until one-half hour before sunrise, a red light shall be displayed on the rear of a truck, which, with its load, is 80 inches or more in width, and also a red light at the end of a load thereon when the same extends more than 4 feet beyond the rear of the truck. *Held*, a failure to

comply with these requirements of said statutes is not actionable negligence as a matter of law, but evidence of negligence to be taken into consideration with all the other facts and circumstances in evidence in determining whether or not negligence is established thereby.

3. ———: PARKING. Section 39-1154, Comp. St. Supp. 1931, prohibiting parking or to leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of the business or residence district, when it is practicable to leave such vehicle off the paved or improved or main traveled portion of the highway, does not, by an express exception contained therein, apply to any automobile which is disabled, while on the paved highway, in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position.
4. **Negligence.** Under the facts set out in the opinion, *held* that the questions of negligence and contributory negligence and whether the deceased was guilty of such contributory negligence as would bar a right of recovery under the comparative negligence statute were issues which should have been submitted to the jury for their determination.
5. **Master and Servant.** "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." *Stone v. Hills*, 45 Conn. 44.
6. ———. In actions wherein it is sought to hold the master liable for the wrongful act of his servant, each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment, in the execution of his master's business, is ordinarily one of fact for the determination of the jury.

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

Morrow & Morrow, for appellants.

Mothersead & York and *Wright & Wright, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

HASTINGS, District Judge.

This action was brought by Ethyl LaFleur, as administratrix of the estate of Harry C. LaFleur, deceased, against William Poesch and the Cudahy Packing Company to recover damages for alleged negligence resulting in the death of her husband, Harry C. LaFleur. The Western Public Service Company, by whom Harry C. LaFleur was employed at the time of the accident which resulted in his death, paid compensation under the workmen's compensation act to his widow and was joined as a defendant so that it might be subrogated to the rights of the plaintiff for such sums as it had paid or might thereafter pay under said act. At the close of plaintiff's evidence the court sustained separate motions of the defendants, Poesch and the Cudahy Packing Company, for a directed verdict. From the judgment entered on the verdict the plaintiff and the Western Public Service Company appeal.

The principal error assigned is that the court erred in directing a verdict for the defendants. It is contended by plaintiff that the evidence does not show that the decedent was guilty of such contributory negligence as would bar a right of recovery under the comparative negligence statute. The correctness of the ruling of the trial court will be tested in accord with the rule announced by this court in *Bainter v. Appel,* 124 Neb. 40, wherein it is stated:

"If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclu-

sions, it will be deemed error on the part of the trial court to have directed a verdict thereon."

A consideration of the question involved necessitates a brief outline of the facts as disclosed by the evidence. The deceased, Harry C. LaFleur, at the time of his death and for several years prior thereto, was in the employ of the Western Public Service Company as a construction or line foreman. He and the men who worked under his direction had their headquarters at Scottsbluff. A truck was used for the purpose of conveying the men to and from their work and, also, to carry the equipment and material required in performing the work. On February 25, 1932, the deceased and his crew of three men, having completed their work, started at about 4:15 p. m. in the truck for Scottsbluff. When they reached a point on the main paved highway between Mitchell and Scottsbluff, about 4 miles east of Mitchell and 6 miles west of Scottsbluff, the motor of the truck became so disabled that the truck could not be driven on its own power. This happened at about 5:20 p. m. when it was still day-light. The truck in question was a large heavy truck, with dual wheels in the rear, with brackets on the sides for carrying iron pipes or poles used in the performance of the work of repairing or constructing electric lines. At the time the truck became disabled there were being carried on the brackets on the left side thereof 4 iron pipes which were 4 or 5 inches in diameter, three being 18 feet in length; there were also pipes of like size in brackets on the right side of the truck. The pipes 18 feet in length extended from near the door of the cab to about 6 feet to the rear of the body of the truck. The body of the truck was 6 feet and 4 inches in width and, with brackets loaded, over 80 inches in width. After the truck stopped, the starter was used to remove it from the pavement, as far as it could be removed by the use of the starter. This left the left wheels of the truck 2 feet and 2 inches on the pavement, the right wheels of the truck were off the pavement resting upon the shoulder of the highway,

which at that point was about 4 or 5 feet in width, with its sides sloping into a barrow pit about 4 feet in depth. The right wheels of the truck were between one foot and one foot and a half from the south edge of the shoulder of the highway. The truck, as parked, faced in an easterly direction. The pavement at the point where the truck was parked was 20 feet in width, leaving a clear space between the north side of the truck and the north edge of the pavement of nearly 18 feet. About 15 or 20 minutes after the truck became disabled the deceased sent one of the crew to Scottsbluff to procure a truck to pull the disabled truck to said town. It was still daylight. The man returned with the truck very shortly after the accident, which happened about 6:30 p. m. At the rear end of the poles there was a red flag. It was the intention of the deceased to reach Scottsbluff before it became dark and he would have done so had not the truck been disabled. The truck was not equipped with any lights except two headlights. When it began to get dark the two headlights were turned on, and not having any lights on the rear of the truck or at the end of the protruding load, the deceased directed that a blow pot, that was in the truck, be lighted and placed to the rear of the load. The lighted blow pot was placed on the pavement about 8 feet to the rear of the end of these poles. It gave a pinkish light about 10 inches in height, in size comparable to the lights used by the highway department to warn of some obstruction on or defect in the highway.

Shortly after dark a car was approaching from the east and also one from the west. The one from the west being driven by the defendant Poesch. Both of these cars had their headlights burning. The car of the defendant Poesch, when first noticed, was about a half mile distant from the truck and the other car approaching from the east somewhat nearer. The lighted blow pot was burning during all the time that the defendant Poesch was approaching the truck.

The deceased and two others of the crew were, at the

time those cars were approaching, standing on the left side of the truck near the cab. As the cars drew nearer it became apparent that they were going to pass at or near the point where the truck was located. Upon observing this, one of the men warned the others that they should get out of the way, and two of them immediately ran around to the front of the truck. Both were injured. The deceased remained where he was. As the two men reached the front of the truck, the car driven by the defendant Poesch struck the iron pipes projecting to the rear of the left side of the truck, one of which struck the deceased on the head and caused his death. One of the witnesses estimated the speed of the Poesch car as it approached the truck at 50 to 55 miles an hour. It appears from the marks upon the pavement the brakes on the Poesch car had been set about opposite the rear wheels of the truck. After striking the pipes it went around to the left of the truck, into the ditch on the right-hand side of the pavement. The distance from where the brakes were set to where the car went into the ditch was 56 feet and 8 inches. After going into the ditch on the south side of the pavement it traveled 23 feet east along the course of the ditch and turned over on its side.

It is agreed by all the witnesses that the Poesch car was being driven at a high rate of speed before and at the time it struck the pipes and probably a part of the truck. This fact may be properly inferred from the distance it traveled with the brakes set before turning over in the ditch. The Poesch car before striking the pipes ran over and demolished the lighted blow pot. For several miles west of the point where the truck was standing the highway was level with nothing to obstruct the vision of one driving east. At the time of the accident the atmospheric conditions were normal.

Section 39-1174, Comp. St. Supp. 1931, provides in part: "(a) Every motor vehicle upon a highway within this state during the period from a half hour after sunset to

a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet ahead, shall be equipped with lighted front and rear lamps."

Section 39-1176, Comp. St. Supp. 1931, provides in substance: The head lamps of motor vehicles shall be so constructed, arranged and adjusted that they will at all times at night, under normal atmospheric conditions, and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead.

Nothing to the contrary appearing in the evidence, it will be presumed that the headlights of the Poesch car complied with the statute, and, the atmospheric conditions being normal and the road level, that, if he had kept a proper lookout, he would have seen the truck on the pavement at least 200 feet before the collision, he would have observed the light upon the pavement at a much greater distance and would have been warned thereby that there was some obstruction on or defect in the highway at or near where said light was located. No explanation or reason appears in the evidence as to why the defendant, Poesch, with his car lighted as required by these statutes, could not see the truck or the load protruding therefrom, nor why he did not see the warning light or, if he did, why he did not heed the warning in time to have avoided striking the truck or the protruding pipes, or why, by turning to the left, he could not have avoided the collision. Giving no heed to the truck, which must have been clearly discernible within the radius of his lights, or to the warning light upon the pavement, he drove at an excessive rate of speed over the light and into the pipes protruding at the rear of the truck and, probably, into the truck.

We think, in the matters pointed out, there is such evidence of negligence on the part of said defendant as would warrant a finding of gross negligence on his part, or, so far as inferences may be drawn from the evidence

adduced, would warrant a finding that his negligence was the proximate cause of the injury.

It is contended by counsel for defendants that, notwithstanding the negligence of the defendant Poesch, the deceased, LaFleur, was guilty of contributory negligence which was more than slight in comparison with the negligence of said defendant. The alleged acts of contributory negligence upon which such contention is based are: (a) In leaving the truck standing in part upon the paved highway; (b) in not displaying at the rear of the truck, it being more than 80 inches in width with its load, a red light; (c) failure to display at the end of the load a red light; (d) failure to remove the load from the truck; (e) failure of the decedent to remove himself from a place of obvious danger; (f) failure to go or send some member of the crew to the rear of such truck to warn approaching motorists of the presence of the truck thereon.

It is urged that the leaving of the truck partly upon the pavement was in violation of section 39-1154, Comp. St. Supp. 1931, which, so far as material, provides: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of said highway. * * * (c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

The statute by an express exception does not apply to a vehicle which is disabled while on the paved or improved or main traveled portion of any highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. In the case of *Grubbs v. Grayson*, 165 Wash. 548, it was

said by that court, in construing a statute very similar to the one under consideration: "The statutes are not violated if there is proper excuse or a necessity for stopping an automobile upon the highway, and a reasonable effort is made to get it entirely off the traveled portion of the road or as nearly so as circumstances will permit." See, also, *Menge v. Manthey,* 200 Wis. 485.

Under the evidence in this case we cannot say, as a matter of law, that the decedent was guilty of contributory negligence in not removing the truck entirely off the pavement.

The statutes relating to the equipment and display of lights on trucks of the kind involved herein are sections 39-1122 and 39-1165, Comp. St. Supp. 1931. These statutes provide, in substance: Every motor vehicle, including road rollers, road machinery or farm tractors having a width including the load of 80 inches or more shall display during the period from one-half hour after sunset until one-half hour before sunrise and at all other times when there is not sufficient light to render such vehicle clearly discernible, at the rear of such motor vehicle, a red light located at a sufficient distance above the tail light of such vehicle as not to be confused therewith and visible under normal atmospheric conditions for a distance of 300 feet to the rear of said vehicle. Comp. St. Supp. 1931, sec. 39-1122. Whenever the load of any vehicle shall extend more than 4 feet beyond the rear there shall be displayed at the end of such load a red flag not less than 12 inches in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least 200 feet to the rear of such vehicle. Comp. St. Supp. 1931, sec. 39-1165.

It is insisted that the failure to display lights upon the truck and at the rear of its load, as required by these statutes, was negligence *per se.* The law is well settled by the decisions of this court that a violation of statutes

regulating the use and operation of motor vehicles upon the highways is not negligence *per se,* but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Stevens v. Luther,* 105 Neb. 184; *Dorrance v. Omaha & C. B. Street R. Co.,* 105 Neb. 196; *Thomas v. Rasmussen,* 106 Neb. 442; *Taylor v. Koukal,* 107 Neb. 409; *Burkamp v. Roberts Sanitary Dairy,* 117 Neb. 60.

In the case of *Taylor v. Koukal, supra,* we held that the violation of a statute requiring lights to be displayed on motor vehicles in use during the period from one hour after sunset to one hour before sunrise was not negligence in itself. The same rule is also announced in *Burkamp v. Roberts Sanitary Dairy, supra.* The failure on the part of the deceased to have displayed upon the truck and its load lights as required by the statutes under consideration was not negligence in itself, but evidence of negligence to be considered with all the other facts and circumstances in evidence in determining whether the deceased, in fact, was guilty of negligence in that regard.

It is contended by the appellees that the failure to display red lights, as required by these statutes, was gross negligence on the part of the deceased. In support of this contention we are cited to the cases of *Giles v. Welsh,* 122 Neb. 164, and *Monasmith v. Cosden Oil Co.,* 124 Neb. 327. In the latter case we said: "Leaving an unlighted vehicle on highway, on dark night, without any warning, constitutes gross negligence, within the meaning of the comparative negligence statute." The rule announced in those cases does not apply to the facts in this case. The facts in each of the cases show that there were no lights whatever upon the motor vehicles left upon the highways, or any means taken to warn approaching travelers upon the highway of their presence.

Under all the facts in this case, we cannot say that the decedent was guilty of negligence, as a matter of law, in not either going himself or sending some member of

the crew to the rear of the truck to warn motorists approaching from the rear of its presence, or in not removing the pipes from the truck, or in remaining in the place in which he did and not attempting to seek a place of safety. Whether the deceased in all of these matters did or omitted to do what a reasonably prudent man would have done or would not have done under the same or similar circumstances or conditions was a question for the jury. From the facts different minds might reasonably draw different conclusions. From a careful examination of the evidence, we are convinced that the questions of negligence and contributory negligence and whether the deceased was guilty of such contributory negligence as would bar a right of recovery under the comparative negligence statute were issues which should have been submitted to the jury for their consideration.

It is urged by counsel for appellee Cudahy Packing Company that, even if the action of the trial court in directing a verdict in behalf of the defendant Poesch cannot be sustained, its action in directing a verdict in favor of the packing company must be sustained on the ground that the defendant Poesch was not at the time of the accident in the execution of his master's business or acting within the scope of his employment. The contention is that at the time of the accident he was on his way to his home to spend the night for his own convenience. The evidence shows that the defendant Poesch was employed by his codefendant, Cudahy Packing Company, on the 13th day of July, 1931, under a written contract, which, as far as material, provides: "Said employee has this day entered the employ of the said employer to work for said employer from week to week in such capacity and in such manner as said employer may from time to time direct at a salary of $31.50 per week and actual traveling expenses while away from his headquarters town on company business."

The duties of the defendant Poesch were to sell meat, collect accounts, and make adjustments for the company.

His home and headquarters were at Scottsbluff. He worked under the directions of the sales manager for the company, who mapped out his territory. Under the directions of the sales manager he was required to cover his territory each week. The territory included the city of Scottsbluff and the towns west to Wheatland, Wyoming. Under the direction of the company he was required on Wednesday morning of each week to leave Scottsbluff and work as far west as Gurnsey by Wednesday night; Thursday he would go to Wheatland, Wyoming, and back to Torrington, Wyoming, and make the towns back to Scottsbluff. The accident involved occurred on one of his regular trips. His contract with the company created the necessity for travel. To make his territory, as required, the use of an automobile was necessary. Under arrangements with the company he used his own (which he was using on the night of the accident) for which he was required to furnish oil and gas and to pay for its upkeep. For the use of his automobile in the business of the company he was paid 5 cents a mile and in addition thereto he was allowed traveling expenses for meals, hotel bills and telephone expense. During the time of his employment up to the time of the accident he had continually used his automobile in the business of the company, using no other means to make his territory. He occasionally carried samples for the company and at the time of the accident had some bacon in his car, also two or three cartons of cheese which he had taken in on adjustments for the company and which he contemplated reselling for the company. At the time of the accident he was taking this merchandise to Scottsbluff.

On the day of the accident he was returning home after having covered the western part of his territory. Mitchell was the last town he was to work before returning to Scottsbluff. When he arrived at Mitchell on this particular trip the stores were closed so that he was unable to work the town that night. His instructions from the sales manager were to cover the territory with the least

possible expense, and when he was close to Scottsbluff and the expense of going there would be less than staying in some outside town he was to use his own judgment as to whether he should stay in such town or come to Scottsbluff and go back the following day and finish his work there. He had done this at least twice each month before the time of the accident. Under these instructions from his employer he could have stayed in Mitchell that night and worked the town the next morning and the company would have paid his expenses. The expense of staying in Mitchell that night would be from $2 to $2.50 and the expense of coming home and returning to Mitchell in the morning would be about $1. The only witness called by the plaintiff upon this question was the defendant Poesch, and in addition to testifying to the facts set out, he stated that at the time of the accident he was on his way home on a trip for his own convenience so that he might be at home that night.

The general rule of law applicable to this class of cases is accurately and concisely stated in *Stone v. Hills,* 45 Conn. 44, 29 Am. Rep. 635, and is as follows:

"For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible."

Whether the act was done in the execution of the master's business, within the scope of his employment, is a question of fact. The rule cannot aid in the determination of the fact. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of

fact for the determination of the jury. 18 R. C. L. 795, sec. 254. "The cases which have arisen upon this subject have from the earliest times been productive of much astute and interesting discussions in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves." *Rayner v. Mitchell,* Law Rep. 2 C. P. Div. 357.

Under the facts in this case, had the defendant Poesch arrived at Mitchell on the night of the accident in time to have completed his work, and when on his trip from Mitchell to Scottsbluff the accident had happened, it can hardly be questioned but what he would then have been acting within the scope of his employment and in the execution of his master's business. When he arrived in Mitchell and the stores were closed and he was unable to work the town that evening, he had the authority from his employer to either stay in Mitchell that night or return to Scottsbluff and return to Mitchell the next morning. He was to cover his territory at the least possible expense. To keep down the expense he was required not to stay overnight in Mitchell but to go on to Scottsbluff and return to Mitchell the next morning. Whether he may have had the option to go to his home or stay at Mitchell overnight can make no difference. In either event he was acting on the instructions of his employer, and his act in going from Mitchell to Scottsbluff under the circumstances disclosed by the evidence would support a finding that he was acting within the scope of his employment and in the execution of his master's business.

The argument that he was not so engaged is based upon his testimony that the trip from Mitchell to Scottsbluff was made for his own convenience so that he might be at home that night. This was but a conclusion of the witness. The other facts and circumstances in evidence would warrant a different conclusion. Although the trip might have been taken in part for his own convenience

and his desire to be home that evening, we think the facts shown by the record presented a question for the jury.

Error is also assigned in the exclusion from evidence of a plat of the scene of the accident. From the view we have taken of the case we do not find it necessary to give consideration to this assignment.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

HAROLD D. HOOVER ET AL. V. STATE OF NEBRASKA.

FILED MARCH 2, 1934. No. 28967.

1. **Criminal Law**: REVIEW. Only judgments and sentences of the district court upon convictions for felonies and misdemeanors under the Criminal Code may be brought to this court by petition in error. Comp. St. 1929, sec. 20-1912; *Brandt v. State*, 80 Neb. 843.
2. **Municipal Corporations**: ORDINANCES: VIOLATION: REVIEW. A judgment and sentence for the violation of a city ordinance, which does not embrace any offense made criminal by the statutes, partakes of the nature of a civil proceeding to recover a penalty and is reviewable only by appeal.
3. **Criminal Law**: REVIEW. For a review of errors occurring at the trial, it is mandatory that a motion for a new trial be filed within three days after the trial, except for the cause of newly discovered evidence.
4. ———: DISMISSAL. Motion to dismiss petitions in error sustained.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Dismissed.*

W. A. Ehlers, for plaintiffs in error.

Paul F. Good, Attorney General, Max Kier and *Lloyd E. Chapman, contra.*

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

GOSS, C. J.

Defendants were first found guilty and fined in the municipal court of Lincoln. They appealed to the district court for Lancaster county, where they were tried by the court and found guilty. Each was fined $10 and costs, for which execution was awarded. While there were separate complaints, defendants were tried together. They brought proceedings in error here and the causes were briefed and argued together.

Each defendant gave a surety bond in the district court reciting that he intended to prosecute error proceedings. Each duly filed a petition in error. In their brief they described themselves as plaintiffs in error and the state as defendant in error.

After defendants filed their brief the state moved to dismiss the petition in error and the proceedings for review on these grounds: First, that the actions were civil in nature and reviewable by appeal, and not by error proceedings; second, that defendants had failed to file motions for new trials in the district court. We deferred ruling on the motion until we might hear arguments on the merits.

The complaints contained two counts. The first count charged defendants with violating an ordinance requiring peddlers of merchandise to pay a license fee. Among other things it defined a peddler of merchandise as one who takes orders for present or future delivery. The second count charged defendants with violating another ordinance requiring peddlers of merchandise to pay an occupation tax. That ordinance defined peddlers of merchandise in the same way. Neither ordinance prescribed a penalty other than a fine. They solicited orders for goods which would later be delivered from a stock in Omaha. The business had no interstate features; it was all intrastate in character.

In 1907 the legislature eliminated much confusion by doing away with proceedings in error in all cases except criminal cases. Laws 1907, ch. 162. This has been

brought down to date in section 20-1912, Comp. St. 1929. "Judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code" are expressly excepted from the procedure for review on appeal. All judgments in causes other than those made felonies or misdemeanors by the criminal statutes are reviewable by appeal.

The first point for decision, therefore, is whether the city ordinances under which defendants were convicted brought defendants within the exception made by the statute so that they may obtain a review as plaintiffs in error. An early decision under the 1907 law came in 1908. *Brandt v. State,* 80 Neb. 843. Defendant was convicted of violating an ordinance prohibiting keeping a saloon open after specified hours or on Sunday. He appealed to the district court, where the appeal was dismissed. He filed a petition in error in this court. Finding that the Criminal Code specified no particular hours during which it is a crime to keep open a saloon, this court sustained an objection to the jurisdiction. The syllabus says: "Under the provisions of chapter 162, Laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive."

Prior to the passage of the 1907 act this court had held in *Peterson v. State,* 79 Neb. 132, that "A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, * * * is, in fact, a civil proceeding to recover a penalty, and clear and satisfactory proof that the offense has been committed is sufficient to sustain a conviction. Proof beyond a reasonable doubt is not required." On the point that such a proceeding is civil in its nature, see, also, *Ruffing v. State,* 80 Neb. 555; *Pulver v. State,* 83 Neb.

446; *Cleaver v. Jenkins,* 84 Neb. 565; *Western Union Telegraph Co. v. City of Franklin,* 93 Neb. 704; *Francisco v. State,* 108 Neb. 309; *McLaughlin v. State,* 123 Neb. 861.

It clearly appears that the ordinances in question do not embrace either a felony or misdemeanor under the Criminal Code. The inquiry by the district court (as well as by the municipal court) was as to the violation of a municipal regulation. Its purpose was to recover a penalty. While it had the form of a criminal proceeding it was, in fact, a civil proceeding. Under the rules followed from the beginning, the judgment in such a cause is reviewable here only on appeal, and not by petition in error.

The judgments were severally entered on June 24, 1933. Neither defendant filed a motion for new trial within three days thereafter, as required by statute. July 27, 1933, each defendant tendered a conventional motion for a new trial without any reference to newly discovered evidence, and also filed a motion for an order permitting such defendant to file the motion for new trial *nunc pro tunc* as of June 24, 1933. On July 27, 1933, the district court overruled the motion to permit the motion for new trial to be filed out of time. No abuse of discretion appears. The filing of a motion for new trial is provided for in section 20-1143, Comp. St. 1929. It is mandatory, for a review of errors occurring at the trial, that the motion be filed within three days after the decision is rendered, except for the cause of newly discovered evidence. *Nebraska Nat. Bank v. Pennock,* 59 Neb. 61; *Carmack v. Erdenberger,* 77 Neb. 592; *Havens-White Coal Co. v. Bank of Rulo,* 98 Neb. 632; *Young v. Estate of Young,* 103 Neb. 418. No motion for a new trial having been filed, we cannot review the errors alleged to have been committed by the trial court.

We make no survey of the merits beyond that involved in the motion to dismiss and express no opinion upon the validity of the city ordinance. For the reasons stated, the

motion of the city of Lincoln to dismiss the petitions in error is sustained.

DISMISSED.

LAURA ELEANOR HAYNES, ADMINISTRATRIX, APPELLANT, V. NORFOLK BRIDGE & CONSTRUCTION COMPANY ET AL., APPELLEES.

FILED MARCH 2, 1934. No. 28776.

1. **Automobiles:** HIGHWAYS: CONSTRUCTION: ACCEPTANCE OF WORK. The acceptance that is required by the proprietor of the work of a contractor, in order to relieve the contractor of liability for injuries to third persons after the acceptance, is a practical acceptance after the completion of the work, a formal acceptance not being required.
2. **Trial:** DIRECTION OF VERDICT. The trial court should direct verdict for defendant, where evidence is insufficient to sustain a verdict against him.

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

George I. Craven and *Williams & Williams,* for appellant.

Deutsch & Stevens, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

GOOD, J.

Laura Eleanor Haynes, as administratrix of the estate of her deceased husband, Thomas Haynes, brought this action on behalf of herself and minor children, to recover damages because of the death of her husband, which she alleges was caused by the wrongful and negligent acts of the Norfolk Bridge & Construction Company. At the conclusion of all the evidence, the trial court, on motion of defendant, directed a verdict in its favor. Plaintiff has appealed.

We are required to determine from the record whether there was sufficient evidence to require submission of the cause to the jury.

In November, 1929, the Norfolk Bridge & Construction Company (hereinafter referred to as the Norfolk Company) entered into a contract with the state of Nebraska, whereby it was to construct and install all culverts required on a highway extending from the city of Albion eight miles south. The project was designated and known as 619-A. The Norfolk Company began constructing the culverts at the south end of project 619-A and worked north. The last work being done was the laying or installing of twin concrete culverts a short distance south of the city of Albion. These twin culverts were each 36 inches in diameter, and the roadway was excavated to the depth of about 1½ feet. The concrete culverts were 36 feet and 40 feet long, respectively, and were laid parallel to each other. The Norfolk Company, after the excavation and placing of these culverts in position, threw the dirt that had been excavated so as to make an approach to and cover the center part of the culverts. The evidence shows that the last work done upon this project 619-A by the Norfolk Company was on the 18th day of July, 1930; that at that time the state's project engineer and the foreman of the Norfolk Company together estimated and agreed upon the yardage, and the engineer entered in his book, kept for the purpose, that the work was finished or completed. A day or two thereafter the Norfolk Company removed all of its equipment and entered upon the work of construction on project 620-A, several miles distant from the scene of the twin culverts, and upon an entirely different contract. The record discloses that there was also a second contract between the state and another contractor, the latter to do the work of grading and surfacing on project 619-A after the culverts were installed. The record shows that this contractor entered upon its work of grading and surfacing the road on the 15th day of July, 1930.

About midnight of July 29, 1930, Thomas Haynes and a companion were driving north over this road, and, in attempting to pass another car in front, ran into the west end of the twin culverts which was not yet covered with dirt. Haynes' car was overturned, and he sustained injuries from which he died on the 10th of August, 1930.

It is plaintiff's contention that the work done by the Norfolk Company had not been accepted by the state; that it was yet in control of that part of the road where the twin culverts had been installed, and that the Norfolk Company had failed to erect barriers or put up warnings or danger signals to advise plaintiff's husband and others traveling upon the highway that it was under construction and dangerous for travel.

The record shows that the project, or resident, engineer, in the course of his work, makes his reports to the district engineer, who, in turn, makes his reports to the department of public works at the state capitol, and that the district engineer did not send any recommendation of formal acceptance of the work on project 619-A to the department of public works until the 6th day of August, 1930. Plaintiff insists that until this acceptance was made the contractor was in charge of the highway and under duty of maintaining barricades, warning signs, and red lights, as provided by the contract between the state and the Norfolk Company.

During the trial plaintiff introduced in evidence a part of a single sentence from the 15th paragraph of defendant's answer, and contends that this amounts to an admission that the work of defendant on the twin culverts had not been accepted by the state until August 6, 1930, or nine days after the accident. Standing alone, the sentence may lend color to the plaintiff's contention, but, if taken in connection with the other allegations of the paragraph, it fails, in our opinion, to have the probative force asserted by plaintiff.

The following is the portion of the paragraph that is material to this consideration, the italicized words being

the part introduced in evidence by plaintiff: "On the 18th day of July, 1930, this answering defendant completed the construction of such work on such section and the engineer in charge thereupon inspected the same and calculated the excavation and yardage in company with the superintendent of this answering defendant and each agreed upon the completion of the construction of such culverts according to the specifications and contract and further agreed upon the yardage reflected in the excavation necessary for the installation and construction of such culverts, and the said engineer in charge then noted the said work in writing in the presence of the said superintendent as completed and finished and then expressly informed the said superintendent to not move any additional dirt thereon and advised and informed him that arrangements had been made with a county commissioner of Boone county to move dirt at any culvert or bridge construction upon said project because of the high contract price for grading provided in the contract with this answering defendant, and then tentatively accepted such construction in writing, and accepted the maintenance thereof on behalf of the state, and authorized this answering defendant to remove from said project to the said project 620-A and that subsequently, *on the 6th day of August, 1930, the said engineer and his superiors made their final estimates and recommendation for final acceptance to the office of the said department of public works at Lincoln, Nebraska, and the said construction upon said project 619-A and especially the said twin culvert construction was formally and finally accepted by the said department of public works in the course of the routine thereof* and that this answering defendant, subsequent to the 18th day of July, 1930, was not prosecuting any construction upon said project 619-A but had fully and completely performed its contract aforesaid and was not in possession or upon any of said project 619-A but had completed the same according to specification and delivered the same to the said state of Nebraska and the said

state of Nebraska was in possession thereof as proprietor at the time of the accident aforesaid."

Taking the paragraph as a whole, it seems clear that there is nothing that amounts to an admission that the work had not been completed and accepted by the state, unless it is contended that, by acceptance, is meant formal acceptance. However, plaintiff admits in her brief and on oral argument that formal acceptance is not essential.

The contract between the state and the Norfolk Company makes provision for tentative acceptance and relieving the contractor of liability for accidents occurring upon the highway. Section 7.13 provides:

"Opening of Section of Highway to Traffic.

"At the option of the engineer certain sections of the work may be opened to traffic. In such case the section will be inspected, completed work tentatively accepted in writing at the discretion of the engineer, and the same turned over to the state for maintenance. Such action shall not in any way be construed as a final acceptance of the road.

"Upon written authorization by the engineer the contractor may cease to maintain barriers and red lights; the road may be opened to traffic; the contractor is relieved from further maintenance of barriers and lights on that portion of the road; and the contractor is relieved from further public liability on that portion of the road.

"The contractor will not be held responsible for damages to portions of the road which have been approved by the engineer and opened to traffic prior to final approval and acceptance of the road, provided such damages are due to actions of the elements or to the ordinary action of traffic. The contractor is responsible for any damages which may have been occasioned by defective work or because of noncompliance with the plans, specifications and contract."

There is no evidence in the record that there were any defects in the work performed by the Norfolk Company,

or that it failed in any respect to comply with the plans and specifications of the contract.

It is a general rule that the acceptance that is required by the proprietor of the work of a contractor, in order to relieve the contractor of liability for injuries to third persons after the acceptance, is a practical acceptance after the completion of the work, a formal acceptance not being required. This rule is supported in *McCrorey v. Thomas,* 109 Va. 373; *Rengstorf v. Winston Bros. Co.,* 167 Minn. 290; *First Presbyterian Congregation v. Smith,* 163 Pa. St. 561; *Memphis Asphalt & Paving Co. v. Fleming,* 96 Ark. 442; *Read v. East Providence Fire District,* 20 R. I. 574; *Armstrong v. City of Tulsa,* 102 Okla. 49; and numerous other cases. The rule is also substantially stated in 45 C. J. 884, and in 20 R. C. L. 53, sec. 49. In the *Rengstorf* case the facts were very similar to those involved in the instant case. The contract was quite similar to the one involved in this action. The injury occurred after completion of the work and before final formal acceptance. It was there held that the contractor was not liable. In many of the cases the acceptance that will relieve the contractor is designated as actual, factual, practical, or tentative, as distinguished from final and formal acceptance.

In the instant case it appears beyond dispute that defendant had completed its work and did no work on the culverts after the 18th day of July; that there was no other work for the contractor to do after that date; that on that day the contractor removed its equipment to another locality under the direction of the state's engineer. It is undisputed that the work was inspected by the state's engineer in company with the defendant's superintendent; that the engineer designated the work of the culverts as 100 per cent. complete and entered on his book a record that defendant's work was finished. We think, beyond question, this amounted to a tentative and actual acceptance and relieved the contractor from any further duty to maintain lights, guards or other warning

signals after that date. The burden was upon the plaintiff to establish that the contractor was yet in charge and control of the work at the time of the accident. In this she has utterly failed. There is no evidence that would warrant submitting this question to the jury. Trial court should direct verdict for defendant where evidence is insufficient to sustain a verdict against him.

There are other assignments of error and a cross-appeal by defendant, but the conclusion reached renders it unnecessary to consider either the cross-appeal or the other assignments of error.

The judgment is right and is

AFFIRMED.

EARL A. TEMPLE, APPELLANT, V. COTTON TRANSFER COMPANY ET AL., APPELLEES.

FILED MARCH 2, 1934. No. 28801.

1. Action. Where the transactions involved are neither *contra bonos mores* nor obnoxious to public policy, the procedure in civil jury trials in the district court is regulated and controlled by our Civil Code.
2. Trial. The requirements of section 20-1107, Comp. St. 1929, that, after a jury is impaneled and sworn, "the plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it," neither necessitate the statement by his counsel of a "cause of action," nor require the recital of all evidence relied upon to establish the same.
3. ———. Such opening statement of plaintiff's attorney, thus required to be made, must be viewed in the light of the limited purpose it is intended to serve, and will not ordinarily be regarded as a distinct and formal admission made for the express purpose of dispensing with formal proof of a fact at the trial, and thus binding as such upon the plaintiff.
4. ———. In civil actions, where the pleadings disclose a proper, justiciable controversy, the practice of trial courts, at the close of opening statements to the jury, in directing the entry of a nonsuit, the dismissal of the action, or the return of a verdict based upon such statements is disapproved.

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

Harry R. Ankeny, for appellant.

Reed, Ramacciotti & Robinson, contra.

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

EBERLY, J.

This is an action at law for damages alleged to have resulted to plaintiff by reason of personal injuries received while "lawfully riding as a passenger and guest in an automobile, the property of one E. Byron Hirst," which was by Hirst operated and driven at the time of the accident. Plaintiff alleged that the accident from which his injuries resulted was due wholly to the unlawful and negligent parking by the defendant Cotton Transfer Company and its drivers of two trucks upon the traveled portion of the highway; that due to the situation of the trucks a collision followed in which plaintiff sustained the injuries for which this suit was brought. The allegations of plaintiff's petition were denied by defendants, and contributory negligence was pleaded. Issues were made up by plaintiff's reply which was a general denial of the allegations of the answer.

The transcript of the record in the district court discloses that, after the impaneling of the jury, the following proceedings were had: "The said jury having heard the opening statements made by plaintiff's counsel on behalf of said plaintiff, thereupon the defendants move the court to discharge the jury and dismiss this cause, upon consideration whereof, the court, being fully advised in the premises, sustains said motion." Thereupon the court ordered the action dismissed.

The bill of exceptions discloses that the order of dismissal was entered on motion of the defendants, orally made, after the opening statements of plaintiff's counsel following the impaneling of the trial jury, and was in the

following terms: "At this time the defendants, and each of them, individually move the court to withdraw this case from the jury and enter judgment in favor of the defendants on the petition of plaintiff and the opening statement of counsel for the plaintiff, or in the alternative, to instruct the jury to return a verdict for defendants on said petition and opening statement."

The lawfulness and regularity of this direction of the trial court is presented here by this appeal.

Appellees seek to sustain the action taken by the contention in their brief that, "Where counsel in his opening statement to the jury fails to state a cause of action, it is within the power of the trial court to render judgment on such statement for the defendant." Further, that there was such failure in the instant case, and the judgment entered was proper.

The action of the trial court in the present case exemplifies a development in legal proceedings peculiar to American jurisprudence. The principle of procedure here involved is to be distinguished from cases involving the exercise of the inherent power of courts when their jurisdiction is invoked in transactions which may clearly be deemed *contra bonos mores* or obnoxious to public policy, such as an attempt by judicial procedure to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue laws, embezzle public funds, or clear, intentional, manifest, and continued abuse of judicial functions or process. In such a case it is the manifest duty of any court to take advantage of any source of information available and, on its own motion, exercise the full measure of its powers of investigation, and if it should clearly appear that for any reason suggested there could be no recovery, such court should not hesitate to so declare, and give such direction at the earliest possible moment as will dispose of the action. *Oscanyan v. Arms Co.*, 103 U. S. 261; *Ferson v. Armour & Co.*, 109 Neb. 648.

But matters of this class are not involved in the present investigation. Here we have a justiciable controversy for personal injuries sustained, wherein the plaintiff is constitutionally guaranteed an open court for any injury done him or his person, and a remedy by due course of law (Const. art. I, sec. 13) in which the right of trial by jury is inviolate (Const. art. I, sec. 6). The trial judge interposed at the conclusion of the opening statement of plaintiff's counsel to the jurors, discharged the jury, and dismissed the action. The legal sufficiency of the evidence to go to the jury, as narrated by the counsel in his opening statements, was the sole matter considered by the trial judge, and the one on which his action was based. The relief administered by him was not a direction to the jury to return a verdict, treating the opening statement as an admission of fact, but the sole order of the court in the instant case was that the action "be dismissed," plaintiff excepting.

"A dismissal in effect is equivalent of a nonsuit, and, in practice, also imports the same thing as a discontinuance, namely, that the cause is sent out of court." 18 C. J. 1145.

In justice to the action of the trial court, it may be said to be supported by ample authority evidenced by precedents in jurisdictions other than our own; though even where prevailing the practice is admittedly one that involves dangers and must be followed with extreme caution. This court, as yet, has never approved it. It is not universally recognized even in the American jurisdictions. Thus, the practice of granting a nonsuit on the opening statement by counsel for plaintiff does not prevail, and never has prevailed, in the Code state of Wisconsin. *Haley v. Western Transit Co.*, 76 Wis. 344; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Fisher v. Fisher*, 5 Wis. 472.

Notwithstanding the liberality of the practice which obtains in the courts of England since the adoption of their reformed procedure, the practice here under con-

sideration is there precluded. Thus, in *Fletcher v. London & N. W. R. Co.*, 65 Law Times n. s. 605, 1 Q. B. 122, the plaintiff sued to recover damages for personal injuries sustained by him. At the trial, after plaintiff's counsel had opened the case to the jury, the presiding judge nonsuited him. On review it was held, all judges concurring: "A judge, at the trial of an action, has no power to nonsuit the plaintiff upon the opening statements of his counsel, unless his counsel consents to that course being taken." Among the reasons advanced in support of this determination were the following: "It is almost unnecessary to point out how dangerous such a course may be. Briefs of counsel do not always give all the facts of a case; sometimes there are other material facts which are not stated in the brief; sometimes the witnesses give evidence which differs from that which appears in the brief and alters the aspect of the case; sometimes upon the cross-examination of the plaintiff himself evidence is elicited which is favorable to his case. For those reasons it is very undesirable that a judge should have power to nonsuit a plaintiff upon the opening of his case." Further, "That would be a startling result in an English court of justice."

In this state the practice of the district court is governed by the provisions of our Civil Code, so far as applicable.

In the instant case the transcript discloses that an issue of fact arising in an action for the recovery of money only had been duly formed by the pleadings of the parties, and as there was no waiver by such parties shown, it was for trial by a constitutional jury. Comp. St. 1929, secs. 20-1101 to 20-1112. The course of a jury trial in the district court, after a jury has been impaneled, is prescribed by section 20-1107, Comp. St. 1929. In the present case, there being "no contrary directions" by the trial court, plaintiff's counsel, after the impaneling of the jury, exercised the rights secured to his client by the first subdivision of the Code section last referred to, viz.: "First.

The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it." It will be noted that the word "claim," as employed in the statutory provision last quoted, embraces no more than is involved in the definition of this term by Webster's New International Dictionary, viz.: "A demand of a right or supposed right; a calling on another for something due or supposed to be due; an assertion of a right or fact." It is quite different, considered both as to definition and as to context, from the term "petition," as used in our Civil Code. As to the latter the Code requirements are that a "petition" must contain: "Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Comp. St. 1929, sec. 20-804. It is quite plain that the statutory language employed does not import into the term "claim" the statutory requirement for a good petition. And it must follow that the statutory direction to "briefly state his claim" is not to be deemed a requirement to "state a cause of action" in the technical sense of those words. And, again, permission to plaintiff's counsel to "briefly state the evidence by which he expects to sustain it (the claim)" is wholly incompatible with the thought that the entire evidence on the subject involved must be detailed to the jury at this time, and that failure so to do will furnish the basis of a denial of plaintiff's cause of action.

On the contrary, the statutory purpose indicated by the general language under consideration, it seems, requires no more, in view of the object to be attained thereby, than that counsel present to the jury the nature of the questions involved which the evidence later to be presented for their consideration will tend to establish, and advise the jurors of the issues to be determined so as to enable them to understand the case to be tried as it will be presented by the proof.

Moreover, this court is committed to the view that the power of counsel to bind his client by admissions made is

not involved at this stage of a lawsuit. "Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense." *Yechout v. Tesnohlidek*, 97 Neb. 387. And we have expressly refused to penalize a client because the proof subsequently offered may involve a failure to sustain the "opening statement" made. *Yechout v. Tesnohlidek, supra.*

Then, too, by the terms of our Civil Code the issues to be tried in a lawsuit in the district court are ordinarily determined by the written pleadings of the parties. The making of the "opening statements," as prescribed by the Code, evinces no intention on the part of the authors of our Code that the written pleadings of the parties shall be altered or varied thereby. This conclusion as to pleadings finds ample support in the following precedents: *Lane v. Portland R., L. & P. Co.*, 58 Or. 364; *Hunter Milling Co. v. Allen*, 65 Kan. 158; *Moore v. Dawson*, 220 Mo. App. 791.

And, again, we find that our Civil Code (Comp. St. 1929, sec. 20-601) also expressly regulates the common-law powers of a court to enter a "nonsuit" at least in cases of the class now under consideration. The present controversy under the Code section last referred to is not one in which a "nonsuit" is authorized. Indeed, the closing words of this provision are, "In all other cases on the trial of the action the decision must be upon the merits," and must be deemed applicable and controlling in the instant case.

The concluding words quoted from the section just referred to obviously preclude the adoption by our court of a rule, either through judicial decision or by the exercise of its constitutional powers to promulgate rules of practice and procedure, empowering and authorizing trial courts to enter a "nonsuit" upon the conclusion of the opening statement of counsel to the jury made as provided by section 20-1107, Comp. St. 1929. This for the

reason already stated, because such rule, if adopted, would necessarily be "in conflict with laws governing such matters." Const. art. V, sec. 25. Indeed, this court has already announced the doctrine that a dismissal by a court, or entry by it of an order of nonsuit, under the circumstances of this case, is contrary to the provisions of the statute just quoted, wholly unauthorized, and erroneous. *Zittle v. Schlesinger*, 46 Neb. 844; *Thompson v. Missouri P. R. Co.*, 51 Neb. 527. Yet the practice of the entry of a nonsuit thus condemned is the practice generally followed in the disposition of questions similar to the present one in the jurisdictions from which the appellees' sustaining precedents are drawn. True, in *Zittle v. Schlesinger, supra,* the evidence of plaintiff in the district court had been regularly received, and was before this court as contained in the bill of exceptions. This court after determining that "Under our Code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal, because the plaintiff fails by his evidence to establish his cause of action," also determined that "A judgment so entered will not be reversed by this court where, on the evidence, the defendant was entitled to have a verdict directed. In that case the error is without prejudice." In *Thompson v. Missouri P. R. Co., supra,* the rule announced in the *Zittle* case was followed, but the cause was reversed for the reason that the facts were such that the defendant was not entitled to an instructed verdict, and therefore the original error committed by the trial court in the entry of the nonsuit was thereby not cured.

But these cases in no manner sustain appellees' contention. Even the cases on which they rely, which are from jurisdictions other than our own, recognize a distinction between the act of a court directing a dismissal at the close of the opening statement and the action of a court directing a verdict at the close of a party's evidence. As to the former situation, the weight of appellees' authorities (in entire absence of statute) sustain the prop-

osition, viz.: "The failure of counsel in his opening statement to recite all the material facts necessary to a recovery will not warrant the court in taking the case from the jury, and the neglect of defendant to refer to a certain defense in his opening statement will not bar the establishment of such defense on trial." 64 C. J. 239. See, also, *Jones v. Railroad Co.*, 5 Mackey (D. C.) 8; *Wheeler v. Oregon R. & N. Co.*, 16 Idaho, 375; *Berggren v. Johnson*, 105 Kan. 501; *Brashear v. Rabenstein*, 71 Kan. 455; *Goodman v. Brooklyn Hebrew Orphan Asylum*, 165 N. Y. Supp. 949; *Darton v. Interborough Rapid Transit Co.*, 110 N. Y. Supp. 171; *Stewart v. Hamilton*, 26 N. Y. Super. Ct. 672; *Portugal v. Ottens*, 147 N. Y. Supp. 933; *Fini v. Perry*, 119 Ohio St. 367; *Fiegel v. First Nat. Bank*, 90 Okla. 26; *Sullivan v. Williamson*, 21 Okla. 844; *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642; *Martin Emerich Outfitting Co. v. Siegel, Cooper & Co.*, 108 Ill. App. 364; *Petherick v. Order of the Amaranth*, 114 Mich. 420; *Meeks v. Meeks*, 106 N. Y. Supp. 907.

In the last analysis the controlling element in the decision of the question here presented is the policy evidenced by the provisions of our Civil Code already referred to. The purpose of the opening statements of counsel is in aid of the jury. The trial judge has access to, and finds the exact issues to be tried in, the written pleadings. "Issues" are stated to the jury by counsel in opening his case only to the extent that a knowledge thereof may be deemed helpful in the consideration of the evidence subsequently to be introduced. Evidence expected to be produced is narrated only to a similar extent and for the same reason. The very form and purpose of the Code provision precludes the conclusion that completeness or technical exactness is a requirement as to performance of either duty involved or permitted in the opening statement. Remarks of counsel made in the performance of this duty may be viewed in the light of the limited purpose which calls them forth. Clients may not be penalized for failure of attorneys to conform to

requirements which the terms of the statute do not exact. It also clearly appears that these statements may not, because of the limited purpose which called them forth, be deemed "admissions" in the technical sense of that term. "Admissions by counsel, made in good faith at the trial of an action in open court for the purpose of dispensing with testimony, bind their clients. * * * But such admissions, in order to bind a client, must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial." 6 C. J. 649. See, also, *Godwin v. State,* 1 Boyce (Del.) 173; *Cable Co. v. Parantha,* 118 Ga. 913; *Preston v. Davis,* 112 Ill. App. 636; *Chown v. Lennox Furnace Co.,* 166 Ia. 1; *Treadway v. Sioux City & St. P. R. Co.,* 40 Ia. 526; *Scott v. Chambers,* 62 Mich. 532; *Sullivan v. Dunham,* 54 N. Y. Supp. 962; *Hicks v. Manufacturing Co.,* 138 N. Car. 319; *Virginia-Carolina Chemical Co. v. Knight,* 106 Va. 674.

In *Davidson v. Gifford,* 100 N. Car. 18, 23, it was held: "Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial, do not bind the client; they are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly and confusing, if the client should interpose to correct his counsel and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose."

The obvious conclusion of the preceding discussion, including precedents cited and considered, is that the remarks of counsel for appellant embraced in his opening statements to the trial jury in the instant case, and contained in the bill of exceptions, in view of the limited purpose for which they were required to be made, may

not be regarded as "distinct and formal, and made for the express purpose of dispensing with formal proof of a fact (or facts) at the trial," so as to constitute them "admissions" in the technical sense of that term and binding upon appellant herein.

It also follows that the action of the trial court, based upon such statements so made, whereby it entered a judgment of nonsuit and dismissed this action, was not contemplated by the terms of the statute, and was wholly unjustified by the recitals contained in the bill of exceptions filed herein; and that error was committed in the rendition of the same.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ROSA JOHNS WHEELER, APPELLANT, V. FRANK J. BRADY, ADMINISTRATOR OF THE ESTATE OF WILLARD A. WHEELER, ET AL., APPELLEES.

FILED MARCH 2, 1934. No. 28827.

1. Judgment: RES JUDICATA. "Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 743.
2. ———: ———. An adjudication in an action to quiet title against a purported deed, testamentary in character, is not *res judicata* to a suit to reform the instrument.
3. Contracts: REFORMATION. "To warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties." *Sutherland State Bank v. Dial*, 103 Neb. 136.

4. **Deeds: REFORMATION.** In suit to reform deed of deceased grantor, evidence of casual statement to witnesses that he had deeded his property to wife and that he had nothing for some other heirs is not such clear, convincing and satisfactory evidence as necessary to overcome the terms which provide that it was not to be in force while grantor lived; that it was to be in force after his death; and that it might be filed after his death if he still owned the property, and to justify reformation so that deed would be an absolute conveyance with reservation of life estate in grantor.

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

Hotz & Hotz, for appellant.

J. J. Harrington and *D. R. Mounts, contra.*

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

DAY, J.

This is a suit to reform a purported deed and to quiet title to real estate. The deed is the ordinary quitclaim deed except for a provision which caused this controversy. It was given to Mrs. Wheeler by her husband about six months before his death, after which she caused it to be recorded. The other heirs of Mr. Wheeler brought a suit to set aside the deed and quiet title in themselves to an undivided one-half interest in the real estate. The trial court decreed that the purported deed was in fact testamentary in character but that it was not executed in accordance with the laws pertaining to the execution of wills and quieted title in the plaintiffs. Mrs. Wheeler appealed from this judgment, which was affirmed by this court, *Miller v. Wheeler,* 120 Neb. 874, on the authority of *Pinkham v. Pinkham,* 55 Neb. 729. Subsequently, this suit was commenced in the district court and upon trial a decree was entered against the plaintiff. In the decree, the court found generally in favor of defendants. The assignments of error present two questions: (1) Application of the doctrine of *res judicata* and (2) considera-

tion of the evidence to determine if it requires a reformation of the deed. The present suit was commenced by filing a petition in the same case, and the theory of the plaintiff, who was formerly the defendant, is that, after the case was affirmed, she was entitled to file a petition asking reformation, since the adjudication by the court that a deed is testamentary in character is not *res judicata* nor a bar to an action to reform the instrument. She relies upon the case of *Pinkham v. Pinkham*, 60 Neb. 600. In that case, the trial court had decreed that a deed was a conveyance of the present title. This court held upon appeal that the deed was not a conveyance but was testamentary in character, reversed the judgment of the trial court and remanded the case for further proceedings. Whereupon the defendant filed an amended answer pleading mistake and error in the drawing of the deed and asking for a reformation. In that case it was held that where a case was remanded generally, and not for a particular purpose, the trial court, in the exercise of a sound discretion, may permit amendments of the pleadings. This is not the situation here and the rule is not applicable.

A suit was brought against plaintiff, the wife of deceased, by other heirs to quiet title to real estate which was clouded by this purported deed. A decree was entered that the purported deed was testamentary in character but not executed in accordance with the law of wills and quieted title in the heirs. Whereupon plaintiff brought this suit to reform the purported deed and quiet title in her against the same heirs. Does the judgment in the first suit constitute a bar to the second suit?

The former decision is not of course an adjudication that the contract cannot be reformed. That question was not presented nor considered at that time. That suit only decided that the purported deed as it stood did not convey title to the real estate in question, because it was testamentary in character, but since it was not executed according to the law relating to wills, title to a portion

of the property was quieted in the other heirs at law. The cases in which the fundamental principles of *res judicata* are discussed are legion. All we need as a test here is the general rule, which is well stated as follows: "Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 743. The right of reformation was not a right, fact, or matter litigated in the first suit and the judgment therein was not a bar to this suit.

In *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149, a suit which was brought to reform a policy of fire insurance after an action at law had previously been brought upon the policy in the federal court and a verdict obtained, an appeal was taken to the circuit court of appeals, where the judgment was affirmed, and the case removed thence by certiorari to the supreme court of the United States, which latter court reversed the judgment of the lower courts and, in obedience to a mandate from the supreme court, the circuit court rendered a judgment for the defendant company upon the merits. *Northern Assurance Co. v. Grand View Bldg. Ass'n,* 183 U. S. 308. In this court, that case held: "A suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract." *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149. Since this court affirmed a judgment in that case on the policy, the case was removed to the supreme court of the United States, and that court held: "An adjudication in an action at law on a policy of insurance that the insured cannot re-

cover on the policy as it then stood is not an adjudication that the contract cannot be reformed." *Northern Assurance Co. v. Grand View Bldg. Ass'n,* 203 U. S. 106. See, also, *City of Omaha v. Redick,* 61 Neb. 163; *Reams v. Sinclair,* 97 Neb. 542; *Simons v. Fagan,* 62 Neb. 287; *Uppfalt v. Woermann,* 30 Neb. 189. We are constrained to hold that the correct rule is that an adjudication in an action to quiet title against a purported deed, testamentary in character, is not *res judicata* to a suit to reform the instrument. This conclusion is reached without reference to election of remedies, which could not be pertinent here, if ever, for that plaintiff was defendant before and did not make an election.

It therefore becomes the duty of this court to consider the evidence to determine if the plaintiff in this suit is entitled to a reformation of the deed as requested. The plaintiff prays that the deed be reformed according to the intentions of herself and husband at the time it was executed so that it will vest the title in her with a life estate in her husband. Such relief was granted in a somewhat similar case, *Pinkham v. Pinkham,* 60 Neb. 600. It was held in that case that a deed of conveyance founded upon consideration should be reformed to accomplish a result which the plaintiff prays for in this case. But there is a distinction in this case from that of the *Pinkham* case in that the mistake in that case was one of the conveyancer. The evidence established that the grantor relied upon the conveyancer to express in the deed his reservation of a life estate in the property conveyed. All of the evidence supported the allegation that it was the unequivocal intention of the grantor in that case to execute such a deed. The language reformed in the *Pinkham* case is: "This deed is to take effect and be in full force from and after my death." As was stated in that case, the mistake was not a glaring one and the conveyancer might easily have misunderstood the purport and legal effect as well as the intention of the grantor. What is the evidence in this case? The provision which it is

sought to reform was written in a printed form quitclaim deed by the grantor himself. It is: "This deed on the above described property is not to be in force and effect as long as I am here on earth alive, but, after my natural death, this deed may be filed and become in full force and effect as if done before in the usual way, providing said property belongs to me at the time stated." This was a studied and labored effort, not to do what the plaintiff asks us to do here. He retained the title, because the deed was not to be filed and he reserved the right in himself to dispose of the property up until the time of his death. This was not accomplished by the use of technical language which deceased did not understand. It is ordinary, simple language, clear and unambiguous, which any one could understand. To reform this provision of the deed or to eliminate it would be to rewrite grantor's deed. There was no mistake of fact as to the provision of the deed. The only mistake, if any, was the legal effect after his death.

There is evidence that the grantor did not want his property to go to some of the defendants in this case, and there is evidence that he told witnesses that he had deeded the property to his wife, but, at about the same time, he placed with his own hand a provision in the purported deed which gave it a testamentary character instead of a present conveyance of the title to the real estate. The provision he inserted with his own hand speaks more persuasively than any evidence of a casual statement. The grantor neither desired nor intended to convey the property to his wife when he executed the purported deed. The language negatives such an intention. It was not to be in force while he was alive; it was not to be filed until his death, and it was not to be effective then, if he had disposed of the real estate previously. "To warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidenc-

ing the intention of the parties." *Sutherland State Bank v. Dial,* 103 Neb. 136. See *Paine-Fishburn Granite Co. v. Reynoldson,* 115 Neb. 520.

Upon a trial *de novo,* it is found that plaintiff is not entitled to a reformation of the instrument. The judgment of the trial court will not be disturbed.

AFFIRMED.

C. F. CONNOLLY, TRUSTEE, APPELLEE, V. PROVIDENCE WASHINGTON INSURANCE COMPANY, APPELLANT: OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE.

FILED MARCH 2, 1934. No. 28765.

1. **Trial:** INSTRUCTIONS. "Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants." *Citizens Nat. Bank v. Sporn,* 115 Neb. 875.
2. **Insurance:** POLICY: ASSIGNMENT. Where a policy of fire insurance by its terms provides that the policy shall be void if the policy is assigned before loss, unless the assent of the company is indorsed thereon or added thereto, an assignment of the policy without such consent of the insurance company is invalid and inoperative.
3. ———: ———: ———: VALIDITY. In such case, where the indorsement of the consent of the company to the assignment of an insurance policy is made after a fire has destroyed the insured property and without notice of such fire to the agent making such indorsement on the policy, the consent to such assignment is void.
4. **Evidence** examined, and *held* insufficient to support the verdict of the jury and the judgment of the trial court.

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

William C. Ramsey and *Sherman S. Welpton, Jr.,* for appellant.

Sidney W. Smith and *Crofoot, Fraser, Connolly & Stryker, contra.*

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

ELDRED, District Judge.

This is an action on a fire insurance policy. From a verdict and judgment for plaintiff, defendant insurance company has appealed. Plaintiff filed a cross-appeal contending that the recovery is insufficient in amount.

On the 20th day of September, 1928, the defendant insurance company issued to one John D. Suchart the fire insurance policy involved in this action, insuring a residence property for the sum of $6,000, garage for $1,500, and a chicken house for $150, from said date to September 20, 1931; all of said buildings being upon real estate in Douglas county, the title of which was vested in one John D. Suchart. Mortgage clauses were attached to the policy in favor of the defendant Omaha Loan & Building Association.

On November 10, 1930, Suchart and wife conveyed the property to the plaintiff, C. F. Connolly, trustee.

On December 5, 1930, the insurance policy in question was assigned by John D. Suchart to the plaintiff, C. F. Connolly, trustee, and plaintiff alleges that the insurance company consented to the assignment. The defendant, by its answer, put in issue the question of consent to the assignment.

By the "proof of loss" made by the plaintiff it appears that on the 13th day of January, 1931, at about the hour of 1:23 a. m., a fire occurred which completely destroyed the insured dwelling-house and damaged the garage.

The defendant insurance company, in its answer, admits the fire occurred at the time above stated, and that the dwelling-house was destroyed and the garage damaged thereby; admits the conveyance of the property by Suchart to plaintiff, but alleges that said conveyance was made without the knowledge or consent of the insurance company, and in violation of the terms of the policy, which provided:

"This entire policy, unless otherwise provided by agree-

ment indorsed hereon or added hereto, shall be void * * * if any change, other than by death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process, or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before loss."

Further answering, the defendant alleges that on the afternoon of January 13, 1931, and after the fire which occurred in the morning of said date, the defendant, through its agents, Reynolds Brothers, of Fremont, Nebraska, without any knowledge or notice of said fire, was induced by plaintiff to sign a consent to an assignment of said policy from said John D. Suchart to plaintiff; that such consent to said assignment was procured by the fraud or concealment of the plaintiff in failing to disclose to the general agents of this defendant the fact or knowledge of said fire.

The plaintiff, by way of reply, pleads that the defendant insurance company has waived any defense it might have had based upon the time of indorsement of its consent to the assignment of the policy of insurance, because the policy itself with the assignment of the same had been in the hands of the defendant insurance company's agent for several days prior to the fire loss; and further alleges that at no time since said date has the defendant insurance company repudiated its consent to the assignment of the policy, or tendered back, either to John D. Suchart or to the plaintiff herein, any part of the insurance premium; and the plaintiff alleges that the defendant insurance company accepted and retained, and still retains, the full premium upon said insurance policy, and is estopped from asserting any defense based upon the delay in completing the transfer of the insurance policy from John D. Suchart to the plaintiff.

The mortgage clause attached to the policy provided that the insurance, as to the interests of the mortgagee, shall not be invalidated by any acts or neglect of the

mortgagor or owner of the property insured, nor any change in the title of the property, whether by legal process or otherwise; also, that whenever the company shall pay the mortgagee any sum for loss under the policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to the rights of the mortgagee to whom such payments shall be made under any and all securities held by the mortgagee for the payment of said debt; or, such company may, at its option, pay to said mortgagee the whole debt secured, with all interest which may have accrued thereon to the date of such payment, and shall thereupon receive from said mortgagee an assignment and transfer of said mortgage debt, with all security held by said mortgagee for the payment thereof.

The defendant insurance company, conceding its liability to the mortgagee under said mortgage clause, paid into court for the mortgagee the sum of $6,023.32, being the amount of the indebtedness secured by the mortgage held by the defendant building association against the insured property, and costs advanced, and prayed that it be subrogated to all of the rights of said building association as mortgagee. The sum paid into court was accepted by the mortgagee, and an assignment of mortgage made by mortgagee to the defendant insurance company. However, verdict having been returned for the plaintiff, the trial court, on entering judgment on the verdict, also entered decree canceling this mortgage.

The court properly instructed the jury that the burden was upon the plaintiff to prove, by a preponderance of the evidence, that the defendant consented to the assignment of the rights under the policy by Suchart to the plaintiff; but in the same connection qualified the instruction by adding thereto, "or that he made a full disclosure to the defendant company of the facts concerning the assignment and that the failure to complete the consent to the assignment before the fire was due to negligence

of the defendant or its agents." And by instruction No. 7, the jury were advised: "You are instructed that under the law of Nebraska, when an insurance policy is delivered to an insurance company for the purpose of securing its consent to an assignment of the interest of the insured therein, and the transfer of the insurance to another party, it is the duty of the insurance company to act within a reasonable time in the premises by either consenting to said assignment or notifying the insured that it will not consent, so as to enable him to procure other insurance."

Appellant contends that by these instructions an issue was interjected into the case that was not involved under the pleadings. This contention appears well founded. The question of negligence was not raised by the pleadings. The allegations of the plaintiff's petition as to that phase of the case being: "Which said assignment was duly accepted by the defendant Providence Washington Insurance Company and the consent of said insurance company to said assignment from John D. Suchart to the plaintiff herein, C. F. Connolly, trustee, was duly indorsed upon said insurance policy."

By the instruction referred to the trial court submitted to the jury, and gave the plaintiff the benefit of, an issue not raised by the pleadings. The submission of that issue was prejudicial to the rights of the defendant.

The appellant further contends that the verdict and judgment are not supported by the evidence. The vital question under the issues in this case was: Had the defendant insurance company consented to the assignment of the insurance policy by John D. Suchart to the plaintiff prior to the time the property was destroyed by fire? It is contended by the defendant that plaintiff concealed from defendant's agent, Wilson B. Reynolds, the fact that the fire had occurred which had destroyed the house and damaged the garage, until after the plaintiff had induced such agent to execute the company's consent to the as-

signment of the policy. The agent, Reynolds, called by the defendant, testified:

About 3 o'clock in the afternoon our office received a long distance telephone call from Omaha. Some one was speaking from the Omaha Loan & Building Association, and they referred to a policy that they wanted assigned; and I told them I had written a letter that morning in regard to that policy, and they asked if it had been mailed back to them. I told them no, that my letter would be self-explanatory; that I desired some information in regard to what this trusteeship was about. The gentleman who talked with me said that some one was coming out to see me about the assignment of this policy. Approximately an hour afterwards Mr. Connolly came to the office. He said he wanted to talk with me about this trusteeship and explain it to me. He said, "I can tell you all about it," so he went into a rather lengthy explanation. I then questioned him on matters pertaining to the tenant on the property, whether it was occupied or not. He said, "Yes." I said, "By a good reliable family?" He said, "Yes; so far as I know." He said so far as he knew there was nothing irregular about this; that the property was in good physical condition; that he was in close touch with it and that it was well rented and occupied. I thanked him for going into all the details concerning it, and I took this policy which had been filled in by some one, the assignment had, and I signed my name. I handed the policies to Mr. Connolly and he by that time was putting on his overcoat. Then he went outside of the railing and I had given him the policies. He stood there for just a moment or two before he left, and he said, "Well, Mr. Reynolds, I don't know how serious it is, but there was a fire on this property last night." I said, "Well then, I should say this assignment is of no benefit to you." I said, "I consented to it after the fire has occurred," and I said it should not govern. "Q. Did Mr. Connolly ever at any time, up to the time you had delivered to him the policies of insurance with

the consent to assignment indorsed on them, disclose to you that there had been a fire on the property? A. No, sir; not in any way. * * * Q. Did you ever execute the consent to the transfer of this until the afternoon of January 13? A. No; not until about 4:30 in the afternoon of January 13, 1931. Q. Which was after the fire occurred? A. After the fire occurred; yes, sir. Q. And before you knew that the fire had occurred, as a matter of fact? A. Yes, sir."

This witness is corroborated by the letter referred to in his testimony written to the Omaha Loan & Building Association prior to his receiving notice of the fire. The letter bears date of January 13, 1931, and reads: "Your letter addressed to W. L. O'Keefe has been referred to us for attention, together with the two policies. Before indorsing these policies to cover the interest of C. F. Connolly, trustee, please advise us fully as to the nature of the trusteeship, also how the property is occupied at the present time and what revenue it is bringing in."

On the same subject the plaintiff in his own behalf testified: I drove out to Fremont that afternoon; saw one of the Reynolds Brothers; told him about the fact that I was acting as trustee for the widow and child of Peter Duque De Estrada, and all about the rather peculiar history of the case, and about the fire. I told him that I had been under the impression the insurance was assigned a long time ago, but only happened to check it up on that particular day because we had a fire that morning, but that otherwise I would not have known anything about the failure to complete the insurance transference, because I had known nothing about there being any delay or the policies being sent to the wrong office. Well, as I recall, when I mentioned the fire, he said, "Just a little fire in one of the outbuildings?" I told him, "No; it was a fire in the main building, in the main residence." He said perhaps it was not important, and I told him that, as I understood it, it was a serious fire, but I did not know the extent of it. Well, he said, "As long as you

have made a good faith effort to transfer this insurance, the company will make no objection but will pay the money." He executed the consent to the assignment that day when I was out there. Some of this conversation was before the policy was actually delivered to me and some of it was after the policy was delivered to me. As to when he actually signed his name to the consent I do not know, because that was done in the back part of the office. The actual signing of his name was not done in my presence, the signing of his name as agent for the company. I met Mr. Reynolds on the one occasion, in his office, and some of the conversation was prior to the actual delivery of the policies to me; some was while I stood there holding them in my hand, and some of it was while I stood there with the policies in my pocket. Now, to pick out each portion of the conversation would be somewhat difficult. "Q. Then, you don't recall definitely whether you told him about the fire prior to the time he handed you the policies, indorsed with the consent to the assignment on them,—before you received the policies or after you received them, do you? A. It is my recollection that I told him that just as he handed me the policies, all in one transaction. Q. That is, right after he handed you the policies, then you told him there had been a fire on the premises? A. It is my idea that it was simultaneously. * * * Q. And during the course of that extended conversation, prior to the time the assignment was indorsed on the policy, did you at any time mention that there had been a fire on the premises? A. I can't tell you that definitely. It was all in the same interview, but I couldn't tell you whether I told him before he signed his name to the policies that there had been a fire, because I don't know when he signed his name to the policies, and I can't tell you whether I told him that before he handed them to me."

From a consideration of the evidence we conclude that plaintiff failed to sustain the burden of proof resting upon him. It is clear from the evidence that the agent of the

appellant never indorsed the consent of the company to the assignment of the insurance policy until after the fire. We conclude further, from the weight of the evidence, that at the time such consent was given the agent of the company did not know that a fire had already occurred, which had destroyed the residence and damaged the garage covered by the policy.

In this case the terms of the policy involved provide that the policy shall be void if any change take place in the interest or title to the subject of the insurance, other than by death of the insured, or if the policy be assigned before loss, unless the assent of the company shall be indorsed thereon or added thereto. Under such circumstances the general rule is that any assignment of the policy, to be valid and operative, must be with the consent of the insurance company. *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456; *New England Loan & Trust Co. v. Kenneally*, 38 Neb. 895; *St. Paul Fire & Marine Ins. Co. v. Ruddy*, 299 Fed. 189. It appearing from the weight of evidence that the defendant company indorsed the assent to the assignment of the policy after the fire which destroyed the residence and damaged the garage in question, and without notice of such fire, its consent to such assignment is void. *Johnston v. Indiana & Ohio Live Stock Ins. Co.*, 94 Neb. 403.

It follows that the evidence was insufficient to sustain the verdict of the jury or the judgment of the trial court thereon, or to sustain the decree of the trial court canceling the mortgage held by the Omaha Loan & Building Association which had been assigned by that association to the insurance company.

The judgment and decree of the district court is therefore reversed and cause remanded.

REVERSED.

NORA MATTINGLY BURNHAM ET AL., APPELLANTS, V. CHARLES W. BENNISON ET AL., APPELLEES AND CROSS-APPELLEES: ELIAS MATTINGLY, CROSS-APPELLANT.

FILED MARCH 2, 1934. No. 28645.

1. **Wills:** AMBIGUITY. A latent ambiguity will ordinarily arise upon a will when it contains an erroneous description of the person named as beneficiary; as where no such person has ever existed as the one described.
2. ———: ———: EXTRINSIC EVIDENCE. In a proper case extrinsic evidence is admissible both to disclose and remove latent ambiguities in a will.
3. ———: ———: ———. Where a latent ambiguity consists of an erroneous description of a beneficiary, such erroneous description will not avoid the legacy if it can be struck out and from the remaining portion, together with proof dehors the instrument, the intended beneficiary clearly appears.
4. ———: ———. Where a legacy was made to one named and described by relationship on condition he appear and make proof of his identity within a time limited, it appearing no such person as the one described ever existed and that the person named was the one intended, *held*, under evidence outlined, that "identity" did not mean "relationship" and that testator did not intend that legatee establish the given relationship as a condition precedent to recovery.
5. **Fraud:** PROOF. "Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." *Hampton v. Webster*, 56 Neb. 628.
6. **Wills:** CLAIMANTS: INTERVENTION: ISSUES. Where claimants of a legacy under one section of a will bring action to enforce such legacy, and a claimant under a separate section of said will intervenes for the purpose of enforcing the provisions of the second section, and neither the will nor the pleadings recite facts showing a conflict of interest between them, and the right to intervene is not questioned, plaintiffs cannot ordinarily resist intervener's claim nor object to evidence in support thereof; mere cross-denials are insufficient to establish an issue between them.
7. ———: TRUSTS: CONDITIONS: PERFORMANCE. Where beneficiaries under a trust in a will are required to appear and make proof to trustees within a certain time, and it appears that the beneficiaries named were able and offered within the

period specified to make such appearance and proof, but they were prevented from so doing by the trustees who were residuary legatees and would profit by their failure, it shall be accounted as performance.

8. Trusts: TRUSTEES: LIABILITY. Where trustees under a will assume to act as such, but unreasonably neglect to reduce the trust estate to possession as required and unduly delay determination of the identity of the beneficiaries named, such trustees are personally liable to the beneficiaries for any resulting loss, including interest.

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

James E. Brittain and *Deutsch & Stevens*, for appellants.

Perry, Van Pelt & Marti and *L. B. Fuller*, for cross-appellant Mattingly.

Thomas & Vail, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY and MEYER, District Judges.

MEYER, District Judge.

George W. Mattingly, colored, died testate, in Butler county, Nebraska, April 17, 1924. His will, dated March 24, 1924, was duly probated in said county. April 16, 1926, plaintiffs commenced an action in the district court for Butler county, Nebraska, to enforce the provisions of a testamentary trust, provided in said will. Issues were joined and on April 28, 1930, trial on the merits having commenced, defendants interposed a demurrer *ore tenus*, which was sustained. Plaintiffs electing to stand upon their petition and refusing to plead further, the petition was dismissed. Plaintiffs appealed to this court, and in *Burnham v. Bennison*, 121 Neb. 291, the judgment of the lower court was reversed, with directions.

Plaintiffs, by permission, filed an amended and supplemental petition in which is set out a copy of said will. The residuary clause thereof, so far as is material to this controversy, provided: "(6) The rest, residue and re-

mainder of my estate, real and personal, wheresoever situated, I give, devise and bequeath to C. W. Bennison and I. T. McCaskey as trustees, upon the following trusts, to wit: (a) That my said trustees shall pay to Joseph Mattingly, a son of a half-brother of my father, the sum of $10,000, on condition and in the event that the said Mattingly is living at my death and appears and makes due proof of his identity to my said trustees within one year after my death; and if the said Joseph Mattingly is dead or fails to appear then and in that event such payment shall be made to his living children, if any he has, on condition and in event that his child or children appear and make due proof to said trustees of their relationship within two years after my death; and if the said Joseph Mattingly fails so to appear and make such proof within one year, and if also, his child or children fail to so appear and make proof of their relationship within two years after my death, then the provisions of this paragraph made shall lapse and be null and void. (b) That my said trustees shall pay Elias Mattingly, the son of a half-brother of my father, the sum of $10,000, if the said Elias Mattingly is living at my death and he appear and make due proof of his relationship to said trustees within one year after my death; and if the said Elias Mattingly is dead or in case he fail to make the aforesaid proof and appearance then my said trustees shall pay said sum to his child or children, if any there are, appearing and making proof to said trustees of his or their relationship within two years after my death and in case of the said Elias Mattingly dying or failing to appear and in case of his child or children, if any he has, failing to appear and make proof as aforesaid, then and in that event the provisions of this paragraph in behalf of said Elias Mattingly and his child or children shall automatically lapse and be null and void. (c) My said trustees shall, during the term of said trust, cumulate the net income of said estate until the two-year period after my death has elapsed and my said trustees are then directed to assign, transfer and

set over to C. W. Bennison and I. T. McCaskey of David City, Nebraska, in equal shares, the rest, residue and remainder of the property remaining in the hands of said trustees and to vest in the said C. W. Bennison and I. T. McCaskey the absolute title thereto; my intention being to give, bequeath and devise to said C. W. Bennison and I. T. McCaskey all of such residue absolutely and unconditionally."

Plaintiffs aver in substance that the Joseph Mattingly mentioned, described and intended under the provisions of section (a) of paragraph (6) of said will (if alive) died March 19, 1919; that plaintiffs are his only children (or descendants); that within the two-year period prescribed, plaintiffs appeared before the trustees named and tendered competent evidence and proof thereof; that the trustees have failed and still fail and decline to receive or hear said proof and fail to determine the facts as contemplated; that on the last day of the two-year period designated, plaintiffs filed their petition in this action, and that said trustees have an interest in said estate adverse to said trust and are not suitable persons to act as trustees.

In December, 1931, Elias Mattingly intervened, alleging that there is a latent ambiguity in paragraph (6) of said will in that Elias Mattingly is therein described as a son of a half-brother of testator's father instead of a son of an uncle of testator; that testator's father had no brother or half-brother at any time, and intervener says he is the person named and intended under section (b) of paragraph (6) of said will.

In their answer, defendants admitted that the plaintiffs are the children of Joseph Mattingly, now deceased, and alleged that the testator firmly believed that Joseph Mattingly was the son of a half-brother of the father of testator, but allege that he was not related to the testator in any manner and that deceased's father never had a brother or a half-brother; that said bequests were intended solely for such persons as were related to the

testator in the manner described and that the existence of such blood relationship is a condition precedent to the right of any beneficiary to take such bequest. They further say that, if plaintiffs are the persons referred to in said will, said provision is null and void, for the reason that same was induced by fraud and deceit practiced on the testator by the plaintiffs and their father and their fraudulent failure to disclose their lack of relationship to him.

At the trial below the court found for defendants. Plaintiffs and intervener have appealed.

Are claimants the parties named, described and intended as beneficiaries?

The record is voluminous. It discloses that the testator was an ex-slave, born in Kentucky in 1841. His mother was a negro slave named Jane, owned by one Ray, and his father was a negro named Pius, originally owned as a slave by William Mattingly, but subsequently manumitted. The mother of Pius was a negro slave owned by said William Mattingly and the father was reputed to be a Charles Mattingly, a white man. Testator enlisted in the federal forces during the Civil War under the name of George W. Ray and apparently continued to use his mother's name until about the time he came to Nebraska. In 1878 he had removed to Butler county where he continued to reside until his death. He married in 1887 and in 1908 his wife died. There were no children. At the time of his death he owned real estate and personal property of considerable value.

Joseph Mattingly, father of plaintiffs, was also born in Kentucky about 1849 and was raised in a Louisville, Kentucky, orphanage. He was a white man, but little is known of his parentage. Despite the racial difference, the claimed relationship was not impossible in view of the irregular parentage of George's father and Charles' propensities. A son of Charles Mattingly by another woman would have been a half-brother of testator's father and, had he had a son, such son, if white, would answer

the designated relationship. While it is disputed, the plaintiff Noah Mattingly testified that testator and his father knew each other in Kentucky following the Civil War. Shortly after becoming of age, Joseph Mattingly went to Indiana where he was married. Afterwards he lived in Illinois and in the early nineties moved to Butler county, Nebraska. For a time he leased testator's farm and testator often visited Joseph and had meals with him and his family at their home. In 1895 or 1896 Joseph moved to Council Bluffs, at which time testator gave him $400. Later, Noah Mattingly made several trips to Butler county in connection with his employment and visited the testator at his home, and just before Noah was married testator gave him a mare. Although unable to read or write, testator occasionally corresponded with Joseph and his family through defendant Bennison and he often talked to Josh and Blanch Coleman, with whom he lived, and others, about Joseph and the children and called and referred to them as his cousins and, as they say, told about the good times they had had together when they used to live on his farm. He also told Noah a number of times that they were related and that some time he would disclose the relationship and that he was going to take care of Noah's father and his children.

As against this evidence, Noah testified on cross-examination that he and his family never claimed to be related to testator. Subsequently, however, as a part of the same cross-examination, when asked why he visited George so often and if it was because he thought he was his cousin, Noah said, "Well, I always figured that he was some relation to me." Considering his entire evidence, we do not understand that he intended to disclaim such relationship. It is easily understandable that white persons would be hesitant about claiming relationship to a negro.

There is, however, evidence in depositions of residents of Kentucky introduced by the intervener, and some of which were reoffered by the defendants, to the effect that

Charles Mattingly, although married, never had a white son. The deposition evidence discloses that, if Joseph Mattingly did not bear the claimed relationship, there never was any such person as the one described, and it is practically conceded by defendants that plaintiffs' father is the person named and intended. A latent ambiguity resulting from what may be an erroneous description of relationship is thus indicated and the question arises whether the legatee was in fact erroneously described. A latent ambiguity will arise upon a will when it contains an erroneous description of the person named as legatee, as where there is no such person as the one described, unless from an examination of the whole will it clearly appears that the testator intended that such legatee answer the precise description therein set out as a condition precedent to recovery. See *Second United Presbyterian Church v. First United Presbyterian Church,* 71 Neb. 563; *Patch v. White,* 117 U. S. 210; *In re Henrikson's Estate,* 163 Minn. 176. Also see *Siegley v. Simpson,* 73 Wash. 69, 47 L. R. A. n. s. 514, and notes. These same authorities hold that in cases of latent ambiguity extrinsic evidence may be considered both to disclose and remove such ambiguity. See, also, 40 Cyc. 1430; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591; *Taylor v. McCowen,* 154 Cal. 798.

The parol evidence further shows that in 1919 the deceased made a will in which he conveyed one-half his estate in trust for his brother, John Ray, on condition that, if he be not found within two years, then to Joseph Mattingly, "who formerly lived on my farm, in this, the county of Butler, state of Nebraska." No other Joseph Mattingly ever lived there. Later testator went to Kentucky in an attempt to find his brother. Being unsuccessful and apparently giving him up as dead, he subsequently made the will in question. It also appears that, after leaving Council Bluffs, Joseph Mattingly lived near Sholes in northeastern Nebraska, and testator told the scrivener who drew his will that Joseph Mattingly who

lived on the Dakota line was the son of a half-brother of his father, and when section (a) of the will was read to him, the testator, upon inquiry, referred to Joseph Mattingly as "first cousin in north Nebraska or Dakota." But defendants urge that plaintiffs' father was not the Joseph Mattingly intended because testator knew that Joseph was dead at the time he made his will. He had been told of Joseph's death, but he forgot or became uncertain on this point during his last days. He was then 83 years old and in ill health. Uncertainty is indicated by the fact that he made the bequest over to Joseph's children. Defendants, however, are estopped to urge this objection by reason of their answer, and, indeed, in their brief they state: "The fact that the testator believed he was related by blood to the plaintiffs and their father was not a disputed issue in the case."

Elias Mattingly, intervener, is a son of one Henry F. Mattingly, a brother of Charles, the father of Pius. He is also white and was born in Kentucky in 1840 and he and deceased lived in houses a short distance apart. They were baptized in the same church, played and worked together as boys and young men, and Elias still lives in the same house where he was born. Deceased told Crosthwaite, one of the attesting witnesses, that Elias Mattingly named therein lived back in Kentucky. He also told the Colemans that he had a cousin in Kentucky, and told others he was part white. Testator was illiterate; he had not been in close touch with his relatives for years; his father's birth was irregular and he might easily have been mistaken as to the precise relationship. There is no evidence that he ever knew any other Joseph or Elias Mattingly or that any others ever existed either in Nebraska or Kentucky or elsewhere. Deceased has now been dead nearly ten years and there is no other Joseph or Elias Mattingly or any one of any other name or relationship claiming either of these legacies. The defendant trustees alone ask for their forfeiture. These defendants were testator's business advisors. They are not

relatives, but are residuary legatees and would profit thereby. If we exclude the plaintiffs, Elias Mattingly was testator's nearest living relative. The evidence of the surrounding circumstances, taken in connection with the will itself, leads inevitably to the conclusion that both plaintiffs' father and intervener were the persons named and intended by testator as the objects of his bounty and it is undisputed that plaintiffs are Joseph's only children and descendants.

Did testator by the conditional provisions stated in the will intend that legatees establish the precise relationship therein set out as a condition precedent to recovery, and was relationship the sole motive for said bequest? The will does not so state, nor do we think that this was what testator meant by the language used. Joseph Mattingly was only required to establish his "identity," while Elias Mattingly was required to establish his "relationship." The word identity is not synonymous with the word relationship, nor is it commonly so used, and where two words of a different meaning are used in the same instrument, they are presumed to have been used advisedly and not synonymously. Again, even if relationship was the sole motive, when it is admitted that testator "firmly believed" that Joseph Mattingly was a relative, and there is no evidence that there was any doubt in his mind on this point, why would he require proof of relationship in which he had full faith?

Plaintiffs are required to make proof of their relationship, but since testator believed thoroughly in said relationship, we think he meant only that they establish their relationship to Joseph. This construction does no violence to the language used. Elias' relationship is not disputed, but defendants contend that claimants must prove the exact relationship described in the will. Had the language been "such identity" and "such relationship" instead of "his identity" and "his relationship," or had he made these gifts on the condition that they prove

themselves to be sons "of a half-brother of my father," then the situation might be different.

The scrivener who drew the will said that testator "wasn't a versatile fellow; his mind was slow and he didn't talk much; everything I got out of him I had to inquire about pretty much." He also stated that he "pressed" testator for the relationship in order to get a description of who was actually intended and that he "tried to search out from him who they were and how they could be identified." He made a memorandum of the evidence gleaned for the purpose of drawing the will. There is no suggestion in it of any conditions precedent to the payment of the money, nor does it even disclose the relationship described in the will. The language used was the scrivener's language, and while testator adopted it, the surrounding circumstances support the foregoing construction.

The evidence tends to show that the motive for the legacy to Elias was that of relationship. However, it does not indicate that testator attached a peculiar importance to the precise relationship or that he would not have made said gift had he had it in mind that Elias was a son of a great uncle rather than a son of a half-brother of his father. There had been a rather close association between testator and Joseph for a considerable period of time, and while in making the gift to him there is evidence he was actuated by a belief of relationship, we are unable to determine that this was his sole motive. He remembered others who were not related and we cannot say that, aside from such relationship or his belief in it, he would have preferred this legacy to go to the residuary legatees, who it is admitted bear no relationship. We believe there is a latent ambiguity arising on the will resulting from an erroneous description. This renders parol testimony admissible, and the rule stated in *Patch v. White, supra,* and quoted with approval in *In re Henrikson's Estate, supra,* is applicable here: "If the misdescription can be struck out, and enough remain in the

will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected." See, also, *Seebrock v. Fedawa*, 33 Neb. 413; Jones, Evidence (2d ed.) sec. 474.

We next consider whether plaintiffs and their father fraudulently induced testator to believe they were related and to make the bequest to them. Defendants admit there is no direct evidence of fraud, but point out that, when testator told Noah that they were related, he did not deny it, and they say that this and the fact that he visited testator and the course of conduct of plaintiffs and their father indicate a studied effort to induce testator to believe they were related and to make a bequest to them, and to conceal the true facts. We think the evidence insufficient to establish such design, nor does it show that testator was influenced by their conduct. None of them except Noah saw testator after 1896. Thereafter he was in Kentucky seeking out his relatives. Apparently his belief in such relationship was of long standing. The only assertions of relationship in the record were made by testator himself. There is nothing to show that Joseph or any plaintiff ever made any such statement or representation either in writing or otherwise. Their correspondence with testator passed through the hands of the defendant Bennison and there is no suggestion that there was anything in it to support this charge. "Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." *Hampton v. Webster*, 56 Neb. 628.

As a general rule, to establish concealment, it must first be shown that the parties charged therewith had knowledge of the facts which it is claimed they concealed or means of knowledge which are not open to both parties alike. 12 R. C. L. 309, sec. 69. Except for Noah's statement earlier discussed, there is no evidence that plaintiffs or their father knew or believed that they were not related and in their petition plaintiffs allege they were related. The evidence indicates testator's means of knowl-

edge was superior to theirs. The trial court found specially for plaintiffs on this issue and with this finding we agree.

Next we consider certain cross-assignments of error. In their answer to the petition in intervention, plaintiffs allege that intervener's claim, if any, had been settled, and that such petition was filed in furtherance of a conspiracy with defendants to harass plaintiffs and defeat their claim. It is noted that defendants did not object to intervener's evidence and they have not answered his brief in this court. It is also shown that negotiations were had looking toward adjustment of his claim, but it does not appear that settlement was reached. While the record reflects many circumstances indicating some favoritism, it fails to show that intervener's petition is not presented in entire good faith.

As heretofore stated, certain depositions were offered by intervener in support of his claim and some of them were reoffered by defendants. Plaintiffs complain that these depositions were improperly received under either offer, over their objections stated at the time of trial, to wit: That said depositions were not taken in the instant case, but were taken in other cases involving different parties and issues, cases in which plaintiffs had no substantial interest and no opportunity to cross-examine, and other grounds. Intervener and defendants, on the other hand, contend that the depositions were all taken in former suits involving substantially the same parties or their privies and the same subject-matter and were therefore competent. The defendants did not object to these depositions when offered by intervener. They were therefore properly received in evidence and entitled to be considered in support of intervener's claim as against the defendants.

Plaintiffs first complain of these depositions because of their possible adverse effect on plaintiffs' claim. The only evidence in them that could be considered detrimental to plaintiffs was the evidence, previously referred to, tending to establish that plaintiffs' father did not bear the

relationship to the testator described in the will. However, as already shown, if their admission under either offer was erroneous because of such evidence, it was error without prejudice. Plaintiffs' second and chief reason for urging the incompetency of these depositions lies in the claim that sufficient funds may not be realized from said estate to pay both legacies in full. While their objections are urged with considerable insistency and they outstrip defendants in their resistance of intervener's proof, their position on this phase of the controversy is frankly indicated by the following statement as it appears in their brief: "Except for the depletion of the fund and such adverse testimony as may be reflected in these exhibits, there is no controversy between cross-appellant and the appellants." The pleadings raise no issue between plaintiff and intervener other than the issue based on the claim that intervener's petition was not filed in good faith, heretofore discussed, nor does the will itself reflect a conflict of interest between them. Counsel in their brief state that the question of priority is not involved in this action and the right to intervene was not questioned. It should also be noted that plaintiffs' objection to these depositions when they were offered at the trial did not include the grounds now urged, nor does the evidence establish that there will be a deficiency of funds. We do not think, then, that the plaintiffs are entitled, under the record, to resist the allowance of intervener's claim or to object to evidence in support thereof; mere cross-denials were not sufficient to raise an issue between them. There is no error in the record on this point of which the plaintiffs can rightfully complain.

Have plaintiffs and intervener complied with the requirements of said will to appear and submit proof within two years and one year, respectively, after testator's death?

The evidence discloses that several times prior to the expiration of the two-year period, plaintiffs offered, both orally and in writing, to appear before trustees at any

time convenient to them and make proof as required by said will, and vigorously urged that they be given an opportunity to do so. Each offer was ignored and trustees never did appoint a time or place for hearing and never did hear proof under such claim, but finally, through their attorney, suggested that plaintiffs go into court and establish their identity. As stated in the former opinion, *Burnham v. Bennison, supra:* "When the evidence and proof were tendered within the two-year period, it was the plain duty of the trustees to hear the same and proceed as contemplated by the testator." These same trustees would, as individuals, succeed to the bequest in the event of a forfeiture for failure to comply with the conditional requirements. Their actions smack of self-interest and, even if their failure to act was prompted by an honest belief that plaintiffs were not the parties intended under said will, yet it would seem that plaintiffs' interests ought not be adversely affected by their erroneous judgment and that they ought not be permitted to profit by their own wrong.

This is a suit in equity to enforce a trust under a will, and not a suit against an executor to recover a legacy. If real estate is devised, subject to a condition precedent, which becomes impossible of performance before the time of performance arises, the title to it will not vest in the devisee. However, it is held otherwise as to a legacy subject to a condition precedent. See *Nunnery v. Carter,* 5 Jones Eq. (N. Car.) 370, 78 Am. Dec. 231; *Burdis v. Burdis,* 96 Va. 81. And in *Harris v. Wright,* 118 N. Car. 422, where there was a devise of real property, it was held that one should not be allowed to defeat an interest under a will where by his own wrongful act he prevented claimant from performing the condition upon which his interest rested. The court said: "We are not weakening that principle of law" which requires unconditional performance of conditions precedent, "but we are asserting another rule equally as old and equally as binding when we declare that, where a person interested wrongfully

prevents the performance of the condition precedent, he shall not be allowed to take advantage of his own wrong." See, also, *Morris v. Mull*, 110 Ohio St. 623, 39 A. L. R. 323; *Hill v. Gianelli*, 221 Ill. 286; *Peek v. Woman's Home Missionary Society*, 304 Ill. 427, 26 A. L. R. 917; *Seeley v. Hincks*, 65 Conn. 1. In the latter case the court said that, plaintiff therein being ready and willing to do what was required of him, but being prevented from so doing by the executors, it was accounted to him as performance. The rules quoted, we think, are peculiarly applicable to the facts of this case, and plaintiffs now having made proof that they were the parties intended and having been prevented from appearing and making such proof within the time required, by trustees who would profit thereby, it will be "accounted to them as performance."

So far as intervener is concerned, it appears that a number of contests were originally filed against this will, and the trustees, as proponents thereof and beneficiaries thereunder, within the one-year period caused intervener to appear and give evidence in the form of deposition for use in their behalf in said contest; that he then testified as to his identity and relationship to testator and gave the family history of deceased. There also appears in evidence an envelope directed to "C. W. Bennison and I. T. McCaskey, Executors and Trustees, David City, Nebraska," duly stamped and canceled and postmarked in Kentucky and showing post office cancelation, "David City, Nebraska, April 3, 1925, Registered," and also an affidavit of claim of Elias Mattingly apparently transmitted in the envelope, dated April 1, 1925, in which is set forth proof of his relationship and his identity. The defendant Bennison testified that he turned over all papers in connection with the trust to his counsel, and counsel testified that he was familiar with the contents of said exhibit and saw it among the files in the county court. The foundation proof for the admission of the envelope and affidavit was very meagre; however, defendants did not object thereto, and, for reasons heretofore stated,

plaintiffs' objections cannot be urged. The evidence will therefore be received and considered, and shows *prima facie* that this proof was made within the time required. The proof was ample, and we think that, when intervener appeared at instance of trustees and gave his deposition for them as outlined, and supplemented same by proof and formal claim in the form of affidavit, he fulfilled, within time, the conditional requirements.

Trustees are also charged with breach of trust, and judgment is asked against them personally, as well as against the trust estate, and claim is made against each for interest. In *Lewis v. Barkley*, 91 Neb. 127, it was held that, whether interest is to be allowed upon a specific legacy of money depends upon the intention of the testator, and that, if the intention cannot be otherwise determined from the language of the will, it will be presumed that the testator intended that the legacy should be paid during the first year after the appointment of the executor under the will, and if not so paid, should bear interest from that time. In the instant case there is nothing to indicate testator intended the bequests to draw interest before they were demandable and the will clearly shows that he expected payment to be made within two years following his death. However, there was litigation pending over this will almost continuously to November 12, 1929. This was not contemplated by testator. By January 1, 1931, at least, trustees could have reduced the estate to possession and converted it into cash and have been prepared to pay these bequests. Under the circumstances of this case, such time is allowed and interest is therefore charged at 7 per cent. on each legacy from January 1, 1931.

As pointed out in the former opinion, there was a conflict of interest between trustees and claimants. If trustees desired to assume the role of contestants, they should have resigned and petitioned the court for appointment of successors to hear and determine claims. Choosing to act as trustees, it was clearly their duty to reduce the estate

to possession as soon as possible after the death of the testator and either hear and fairly determine the evidence offered by plaintiffs and intervener or secure a judicial determination thereof. Had this been promptly done, the bequests could have been paid at least by January 1, 1931, as outlined above. After litigation was ended in 1929, there was no further excuse for their failure to act; however, in the role of contestants they have continued to unduly delay an early determination of claimants' rights. Even if not prompted by ulterior purpose or personal interest, they have woefully neglected their duties as trustees and they are personally liable for any resulting loss. 39 Cyc. 321; *Kline's Estate,* 280 Pa. St. 41, 32 A. L. R. 926; *Baird v. Lane,* 115 Neb. 413. We have examined the evidence carefully and are unable to determine that there has been any loss to the estate by their neglect, except perhaps a possible loss of interest due to delay, for which interest they are chargeable in the event of a deficiency in the trust estate. If sufficient funds cannot be realized from the trust estate to pay the face of the bequests in full, then the interest chargeable to trustees should be computed on the principal payable.

Trustees are not only liable for interest, but they may not be permitted to charge the trust estate, to the prejudice of the claimants, for any expenses, costs, or attorneys' fees incurred in this litigation, or for any expense, costs, or attorneys' fees incurred or services performed by them in their individual interest, rather than in the interest of the trust.

After the hearing in the trial court, by suggestion of counsel for trustees, and in keeping with the mandate of this court made on former hearing, the trial court entered an order appointing new trustees and removing those originally designated. Plaintiffs complain that the newly appointed trustees are disqualified by interest to act, and that their appointment was made without notice to plaintiffs. While the trustees appointed should clearly be impartial between all the parties, the record does not dis-

close that the newly appointed trustees lack such qualifications, and we fail to find in the record any evidence on the question of notice, but if notice was omitted no prejudice appears. Under the state of the record, we do not think we should disturb the order of the trial court in this regard.

It follows that the judgment of the trial court must be and the same hereby is reversed and the cause remanded to the district court, with instructions to enter judgment in conformity with this opinion.

REVERSED.

GOOD, J., dissents.

LINCOLN TELEPHONE & TELEGRAPH COMPANY, PLAINTIFF, V. WILLIAM ALBERS, COUNTY TREASURER, DEFENDANT.

FILED MARCH 3, 1934. No. 29111.

Taxation. General personal taxes may be paid in two equal instalments. The first instalment becomes delinquent December first after such tax has been levied. If the first instalment is paid before it becomes delinquent, the second instalment does not become delinquent or bear interest until the first day of the following July.

Original proceeding for a declaratory judgment as to time and manner of payment of personal taxes.

Woods, Woods & Aitken, for plaintiff.

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

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and CHAPPELL and REDICK, District Judges.

GOOD, J.

This is an action for a declaratory judgment. The question presented for determination is: Where the first instalment of personal taxes has been paid before such

instalment becomes delinquent, does the second instalment of taxes bear interest from the date the first instalment would have been delinquent, if not paid, or from the date that the second instalment becomes delinquent? The question hinges upon a proper interpretation of chapter 134, Laws 1933, and section 3, ch. 136, Laws 1933.

Chapter 134, Laws 1933, in so far as applicable to the question before us, reads as follows: "All general personal property taxes levied for the state of Nebraska, or for any county, city, village, school district, or other political subdivision therein, shall become due and payable on the first day of November next following the date of levy thereof. One-half thereof shall become delinquent on the first day of December next following the date on which the tax becomes due and payable. The second half thereof shall become delinquent on the first day of July next following the date on which the tax becomes due and payable; provided, however, if the first one-half of such tax be not paid on or before the first day of December then and in that event the entire tax shall become delinquent on the first day of December next following the date on which the tax becomes due and payable. All delinquent taxes shall draw interest at the rate of seven per cent. per annum from the date on which they become delinquent until the date of sale, in case of real property, and until the date upon which distress warrants may issue, in case of personal property. * * * And delinquent taxes on personal property shall draw interest at the rate of ten per cent. per annum from the date upon which distress warrant may lawfully be issued."

Section 3, ch. 136, Laws 1933, reads as follows: "The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent on account of such taxpayer not having paid said personal taxes or the first instalment thereof on December first, as required by law, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by Feb-

ruary 1st next following, distress warrant will be issued therefor. The treasurer shall, on the first day of March next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before March 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board, or unless such person shall, on or before March 1st have paid delinquent personal taxes in full with interest at the rate of seven per cent. (7%) per annum or has paid the first instalment of said personal taxes on or before March 1st with interest at the rate of seven per cent. (7%) per annum; provided, if such person, having paid the first instalment of personal taxes on March 1st, as aforesaid, shall fail, refuse or neglect to pay the second instalment of personal taxes due September 1st, then and thereafter distress warrant shall be issued for the amount of the personal taxes due as of September 1st with interest at the rate of nine (9%) per cent. per annum from March 1st until satisfied by distress warrant or otherwise paid."

Chapter 134 and chapter 136 were each enacted at the same session of the legislature. Chapter 134 was approved by the governor on May 10, 1933; chapter 136 was approved May 12, 1933, and contained an emergency clause, while chapter 134 did not contain an emergency clause.

It is contended that there is inconsistency between the two acts, and that when said chapter 136 was enacted there was no provision for paying personal taxes in in-

stalments, because chapter 134 did not become a law until three months after final adjournment of the legislative session at which it was passed, as provided by the Constitution.

We are of the opinion that the two acts, represented by said chapters 134 and 136, were enacted as companion laws, and while an emergency clause was included in chapter 136, it could not operate on the taxes for 1932, and was inoperative until the tax for 1933 was levied, which was not until after chapter 134 was in force.

We are of the opinion that the legislature had power to enact chapter 136, Laws 1933, and that it would become a law, although not operative until there was further legislation. There was then no statute authorizing payment of personal taxes in instalments, but it would become operative and effective when another act was passed providing for the payment of personal taxes in instalments. Chapters 134 and 136 should be construed together and each given effect if possible. A careful examination of chapter 134 and section 3 of chapter 136 does not disclose any inconsistency with reference to the payment of personal taxes in instalments. Chapter 134 provides specifically for the payment of such taxes in instalments and fixes the time when each instalment will become delinquent. Section 3 of chapter 136 deals exclusively with the manner of enforcing payment of personal taxes after they have become delinquent.

We are of the opinion that a taxpayer may lawfully pay his personal taxes in two equal instalments, as provided by chapter 134, Laws 1933, and that, if he pays the first instalment on or before the first day of December following the levy of such tax, then the second instalment does not become delinquent and does not bear interest until the first day of the following July.

Our attention has been called to the fact that there are provisions in some of the home rule charters of cities which make other and different provisions respecting the collection of city taxes in such cities. Whether those pro-

visions are in conflict with the provisions of said chapters 134 and 136, and which would be controlling, is not involved in this action and is not here decided.

From what has been said, it follows that it is the duty of defendant county treasurer to accept and issue receipts for personal taxes in instalments, and to refrain from collecting any interest where such instalments are paid on or before the date they become delinquent.

JAMES V. CHIZEK, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES: MARK M. SHAW, INTERVENER, APPELLANT.

FILED MARCH 3, 1934. No. 28884.

1. **Equity.** The facts in the instant case invoke the application of the rule that "Equity acts in the present tense, and that relief is dependent upon present and future conditions rather than solely on those existing when the suit was brought." 32 C. J. 76.
2. **Injunction.** One who seeks the extraordinary remedy of injunction must establish by competent evidence every controverted fact necessary to entitle the party to the relief to be granted.
3. **Nuisance: INJUNCTION.** A private person seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to himself aside from and independent of the general injury to the public.
4. **Municipal Corporations: FRANCHISES: INJUNCTION.** An action cannot be maintained by a private person to prevent gas mains being laid in the streets of a city unless he pleads and proves that some special injury will result to him.
5. **Evidence** examined, and *held* to establish that the transactions attacked do not affect injuriously the business of the Metropolitan Utilities District or the proprietary rights of the city of Omaha; and neither do they entail any expenditure of public funds or involve an increase in the burden of municipal taxation.

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

Benjamin S. Baker, Edward Shafton, John A. McKenzie and *Edgar S. Hickey,* for appellants.

Seymour L. Smith, Kennedy, Holland & De Lacy, Thomas Creigh, John A. McKee, Flansburg, Lee & Sheldahl, R. J. Organ, L. J. Te Poel, Philip Klutznick and *Dana B. Van Dusen, contra.*

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

EBERLY, J.

This is a suit in equity commenced and prosecuted in the district court for Douglas county by James V. Chizek as plaintiff against the city of Omaha, its mayor and council, Herman Beal as city engineer, the Metropolitan Utilities District, the Northern Gas & Pipe Line Company, and also four named corporations engaged in the packing house business within said city. Mark M. Shaw became a party to this proceeding by intervention. The relief sought by plaintiff, and also by intervener, speaking generally, may be said to be the prevention of the laying of a gas main in the public streets from the southern corporate limits of the city of Omaha at Twenty-seventh street to the packing houses owned and operated by the defendants designated in the pleadings and located in the vicinity of Twenty-sixth and Twenty-seventh streets at Q street, and to prohibit the transportation of natural gas through said gas main for private purposes to the defendant packing companies. No temporary injunction or restraining order was applied for. The several defendants answered and replies thereto were filed. On the issues thus formed a trial was had on the merits on February 4, 1933, at the close of which a judgment was entered denying injunctive relief and dismissing the action. From the order of the district court overruling his motion for a new trial, the plaintiff alone appeals, filing the transcript of the proceedings in this court on June 2, 1933.

Upon this appeal, so far as necessary, this court retries

the issues of fact and law presented by the record *de novo*, and reaches an independent conclusion without reference to the conclusion reached in the district court. Comp. St. 1929, sec. 20-1925.

The record discloses the fact that at the time of the trial in the district court the improvement sought to be enjoined had been completed and was in operation. The results of this situation appear in the record in practically uncontradicted evidence. That this controversy may be considered with reference to the environment from which it arises, it may be said that the Northern Gas & Pipe Line Company is the owner of a pipe line extending from the natural gas fields of Texas and Kansas to, into and through Nebraska. The company's business is the preparation and transportation of natural gas through this pipe line, and the sale of the same at wholesale to such as desire to purchase. Under contracts it now furnishes such natural gas for a limited use to the four defendant packing companies. The delivery of this product is made to these purchasers through a meter which registers the amount as delivery is made, and which is situated outside of the city of Omaha. This pipe line company is paid on the basis of the amount of gas passing through this meter.

Under a "permit" in writing, and in accordance with the plans and specifications fully approved by all the municipal authorities concerned, the four packing house companies constructed at their own cost, and have installed some five feet under ground, a gas main eighteen inches in diameter from the south boundary of the city of Omaha along Twenty-seventh street and in Twenty-sixth street and Q street to their several packing plants. The gas thus delivered is again metered at the point of receipt in the plant supplied and there measured to ascertain the relative amount to be contributed by such defendant for the purchase price as determined by the meter installed at the city boundary. Contracts in writing by the parties in interest provide that the packing house companies shall

continue to buy manufactured gas from the Metropolitan Utilities District as heretofore; that natural gas furnished through this pipe line would be used by the packing house companies for fuel purposes only; and that there would be no resale of any of the natural gas by the packers. So far as shown in the evidence none of these contract provisions has been breached.

The evidence is also undisputed that the use of manufactured gas for the purposes for which the natural gas is now employed, or may be employed under the terms of the contracts referred to, is an economic impossibility, so that there is no competition with the products of the Metropolitan Utilities District created by the transaction before us.

In view of the situation presented by the record, we are fully justified in determining the question before us on a consideration of the actual results of the transactions on which plaintiff's attack was made.

"It has been said that equity acts in the present tense, and that relief is dependent upon present and future conditions rather than solely on those existing when the suit was brought." 32 C. J. 76. See, also, *Youngblood v. Incorporated Town of Wewoka*, 95 Okla. 28; *Wendell v. City of Peoria*, 274 Ill. 613; *Detroit United Ry. v. City of Detroit*, 214 Mich. 170; *Fugel v. Becker*, 2 S. W. (2d) (Mo.) 743; *Alsager v. Peterson*, 31 S. Dak. 452.

It is not denied that this pipe line was laid and the street, including the pavement thereon, fully restored so that it in no manner affects public travel thereon. This was done at the cost and expense of the defendant packing house companies, and with no damages whatever to either public corporation defendant within whose limits the work was performed.

It also appears that by a deed in writing the defendant packing houses conveyed this pipe line to the Metropolitan Utilities District of Omaha, reserving, however, the full and free use of the pipe line for the period of six years, at the end of which time all reserved right of use shall

terminate; further, that this deed had been accepted and recorded by the grantee prior to the final hearing in the trial court.

As to the general financial effect of this transaction, Mr. Robinson, the chief engineer for the Metropolitan Utilities District, testifies, in substance, that he was familiar with all of the property belonging to the Metropolitan Utilities District, and that the pipe line which was placed in Twenty-seventh street by the defendant packers and which was deeded to the Metropolitan Utilities District on January 18, 1932, was worth approximately $50,000; that the pipe line in Twenty-seventh street provides a way for the carrying of manufactured gas to the southern limits of the city, and that this condition will be advantageous to the city and the district, and furthermore obtains potential customers for the large use of natural gas for industrial value; and that there are no disadvantages to the Metropolitan Utilities District in placing the natural gas pipe line in Twenty-seventh street and Q street. It thus affirmatively appears that the Metropolitan Utilities District has acquired title to property of the value of $50,000, subject only to a use of six years, without the expenditure of public funds, and without in any manner entailing upon it or the city of Omaha any burden of future expenditures. So far as the transaction affecting injuriously the business of the Utilities District or the proprietary rights of the city of Omaha, the contrary appears from uncontradicted evidence.

Even assuming, for the purpose of this discussion only, that the corporate acts questioned in this litigation are wholly illegal and invalid, still it is patent that they have occasioned no expenditure of public funds; that they will require no outlays by the public corporations involved; and neither will they necessitate or involve any future increase in the burden of municipal taxation.

As to the placing of the natural gas main in the streets of Omaha in the manner disclosed by this record, it will be remembered that "Not every invasion of, or structure

upon, a public highway is unlawful, but that they may legally exist, the authority therefor must have its ultimate source in the legislature of the state in whose jurisdiction the highway exists." *World Realty Co. v. City of Omaha*, 113 Neb. 396.

"One who seeks the extraordinary remedy of injunction must establish by competent evidence every controverted fact necessary to entitle the party to the relief to be granted." *World Realty Co. v. City of Omaha, supra.*

"A private person * * * seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to such person * * * aside from and independent of the general injury to the public." *World Realty Co. v. City of Omaha, supra.*

It is obvious the requirement that plaintiff, when a private person seeking an injunction against a public nuisance, "must show some special injury peculiar to" himself is a prerequisite to any injunctive relief. The only material evidence in the instant case relating to this proposition is a stipulation made by the parties at the trial, to the effect that appellant was and is a resident and taxpayer of Omaha, Nebraska. This court is committed to the view that this was, and is, insufficient. The case of *Ray v. Colby & Tenney*, 5 Neb. (Unof.) 151, it appears, was a proceeding to enjoin Colby and Tenney from proceeding to erect, construct, equip, maintain and operate gas works in the city of North Platte for the purpose of making, supplying and selling gas for fuel and for lighting purposes. One Lloyd, intervening therein, alleged in his petition that he was a resident taxpayer, and in addition properly pleaded ultimate facts which, if true, disclosed that the sole ordinance under which the defendants were proceeding with the work sought to be enjoined was wholly void and never in legal force and effect in the city of North Platte. The issue involved in this North Platte case, as in the instant case, under the assumption we here indulge for the purpose of discussion, was whether a resident taxpayer as such, in his private

capacity, was competent and empowered by legal proceedings to enjoin the unlawful laying of gas pipes on the public streets. In the opinion in the case just cited we find the following: "The first question presented is, Does the petition of Lloyd state a cause of action which he is entitled to maintain? His allegations of interest in this controversy are citizenship and being a taxpayer. He does not show by his pleading wherein either of these interests are or may be injured by the acts complained of; therefore we must conclude that his petition is insufficient." In the syllabus the rule is stated: "A private individual cannot maintain an action to prevent gas mains being laid in the streets of a city unless he plead and prove that some special injury will result to him." The rule thus stated has been approved in principle in the following cases: *Kittle v. Fremont,* 1 Neb. 329; *Shed v. Hawthorne,* 3 Neb. 179; *Hill v. Pierson,* 45 Neb. 503; *George v. Peckham,* 73 Neb. 794; *Lee v. City of McCook,* 82 Neb. 26; *Gleason v. Loose-Wiles Cracker & Candy Co.,* 88 Neb. 83; *Powers v. Flansburg,* 90 Neb. 467; *Brown v. Easterday,* 110 Neb. 729. All the decisions cited, in substance, recognize the established principle in this jurisdiction, viz.: "It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind, and not merely of degree." *Ayers v. Citizens R. Co.,* 83 Neb. 26. See, also, *Woods v. Lincoln Traction Co.,* 83 Neb. 23.

The case of *Tukey v. City of Omaha,* 54 Neb. 370, cited by plaintiff, is not in point. That case involved the issuance of an injunction where it was charged and established that "an illegal disposition of the public money, or the illegal creation of a debt which must be paid by taxation," was threatened and would occur if not enjoined. The evidence in the instant case affirmatively negatives both of the conditions quoted.

This reasoning is expressly recognized and approved in *Clark v. Interstate Independent Telephone Co.*, 72 Neb. 883, also cited by plaintiff, where the doctrine is announced, in effect, that a taxpayer, under the facts involved in that case, in the absence of an injury peculiar to himself, cannot maintain a suit for an injunction against a municipality unless the results of the action attacked in such proceeding will cause such "a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby."

The conclusion follows that, under the facts alleged in the petition of plaintiff, and established by the evidence in the instant case, he has failed to establish that any special injury has or will result to him from the matter sought to be enjoined. Neither does it appear that any wrongful squandering of the money of the city has occurred, nor that taxation will in any measure be increased thereby.

Plaintiff is therefore not entitled to maintain this action for injunctive relief, and on this ground the district court properly dismissed the action. In this situation, the basic pleading failing to state a cause of action in favor of plaintiff and being wholly without equity, the determination of other questions presented by the briefs and argued by counsel is wholly unnecessary to a proper disposition of this case and will not be further considered.

It follows that the judgment of the trial court dismissing plaintiff's action and denying him injunctive relief is correct, and is

AFFIRMED.

OLIVER CHAPMAN, APPELLANT, V. CARRIE P. PERSON ET AL., APPELLEES.

FILED MARCH 9, 1934. No. 28859.

Appeal. Motion to quash bill of exceptions having been sustained, judgment affirmed on the authority of *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652.

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

Fred S. Berry and *McDonald & Edens,* for appellant.

Russell W. Bartels, guardian *ad litem, H. E. Siman* and *J. E. Brittain, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

PER CURIAM.

This was an action for foreclosure of a certain real estate mortgage brought by the plaintiff Oliver Chapman against Carrie P. Person and Per Person. Russell W. Bartels was duly appointed guardian *ad litem* for Carrie P. Person, as an insane defendant, and also appears in this cause on appeal as an appellee. There was a judgment in the district court denying relief and dismissing plaintiff's action, and he appeals.

Preliminary to the determination of the merits of the controversy, there was presented a motion to quash the bill of exceptions.

The record in this case discloses that the final judgment appealed from was entered February 17, 1933, a regular day of the November, 1932, term of the district court for Wayne county which adjourned *sine die* on May 1, 1933. The transcript on appeal was filed May 12, 1933. Appellant's brief was filed June 7, 1933. Appellees' briefs were filed July 24 and August 25, 1933. No order was entered in this cause extending the time for settling or allowing the bill of exceptions.

On November 25, 1933, notice was served by the guardian *ad litem* upon appellant of motion to dismiss the appeal because no bill of exceptions had been filed in the cause. On November 28, 1933, a bill of exceptions, settled and allowed by the trial judge on September 18, 1933, was filed in this court. Thereafter the motion to dismiss the appeal because of the absence of the bill of exceptions was by this court denied. On January 26, 1934, a motion

to quash the bill of exceptions was filed. It will be noted that 140 days elapsed between the date of the final adjournment of the term at which the judgment appealed from was entered and the date of the settlement and allowance of the bill of exceptions by the trial judge. This motion we were compelled to sustain.

The language of Rose, J., in *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, is applicable to the facts above outlined, states the controlling principles governing the disposition of the present case, and is as follows: "A motion to quash the bill of exceptions was submitted with the case on its merits, and is sustained for the reason that it was signed by the trial judge after the statutory period for allowing it had expired. The judgment from which defendant appealed was rendered and entered on the journal April 13, 1921, at the February term which expired June 3, 1921. The bill of exceptions was signed by the trial judge December 26, 1921. That was too late. He had no authority to settle it more than 100 days after the expiration of the term. *Walker v. Burtless*, 82 Neb. 211. It is argued, however, that the motion should not be sustained because the briefs of defendant were filed before plaintiff objected to the bill of exceptions. This position is untenable. The bill of exceptions did not reach the appellate court until after defendant's briefs were filed (*Stock v. Luebben*, 72 Neb. 254). With the bill of exceptions quashed in the appellate court, it will be presumed that the evidence sustains the findings of fact below on the material issues. The inquiry on appeal is thus narrowed to the sufficiency of the pleadings to support the judgment," which are in no manner questioned by the appellant in the instant case.

It follows that the motion to quash the bill of exceptions having been sustained, the judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF OMAHA, E. H. LUIKART, RECEIVER, APPELLANT: CORA WOLF, INTERVENER, APPELLEE.

FILED MARCH 9, 1934. No. 28803.

1. **Appeal.** In a suit in equity, credence given by the trial court to a witness whose testimony is contradicted by another witness may be considered on a trial *de novo* in the appellate court.
2. **Banks and Banking: PLEDGES.** In equity, a guaranty and a pledge of collateral securing it may be canceled for fraud in the procuring of those instruments, and in that event the collateral may be restored to pledgor as trust property in the hands of the receiver of the pledgee after insolvency.
3. **Pledges: FRAUD.** Fraud in procuring a guaranty and a pledge of collateral securing it may be proved by evidence that obligor was induced to sign those instruments by false statements of obligee that he had other collateral of equal value which would be exhausted first, that obligor believed and relied on the false statements and except for them would not have entered into the obligations.
4. **Harmless errors** in rulings on evidence do not require a reversal on appeal.

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

F. C. Radke, Barlow Nye and *O'Sullivan & Southard,* for appellant.

G. F. Nye and *Leon & White, contra.*

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

ROSE, J.

This is a proceeding in equity to cancel a guaranty alleged to have been procured by the State Bank of Omaha from Cora Wolf by fraud, to repossess securities pledged by her as collateral for her obligation as guarantor and to require pledgee to account for the income from, or proceeds of, the collateral pledged. The guaranty bore

the signature of Jake Spiesberger, Cora Wolf and E. Treller.

In an action to wind up the affairs of the State Bank of Omaha, an insolvent corporation in the hands of E. H. Luikart, receiver, Cora Wolf, intervener, pleaded that, through fraud, she was induced to sign a 50,000-dollar guaranty for payment of past and future debts, however evidenced, owing by M. Spiesberger & Son Company, hereinafter called the "company," to the State Bank of Omaha, hereinafter called the "bank;" that intervener pledged, and the bank received as collateral, notes, mortgages and bonds aggregating in amount and value $25,000; that, to induce intervener to sign the guaranty and make the pledge, the bank, by its president, falsely stated to intervener that the company had pledged collateral of the value of $25,000 to secure debts owing by the former to the latter; that the collateral so pledged by the company would first be applied to the extinguishment of its obligations to pledgee and that the securities pledged by intervener would only be used in the event the securities pledged by the company would prove to be insufficient; that such statements were false, and intervener believed them and relied on them and was thus induced to sign the warranty and make the pledge; that, as a further inducement, the president of the bank promised to deliver to her the income from the collateral pledged by her; that the company filed a petition in bankruptcy and listed the bank as a creditor in the sum of $34,400, a claim for which was filed in the bankruptcy court January 13, 1931; that the department of trade and commerce took charge of the bank August 10, 1931, and the receiver thereafter threatened to sell intervener's pledged collateral and to apply the proceeds in payment of the bankrupt's indebtedness to the bank; that intervener made a futile demand for the return of her pledged securities.

The receiver denied the fraud charged by intervener and pleaded that her guaranty and pledge were in full

force and effect; that, when the receiver took charge of the bank, the debt owing to it by the company, payment of which had been guaranteed by intervener, was $34,400; that upon payment thereof the receiver would surrender the collateral in his possession and account for money already realized from pledged securities. The receiver prayed for an accounting to determine the amount due on intervener's guaranty, for judgment therefor, and for authority to sell the collateral and apply the proceeds on the judgment, if not paid when directed by the court.

A reply put in issue the facts on which the receiver based his prayer for relief.

Upon a trial of the cause the district court found all the issues in favor of Cora Wolf, intervener; canceled the guaranty for fraud; ordered the receiver to return to intervener her securities in his hands; directed payment of proceeds of her collateral in the sum of $18,960 to her as a trust fund in the receiver's hands. The receiver appealed.

The finding that intervener was induced by fraud of the bank to sign the guaranty and to make the pledge is vigorously assailed as erroneous. The principal witnesses who testified on this issue were Cora Wolf, intervener, and Albert L. Schantz, president of the bank. Their testimony is in direct conflict on the crucial point. Who told the truth? The district judge who believed intervener saw and heard the witnesses. The appellate court is deprived of that advantage and, on a trial *de novo,* may consider the fact that the court below gave credence to the witness Cora Wolf rather than to the witness Schantz, their testimony being in conflict. *Broeker v. Day,* 124 Neb. 316; *Maryland Casualty Co. v. Geary,* 123 Neb. 851.

The company was a corporation which had been engaged in the wholesale millinery business in Omaha for 30 years. Jake Spiesberger, a brother of Cora Wolf, was an executive officer and manager of the company. Other Spiesbergers were also interested in it. The company

wanted credit and Jake arranged with Schantz, president and manager of the bank, for loans, when needed, to the extent of $50,000. The bank was closed on account of insolvency August 10, 1931, when its unpaid loans to the company were $34,400. The company went into bankruptcy December 4, 1931. Intervener signed the guaranty for $50,000 February 8, 1926, and pledged as collateral $25,000 in bonds secured by mortgages on real estate. She testified she had a conversation on that date with Schantz in his office in the bank and that they were the only persons present. Referring to what then and there occurred before she signed the guaranty she said:

"I went down to the bank and went into the little room and talked with Mr. Schantz and he had these papers for me to sign, and I asked him how I was going to be protected. He told me that he had $25,000 in securities from Spiesbergers; he had them, and that they would be used first in case it would be needed before they would take mine."

Uncontradicted evidence proved that the bank did not then have or thereafter acquire from the company $25,000 in collateral. Cora Wolf's testimony tends to prove the following facts: Schantz was president and head of the bank. She believed his statements were true and relied on them. She would not have signed the guaranty except for his statements. She had not owned any stock in the company for 20 years; never signed any notes payable to it; never was at the bank at any other time. Her securities were there when she arrived. Jake had told her the company had deposited $25,000 in securities and for her to go to the bank and sign the papers. Her pledged securities were all the property she had except her residence. She lived on the income from the bonds pledged, having received the interest thereon indirectly from the bank through the company after she signed the guaranty. Two weeks after the bank closed she first learned that the company had not deposited $25,000 in securities.

Schantz was a witness for the receiver of the bank and told a different story. He said Jake prepared and signed the guaranty before Cora Wolf came to the bank, where the papers had been left. Her part in the transaction was narrated by Schantz as follows:

"Mrs. Wolf came to my desk, and said that she had come into the bank to sign the papers that Jake, her brother, had sent her up there to sign, and I took her in my private office and gave her the assignments on the mortgages and the guaranty which she signed. There was no other conversation."

On the witness-stand Schantz denied he made the statements to which intervener testified. He said in substance that he did not tell intervener the bank had received collateral from the company or its officers and denied that he told her the company's collateral would be exhausted before resorting to her pledged securities; that she voluntarily signed the guaranty and the assignments of her pledged paper. If credence is given to his testimony it proves that the guaranty was not procured by fraud.

Some of the circumstances surrounding the transactions seem to strengthen intervener's testimony. Willard L. Idell, an officer of the bank when the guaranty was signed, testified that as a rule collateral for credit was required in approximately the amount of loans. Had this rule been followed, the bank would have exacted $50,000 in collateral. On the date of the guaranty, February 8, 1926, Jake Spiesberger and Mayer Spiesberger, stockholders of the company, in consideration of loans, assigned to the bank any claim either might have or acquire against the company, and this assignment, without indicating any value, was accepted by the bank as collateral security. December 27, 1927, Jake Spiesberger assigned, and the bank accepted as collateral, a claim without any indication of amount or value and a 5,000-dollar note. The evidence does not show that this collateral was of any value.

An effort was made to impeach intervener's testimony

to the effect that she pledged to the bank as collateral all her property except her residence, but there is nothing to show that she retained for herself any property of any kind from which she derived an income. In this situation, before the signing of the guaranty, it would not be unreasonable to infer that she would be prompted to engage Schantz in conversation and to ask him how she was to be protected in trusting to the bank her means of support. If he followed the rules of the bank, it would have had, or would acquire, $25,000 in collateral in addition to her own. In this situation it would not be unreasonable for the banker to say to a guarantor without legal knowledge that collateral of the principal debtor would be first exhausted.

It seems clear that intervener did not part temporarily with all her interests in the pledged securities, since she continued to receive the interest thereon through the bank and the company.

In view of all the testimony, of the surrounding circumstances and of the credence which the trial judge gave to intervener as a witness after having seen and heard her and other witnesses as they testified, the conclusion is that the guaranty was procured by fraud as charged in the petition, that it was properly canceled, and that securities and proceeds belonging to intervener in the hands of the receiver were restorable to her in equity as trust property.

Though the cause was tried before the district court without a jury, each of 40 assignments of error is directed to a ruling on evidence. They do not require separate rulings or reasons. Most of them apply to the sustaining of objections to questions propounded to witnesses. Many of the questions called for collateral facts within the discretion of the trial court to reject as evidence. Others were objectionable as argumentative. The answers to many more would not have thrown any light on any controverted issue. Some were immaterial. As to the re-

mainder of the questions, the facts which the receiver offered to prove, if admitted, would not have required a different result on the merits of the controversy. Prejudicial error in the rulings on evidence has not been pointed out or found. In view of the conclusions reached, the judgment of the district court is

AFFIRMED.

FELIPA HERRERA CRESPIN, APPELLANT, V. NEWELL R. WILCOX ET AL., APPELLEES.

FILED MARCH 9, 1934. No. 28817.

1. **Guardian and Ward.** The county court is a court of record and of original jurisdiction in matters relating to the appointing and directing of guardians.
2. ———. A county court's judgment appointing or directing a guardian is not open to collateral attack merely because it does not recite on its face the jurisdictional facts.
3. **Pleading.** General allegations of conspiracy and of resulting damage are insufficient to state a cause of action, if they are negatived by other allegations in the same petition and by the law applicable thereto.

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

Thomas Ryan and *Grenville P. North*, for appellant.

Lee & Bremers and *Crofoot, Fraser, Connolly & Stryker, contra.*

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

ROSE, J.

The sufficiency of the petition to state a cause of action is the question presented by the record in this case.

Plaintiff, Felipa Herrera Crespin, sued George W. Pratt, Newell R. Wilcox, J. G. Bushnell and Standard Accident

Insurance Company for a conspiracy to defraud her, for an accounting in equity to determine how much each conspirator owes her, for a recovery of damages resulting from the conspiracy, for equitable relief from abuses of confidential relations between attorney and client and between guardian and ward, and for recovery of title to undescribed real estate purchased in the names of the conspirators with money belonging to plaintiff.

General demurrers to the petition were sustained. Plaintiff stood upon her petition and the action was dismissed. Plaintiff appealed.

It may be inferred from the petition that Pratt was attorney for plaintiff when the alleged conspiracy was formed; that the county court of Douglas county appointed Wilcox guardian of plaintiff's property; that the insurance company bonded Wilcox as guardian. The record does not show that Bushnell was summoned or that he entered his appearance.

Plaintiff alleged in her petition that, prior to March 20, 1929, the government of the United States gave her, as widow of a soldier of the World War, a check for $7,200; that she indorsed the check to the Sisters of the Good Shepherd; that, to procure her money from them, Pratt was employed as her attorney and collected from them for her approximately $7,200; that on March 20, 1929, he prepared and filed with the county court of Douglas county the following application which plaintiff signed and verified:

"Comes now Felipa Herrera Crespin, and shows to the court: That she has recently come into possession of a quantity of money; that she is not accustomed to the handling of money, and knows very little of the value of the same; that she desires to have the protection of the court in the handling of her funds, and believes that a guardian appointed for the purpose of looking after her money or property, of whatever nature it may be, would be of great assistance to her, and for these reasons, she

prays the court for an order, appointing Newell R. Wilcox as the guardian of her property, said applicant consenting that said appointment be made immediately, and for such other and further order as to the court may seem just and equitable."

It was further alleged in general terms by plaintiff that the county court, without jurisdiction, entered void orders respecting her property; that money of plaintiff in the sum of $7,200 was turned over to defendants; that no valid order for disbursement thereof has ever been made; that plaintiff does not know where all her funds have gone or how much each defendant received; that a portion of her money has been invested in real estate in the name of Pratt and other portions have been invested in real estate in the names of the other defendants.

It may be inferred from general language of the petition that the acts and judicial orders through which the money of plaintiff passed out of her hands into the hands of defendants were results of the alleged conspiracy. The substance of the conspiracy is that defendants agreed among themselves to procure plaintiff's money for their own use without consideration.

The petition as a whole seems to be fatally defective. The county court is a court of record and of original jurisdiction in matters relating to the appointing and directing of guardians. In the exercise of power to appoint a guardian the county court's judgment is not open to collateral attack merely because it does not recite on its face the jurisdictional facts. The same is true of orders directing distribution of a ward's property. The petition shows further that the county court made orders respecting the identical property which plaintiff now seeks to recover. What those orders were is not stated. The legitimate inference is they were made for her benefit. For anything shown by the petition, those orders may have directed payment of her own money to her or for her own support pursuant to her own applications and

she may be asking now for money which she has received pursuant to a valid order of the county court. The real estate which she seeks to recover may be security for her own money, pursuant to a valid order of the county court. The law presumes the validity of such orders in absence of specific facts showing the contrary. The petition herein shows on its face that plaintiff signed and verified the application for the appointment of Wilcox as guardian of her property. She, herself, thus invoked the power which the county court exercised. There is no fact stated which shows that she made a mistake or that she was incompetent to so act, or that her attorney misled her, or acted in bad faith, or deceived her in respect to her application for a guardian for her property. In view of facts which she herself pleaded herein, her general allegation that her attorney acted pursuant to a conspiracy is a mere conclusion. The petition not only fails to show fraud in the making of the application for a guardian or in judicial orders respecting her property, but it fails to show that whatever was done in the county court was not done at her own request for her own best interest. The petition does not show any specific fact which will prevent her from obtaining full redress in the county court, if she has been wronged there by the exercise of judicial power which she herself invoked without fraud, duress or abuse of trust on the part of any fiduciary acting for her. Moreover, she has not stated any fact showing that she is not fully protected by the bond of the guardian. The general allegations of conspiracy and of resulting damage are negatived by other allegations of facts and the law applicable thereto. For the reasons stated, the conclusion is that the demurrers were properly sustained.

AFFIRMED.

AUGUST MUSSMAN, ADMINISTRATOR, APPELLANT, V. ISAAC C. STEELE, APPELLEE.

FILED MARCH 9, 1934. No. 28825.

1. **Trial.** The trial of issues of fact in a law action is for the jury.
2. ———: DIRECTION OF VERDICT. It is error to direct a verdict for defendant where there is any substantial evidence that would tend to support a verdict for plaintiff.

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

Waring & Waring, for appellant.

Sloans, Keenan & Corbitt, contra.

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

GOOD, J.

August Mussman, as administrator of the estate of his deceased wife, sued to recover damages resulting from her death, which he charges was proximately caused by the negligence and wrongful acts of the defendant. Defendant denied any negligence, and alleged that Mrs. Mussman's death resulted from other causes. At the conclusion of the evidence, the trial court, on motion of defendant, directed a verdict in his favor. Plaintiff has appealed.

The record discloses that Mr. and Mrs. Mussman resided in Fillmore county. July 8, 1932, at her home, Mrs. Mussman accidentally cut the small finger of her left hand. Two days later she became ill, and it appears that she was suffering from septicæmia, or blood poisoning, and continued to grow worse until the 17th of July, when the attending and consulting physicians advised that she be taken to a hospital in Lincoln where she could have better care. The plaintiff arranged with defendant, the owner of an ambulance, to take his wife to a hospital in Lincoln. Defendant went to plaintiff's home, where Mrs. Mussman

was placed on a cot in the ambulance, and the journey to Lincoln started. Plaintiff accompanied his wife in the ambulance. After they had gone six or seven miles, a heavy rain came on, and the roads became muddy and slippery. In going down a long hill, defendant, driving the ambulance, lost control thereof, ran into a ditch on the left side of the road, and the ambulance turned over on its side. Mrs. Mussman received injuries, consisting of two cuts on the left arm and some bruises. She remained in the overturned ambulance, or at the scene of the accident, for an hour or more, until another ambulance could be obtained, in which she was taken to the Lincoln General Hospital, where she died two days later.

Plaintiff testified that he smelled liquor on the breath of the driver of the ambulance at the scene of the accident; that prior to the accident he had been driving at an excessive rate of speed; that plaintiff had protested several times at the rate of speed; that in going down the hill defendant was driving at the rate of 50 miles an hour at the time of the accident; that Mrs. Mussman became wet from the rain at the scene of the accident. The evidence shows without question that she died of pneumonia. There is testimony by a specialist, who did not see Mrs. Mussman at any time, but who testified from data supplied by the hospital record and testimony of physicians who had been attending Mrs. Mussman, which was all in the evidence, that, in his opinion, she did not have pneumonia at the time she started on her journey to the hospital; that the exposure at the time of the accident, especially in her physical condition and lowered resistance, caused the onset of pneumonia, and that it developed within a day after the accident; that, but for the exposure at the scene of the accident, she might not have contracted pneumonia, and that, in his opinion, the cause of the pneumonia was due to exposure at the time of the accident.

In passing, it may be said that there is a sharp conflict in the evidence as to the rate of speed at which

defendant was driving at the time of the accident, and that the evidence on behalf of defendant presents quite a different aspect. However, we are not to pass upon the question of evidence, except to determine whether there was any substantial evidence, tending to sustain plaintiff's cause of action. We think the jury, if they had believed the testimony of plaintiff, would have been justified in finding that defendant was guilty of negligence in driving down a hill over muddy, slippery roads, at a high rate of speed, and that his negligence was the cause of the ambulance overturning; and, if they believed the testimony of the specialist, called by plaintiff, they would have been justified in finding that the exposure of Mrs. Mussman at the scene of the accident was the inducing cause of the onset of pneumonia which caused her death. There is more than a scintilla of evidence tending to support the plaintiff's cause of action. The jury, not the court, are the triers of fact in law actions. The rule is well established that the court is justified in directing a verdict for defendant only where there is no substantial evidence to support a verdict for plaintiff. Even though the evidence of plaintiff is slight and, to the court, apparently greatly outweighed by the evidence for defendant, nevertheless it is for the jury, and not the court, to weigh the evidence and determine the question of fact.

Defendant contends that Mrs. Mussman would have died from septicæmia, or blood poisoning, even if the accident had not occurred, and that the accident had nothing to do with causing her death. It is possible that Mrs. Mussman might have died, had there been no accident; but, if her death was hastened by the negligence of defendant, plaintiff would still be entitled to some recovery. We think there was sufficient evidence to require submission of the cause to the jury, and the court erred in directing a verdict for defendant.

Other errors discussed in the brief are not likely to arise upon another trial and will not be considered.

For the error in directing a verdict for defendant, the judgment is reversed, and the cause remanded for further proceedings.

REVERSED.

HOWELLS STATE BANK, APPELLEE, V. JOHN B. HARDES, APPELLANT.

FILED MARCH 9, 1934. No. 28834.

Judicial Sales: VACATION. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.

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

Dolezal, Mapes & Johnson, for appellant.

George W. Wertz and *Courtright, Sidner, Lee & Gunderson, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

GOOD, J.

This is an appeal from an order confirming a judicial sale, had in an action for foreclosure of a real estate mortgage. The objections to confirmation were that the mortgaged premises did not sell for a fair and reasonable price, and that, if again offered for sale, would bring an increased price. The mortgaged premises consisted of 80 acres and sold for $7,040.

We have carefully examined all of the affidavits filed, and find that nearly all of them bear date a year prior to the date of the sale. There are subsequent affidavits by several of the same persons showing that the sale price of land has decreased very greatly. From a con-

sideration of all the affidavits, we are unable to say that the sale price was so inadequate as to indicate fraud or mistake.

In *First Nat. Bank v. Hunt,* 101 Neb. 743, this court held: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." The rule thus announced was reaffirmed in *Royal Highlanders v. Louthan,* 123 Neb. 469. The rule announced in those cases governs the decision in this case.

The record discloses no error. The judgment of the district court will be affirmed, with leave to defendant to redeem at any time prior to the issuance of mandate.

AFFIRMED.

RACHEL P. DILLON, APPELLEE, V. SEARS-ROEBUCK COMPANY ET AL., APPELLANTS.

FILED MARCH 9, 1934. No. 28583.

1. **Witnesses.** Admission made by party inconsistent with testimoney goes merely to credibility as witness.
2. **False Imprisonment:** QUESTION FOR JURY. Where evidence is sufficient to support verdict for damages for false imprisonment, whether defendant's acts amounted to false imprisonment question of fact for jury.
3. ———. Restraint of person is essential to constitute false imprisonment. Such restraint may be by threats as well as by force, if the words and conduct are such as to induce reasonable apprehension of fear of injury to person, reputation, or property.
4. ———: PRINCIPAL AND AGENT. Principal liable for acts of agents who act within scope of authority in an action for false imprisonment.
5. ———: ———. District manager and manager of local store in charge of property and business of corporation act within scope of authority when they investigate or permit investigation of employees as to fidelity and honesty.

6. ———: ———. One who aids or assists in unlawful imprisonment of another is liable as principal.
7. ———. Where corporation contracts with another for purpose of investigating employees and its authorized agents cooperate with and assist employee of contractor in an illegal restraint of person, the corporation is liable.

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

Ziegler & Dunn, for appellants.

Brome, Thomas & McGuire and *G. H. Seig, contra.*

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

DAY, J.

Rachel P. Dillon brought this action to recover damages against Sears-Roebuck Company, Fred Arndt, district manager, and Roy Sellers, manager of the Omaha store for the company. From a judgment of $3,000, the defendants appeal. This case was previously heard by this court, an opinion adopted, and a judgment of reversal entered, 125 Neb. 269. Upon an oral argument upon the motion for rehearing, the court has reached a different conclusion.

The plaintiff was employed in an inferior capacity in the Omaha store of Sears-Roebuck Company. This controversy had its inception when one Behr, a private detective, an employee of the Willmark Service System, began a check of the Omaha store under a contract between Sears-Roebuck Company and the Willmark System. A woman detective, assistant to Behr, purchased a paint brush from plaintiff, who then was a saleslady in the paint department, for $1.15. In a few minutes, she took it back and exchanged it for one costing $1.10 additional. It was and is the claim of defendants that plaintiff handled this transaction in an irregular manner. Behr directed some employee of Sears-Roebuck, he says Sellers, manager of the local store, and she says the manager of the paint

department, to send her to him for an interview about this transaction. In any event, she was soon closeted with Behr in an office upon the fourth floor of the store. The testimony as to what happened there is largely in conflict. However, this is a law case, not triable *de novo* in this court, and the sole question for determination is the sufficiency of the evidence to support a verdict. *Eggleston v. Quinn,* 88 Neb. 775.

Plaintiff testified that the paint brush transaction was discussed immediately; that she told him what she still claims were the facts; that she made out a ticket in the exchange book and required the purchaser to sign it and laid it upon the cash register with the money. She had to get an "O. K." from the manager and take it to the cashier on the next floor; that a number of customers requiring attention delayed her, and that when she returned, the money and slip were gone. She told Behr that she would make it good. He then stated that she would have to sign a statement to that effect. He prepared a statement which she signed and it is as follows:

"I, Mrs. Rachel Dillon, age 18, married, residing at 2631 Capitol Ave., Omaha, Nebraska, have been in your employ since about Feb. 1, 1930.

"On July 15, 1930, I sold to a customer one paint brush for $1.15, and the customer later exchanged this brush for one selling for $2.25. The customer gave me the difference of $1.10, and I did not record this amount but kept it for my personal use.

"This statement was typewritten at my request by Mr. Fred M. Behr, and I have read it over thoroughly and know it to contain nothing but the truth. I am signing this on my own free will, without threat or promise from any one present, and I have been spoken to in a gentlemanly and courteous manner." (Italics ours.)

Taking the inference most unfavorable to the plaintiff, this was evidence of an admission against her positive sworn testimony that she did not steal the money but that it was lost as she stated. The jury could with propriety

determine that she was careless and negligent rather than that she was a thief. We will discuss this statement later in connection with a second one signed at the same interview.

However, this detective who wrote this statement at plaintiff's request, a thing almost incredible, admits that the last paragraph was in his words and his idea and not suggested by her. It seems that the jury might conclude also that the statement that she kept the money for her own use was also his idea and in his words. Would any one be so credulous as to believe in view of all that transpired that afternoon that Behr would have been satisfied with or accepted anything different?

However, in connection with this transaction, it is interesting to note that the executives of the defendant company were as vague in their notion as to the manner in which such an exchange should be handled by a saleslady as plaintiff. Arndt, who was district manager in charge of five retail stores for Sears-Roebuck Company, testified upon the second trial of this case, a long time after this controversy, when this had been engaging his attention, the method by which an exchange of this kind should be handled. Sellers, the local manager of the store, testified that the transaction should be handled in an entirely different manner, and, as a part of his examination, he made a sample record on their forms showing the correct method. Shinstock, the assistant manager for the defendant, criticized the model, offered in the record as exhibit 5, as having two important omissions. Yet these defendants were, and in this lawsuit are, holding this 18-year-old girl, who was occupying an inferior position, to a strict knowledge of and a strict accountability to the rules concerning which the highest executives of the defendant company had different ideas. In fact, Arndt later took the stand and stated that he was mistaken as to the requirements of the rules. Under such circumstances, the contention of the plaintiff that her action was a mere irregularity and she was negligent in losing the

money is as justifiable a conclusion as that of the private detective that she was a thief, and this conclusion is reached without any consideration of motives or interests on the part of this detective to find some clerk stealing from the store. "An admission made by a party which is inconsistent with his testimony goes merely to the credibility of the witness." 3 Jones, Evidence (2d ed.) 1973.

The discussion of the paint brush episode required about five minutes. Behr then questioned her about stealing other money. Plaintiff testified that he told her that they had a "whole bin full of merchandise" in the shipping department for which she had kept the money, which was untrue. She also testified that he called Mr. Sellers to the office, and that after a conversation he told Behr that the amount of money which plaintiff had taken on account of this merchandise was $850. This was denied by Sellers and by Behr. Behr testified that she stated she had been taking money in this same way during the time of her employment, which was six months, and that she told him she thought it would average about $5 a day; that he figured six months, 27 days to the month, and $5 a day, by which he arrived at the figure of $850. This indicates that Behr's arithmetic was as bad as his detective work, because, figured on that basis, it would only amount to $810. Furthermore, the defendants introduced as exhibit 8 a report of sales for March, April, May, and June, 1930, four of the six months the plaintiff was employed, and this exhibit establishes the fact that March, April, and May had 26 days each, while June had 25 business days. February, another month of this period had only 24 business days in 1930. The evidence also establishes that for one month of the six months' period, the plaintiff was working on the elevator and handled no money, and for the rest of the time, except for the last two weeks when she worked in the paint department, that her average sales were only $14 or $15 a day. The defendant offered testimony showing the department sales to be much larger, but she was not the only saleslady in the

department, and they made no effort to introduce evidence as to the plaintiff's sales, which were undoubtedly shown by their records. The only conclusion that can be reached from this testimony, relating to whether or not the plaintiff had stolen the $850 mentioned in the second statement, is that there is no foundation in fact for the statement. At the time, Behr did not know that Sears-Roebuck Company had lost $850. Sellers, manager of the local store, said that he knew of no such shortage and such a shortage could not exist without his knowledge. He also testified that they had taken an inventory July 1, 14 days earlier, and that, with their system of running inventory, they could check in 12 hours and determine whether the inventory, compared to the sales, would indicate a loss. But, under these circumstances, Behr is determined to get a statement from the plaintiff that she had stolen $850. The statement has a striking similarity to the first except as to amounts and follows:

"I, Mrs. Rachel Dillon, age 18, married, residing at 2631 Capitol Ave., Omaha, Nebraska, have been in your employ since about Feb. 1, 1930.

"During the last five and one-half months, I have taken money from sales that I made but did not record, to the amount of Eight Hundred and Fifty Dollars ($850). This money I used for my own personal use, and I realize I have broken a store rule, by handling these sales in this manner.

"This statement was typewritten at my request by Mr. Fred M. Behr, and I have read it over and know it to contain nothing but the truth. I am signing this statement on my own free will, without threat or promise from any one present, and I have been spoken to in a gentlemanly and courteous manner."

The italics in this statement are ours and call attention to the fact that it was prepared by one experienced and accustomed to this sort of thing. The plaintiff testified that she protested that she had not stolen this money but that he insisted that he had the proof; that she asked that

she be permitted to call her husband by telephone and reached for the phone, but that "he pushed it away from me and he kept insisting that if I didn't sign this, they would send me to jail." She was in this room on the fourth floor alone with Behr, and the door was shut. She was crying and hysterical. She did not try to leave, because he said that, if she tried to leave, they would send her to jail. She was in this office with Behr, according to her testimony, 45 minutes. Behr says that it was about an hour and 40 minutes and that practically all of the time was spent upon this $850 transaction. Sellers testified that it was his opinion that he took her to Behr's office at 10 minutes to 1 and that she was there until 3 o'clock.

Again we want to direct our attention to the last paragraph of the second statement. A former judge of this court, Judge Howell, in *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, used a quotation of Ben Jonson, which is so applicable here that we repeat it: "The dignity of truth is lost with much protesting." This whole transaction indicates third degree methods, particularly when there was no loss of $850. The manner and method used in this case was calculated to terrorize an 18-year-old girl in her situation. That it did terrorize and intimidate her and prevent her from leaving the office is supported by evidence of the fact that she was crying; that she wanted to call her husband to her side, and that she signed an untrue statement admitting that she had misappropriated her employer's money.

Behr testifies that plaintiff told him about her theft of $850 and requested him to write the statement concerning it. Apparently he would have it believed that it required one hour and 40 minutes for her to persuade him to perform this arduous task. The appellant places much emphasis upon the fact that plaintiff remained in the store a half hour after she was released by Behr to see defendants Arndt and Sellers, but it must be remembered that at this time the detective had accomplished

his purpose and had a signed statement that she had taken for her own use $850. When a half hour later she did see Arndt and Sellers, she was still crying. Under somewhat similar circumstances, other courts have held that the question whether the defendants' acts amounted to a false imprisonment was a question for the jury if the evidence was sufficient to support a verdict for the plaintiff. See *Fleisher v. Ensminger* (1922) 140 Md. 604; *Coolahan v. Marshall Field & Co.*, 159 Ill. App. 466; *Moore v. Thompson*, 92 Mich. 498; *Mali v. Lord*, 39 N. Y. 381.

Appellants Arndt and Sellers contend that they had nothing to do with this affair. Let us examine the record. Sellers took her to the fourth floor office and turned her over to Behr who told him to leave. There is a conflict of testimony, but plaintiff testifies that Sellers came up and talked with Behr during the time about the $850. Arndt was in an adjacent office some of the time. He procured a typewriter for Behr to write the so-called confessions. This was done within five minutes of the commencement of the affair. The statements disclose, as does the testimony, that both Arndt and Sellers were called in by Behr to sign as witnesses. Both read them before signing, but they did not protest or make any suggestions, although they did not know of any such loss. During the time this drama was being enacted, Behr was undoubtedly master of ceremonies, but Arndt and Sellers were appearing when and if Behr gave them their cue. Afterwards Arndt had plaintiff in his office and talked to her. She testified the conversation concerned her ability to pay Sears-Roebuck Company the $850. Arndt testified as follows: "She came into my office, and I asked her if she realized that she was in a pretty serious mess. She took a few moments and finally shook her head to indicate yes. I was rather curious to know how she spent the money. I asked her whether they were buying an automobile or radio or something of that order. She said, 'No.' I asked her whether she had any way of making good any of the amount, and she said, 'No,' and that was

the end of our conversation." Arndt then left his office, and plaintiff was in the hands of Sellers. Plaintiff testified that Sellers inquired whether they had an automobile or radio or property of that kind and how she expected to pay the $850. She did not make a statement to Sellers that she had taken the money because she needed it. When Mr. Sellers asked her if they had any property or any automobile or radio or things of that sort, he asked it in connection with whether they could pay Sears-Roebuck Company the $850.

Plaintiff's husband testified that, when his wife came home, he went to see Sellers. He met him on the first floor, and he took him upstairs to talk to him about it. "On the way up, he told me how well he liked my wife and that she was a nice girl. * * * He asked me how we were going to pay it back. I says, * * * 'We have nothing.' I says, 'I don't believe my wife is guilty of the things you have charged her with anyway.' Then he mentioned the $1.10 and asked if I believed that, and if I expected them to believe it. * * * Then he asked me if we had anything that could be used as security until I could raise the money, and I said, 'No.' He said, 'Well, you will have to get me $350 in cash by tomorrow afternoon, and a note for $500, or I will have to send your wife to jail.' I asked him how he expected me to get that, and he says, 'That is not my worry. You will have to get that your own way.' "

Sellers' version of his conversations with the plaintiff and her husband as it appears in the record is that he said, " 'Rachel, for goodness' sake, what did you do this for?' She just sat there and says, 'I don't know.' * * * I says, 'You go home and stop crying. Go home and come back tomorrow afternoon at 3 o'clock and we will talk this thing over;' " that he said nothing to her about a car or a radio; that he never saw her again until in court. He thinks he asked her if she had anything to pay it back with, and she said "No." And she said that Harold had been sick and that they had bills. That he had a con-

versation with her husband in which he asked if any of their relatives had any way to pay back the money and told him to come back tomorrow with his wife. That he did not make a statement that unless they pay $350 and sign a note for $500 he would send her to jail.

Because of the former opinion, which placed considerable credence in the statements signed by plaintiff, it has been necessary to state the evidence at some length. This court does not decide disputed questions of fact, and, upon appeal, the only question presented is the sufficiency of the evidence to support the verdict. In the determination of this issue, the evidence must be considered most favorably for plaintiff with every reasonable inference in her favor. *Wells v. Cochran,* 78 Neb. 612.

Is the evidence upon false imprisonment sufficient to support the verdict? The essential thing to constitute an imprisonment is restraint of the person, which may be by threats as well as by actual force, and if the words and conduct are such as to induce a reasonable apprehension or fear of force, of disaster, or disgrace, a person may be as effectually restrained and deprived of liberty as by prison walls.

"Any intentional conduct chargeable to defendant, that results in placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment." 25 C. J. 452. See *Whitman v. Railway Co.,* 85 Kan. 150. Where plaintiff is detained for a refusal to comply with a condition which defendant has no right to impose, defendant is liable. *Beaver v. Cohen,* 162 N. Y. Supp. 160.

"In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used." *Martin v. Houck,* 141 N. Car. 317.

"Apprehension or fear by which a person is restrained of his liberty may consist in his fear of some injury

either to his person, reputation or property." *Robinson & Co. v. Greene,* 148 Ala. 434.

The plaintiff's evidence, corroborated by even the witnesses for defendant, is sufficient, if believed by jury, as it was, to show restraint of plaintiff for an unlawful purpose by threats of arrest and being sent to jail with all that means to an 18-year-old girl. However, some physical force was present when she was prevented from calling her husband to come to her assistance. The fact that she signed an alleged confession which obviously could not be true demonstrates the fear and apprehension which had possession of her. The jury saw the parties and were able to determine the effect of the threats better than this court can from the cold record. The evidence was ample.

The appellants, in the second argument, relied upon the proposition that plaintiff was an employee and defendants had a right to interview her about the business during business hours, because she was compensated for her time. They cite *Weiler v. Herzfeld-Phillipson Co.,* 189 Wis. 554. This case is somewhat different in that the employee involved therein was interviewed by one directly over her, while the company in this case secured an expert. The court said: "There is further evidence that he threatened to call the patrol and send her to jail if she did not confess. We cannot express our entire approval of this conduct on the part of Mr. Carter. It savors too much of third degree methods. It was one of the means adopted by Carter to coerce a confession from the plaintiff. It amounted to intimidation, and tended to deprive the plaintiff of her own free will. That, however, bears only upon the value of her confession as evidence." An admission made under duress is of no probative value, is incompetent and inadmissible. This is mentioned for that we are urged that, since plaintiff admitted a theft, she was beyond the protection of the law.

Returning to the *Weiler* case, we decline to follow the rule that an employer has a right to hold an employee in

restraint for the purpose of questioning offensively upon an unwarranted suspicion. We believe that the error in that is this, that an employer is not entitled to restrain an employee under any circumstances. The employee may wish to terminate his employment. Surely an employee is not compelled to continue an employment for the purpose of submitting to third degree methods.

To announce a doctrine that employees may be compelled against their will to submit to indignities such as plaintiff in this case was subjected to, because she was an employee and was compensated for her time, would be equivalent to saying that an employer can compel one to continue the employment against his will. The same court has held that similar circumstances constitute false imprisonment of one not an employee. See *Cobb v. Simon*, 119 Wis. 597.

Was Sears-Roebuck Company liable for the acts of Behr, Arndt, and Sellers? Behr was not a direct employee of Sears-Roebuck Company, but he was there by virtue of a contract between the company and his employer. His acts were done within the scope of his authority. It is contended by the appellants that he was an employee of an independent contractor, and, in this connection, personal injury cases and cases coming under the workmen's compensation acts are cited. We do not think that these are applicable. Behr as a representative of Willmark System was placed in the Omaha store for the purpose of testing employees and finding irregularities and the interview with the plaintiff was within the scope of his authority. This is not to say that the employer directly approved of the manner, although Arndt and Sellers assisted him during this transaction at his request. This was sufficient, we think, in view of the fact that, in doing so, they were doing what their employer required them to do. Arndt and Sellers were employees of the defendant and in charge of the Omaha store as managers for Sears-Roebuck Company, and being on the property and in charge of it were acting in the scope of their authority

as agents of the defendant. See *McClure Ten Cent Co. v. Humphries,* 33 Ga. App. 523. In this case, it was also held that where a detective, not an employee of defendant but of others, stopped and ordered plaintiff to accompany her, which invitation was concurred in by an employee of the defendant, the defendant was liable. It was held that whether the detective was acting in the interests of the defendant or of some other mercantile establishment, such an employee of the defendant having participated in the transaction, and treating her as having stolen from the defendant, acted within the scope of her authority as agent for the defendant. In *Kelly v. Shoe Co.,* 190 N. Car. 406, it was held that the "term 'manager,' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the corporation has been committed to him with respect to the property and business under his charge, consequently, his acts in and about corporation's business, so committed to him, are within the scope of his authority." In *Johnson v. Bouton,* 35 Neb. 898, it was said: "The rule is that any one who aids or assists in the unlawful imprisonment of another is chargeable as a principal." See, also, *Painter v. Ives,* 4 Neb. 122; *Fox v. McCurnin,* 205 Ia. 752; *Scott v. Flowers,* 60 Neb. 675. In the last case, Scott filed a complaint charging Sarah Jane Flowers with incorrigibility. The county court committed her to the industrial school for girls at Geneva. After she was released, an action for damages was brought against Scott. In the opinion it says: "It is argued by the same counsel that the consequential loss resulting to plaintiff is not the basis of an action for false imprisonment against Scott, since, had the county court performed its duty, there would have been no false imprisonment. It is true that the court made the finding and order of commitment; but the false imprisonment would not have occurred if no complaint had been filed. Defendant instituted the proceeding which resulted in the imprisonment of the plaintiff, and he cannot escape liability because some one

else equally with him was guilty of the wrong. Tortfeasors are jointly and severally liable for the damages flowing from their acts. And it is no answer to say that plaintiff has a right of action for false imprisonment against the county judge." The defendant Sears-Roebuck Company in this case through its contract with the Willmark System placed Behr in its store for the very purpose of apprehending dishonesty among the employees. In addition to this, its managers were authorized and directed to cooperate with him. It did in this case approve of irregular restraint of the plaintiff and sought to reap the benefits of it. This also answers the contention of the liability of Arndt and Sellers. Arndt was district manager for the defendant company and Sellers was the manager of the local store. The connection of these two defendants with the transaction has already been stated. It was such as to show not only an active participation in but an approval and ratification of the illegal restraint of the plaintiff.

There are certain assignments of error relating to the instructions which are unnecessary to discuss because of the views of this court as to the law of this case which would make them clearly improper. There is, however, a complaint that the verdict is excessive which requires our attention. It is difficult to determine just what the damages should be for a false imprisonment of this sort. Actual damages, as well as damages for mental suffering endured because of the false imprisonment, are recoverable. Worry, as well as indignity, humiliation, disgrace, and injuries to the feelings, are proper elements of mental suffering. These are matters which cannot be measured with accuracy. However, this court is of the opinion, after a consideration of the evidence, that that part of the verdict over $1,800 is excessive. It is therefore ordered that, if the plaintiff file a remittitur of $1,200 within twenty days, the judgment shall stand affirmed; otherwise, the judgment shall be reversed and the cause remanded.

AFFIRMED ON CONDITION.

PAINE, J., dissenting.

An opinion was released in this case July 20, 1933, in which four judges of the supreme court sat, and three district judges, and in that opinion only one judge dissented. It was argued again to this court on January 15, 1934, and three judges sat who had not heard the case before. I voted for the opinion, found in 125 Neb. 269, and no new facts were brought out in the second argument, or new law presented, which have changed my mind. Plaintiff brings suit for false imprisonment, and, instead of proving her case by a preponderance of the evidence, her evidence as to imprisonment is entirely uncorroborated in any particular by the three other witnesses who were present at any time during her alleged incarceration.

In an exchange for a more expensive paint brush, she received $1.10 additional in cash, which she failed in any way to account for or ring up on the cash register. The representative of the Willmark System examined the cash register tape and found that the $1.10 had not been recorded, and she explained in the manager's office that she kept the money because she needed it for bills because of sickness. He denies that she said to him that she left it on the cash register and it disappeared. After she had signed the two confessions, admitting taking money, she went to the rest-room, where she remained 30 minutes, and then she voluntarily went back to the manager's office, and Mr. Sellers asked her why she had done it, and she answered she did not know. He told her to stop crying, to go home and come back the next afternoon, and the next day she promptly went to an attorney's office and began an action for false imprisonment for $50,000. The testimony of the man who examined her was that the door was not closed, and remained open all the time that she was in the room. The testimony is not disputed by her that, up to the time that she signed the confession of taking the first $1.10, no threats of any kind had been made to her, and that she signed the first confession of

her own free will. The manager of the store was in his office, through a very thin board partition, and heard the hum of conversation, but not the words, and said that the entire conversation was conducted in a low tone by both of the parties. The only force used, that the plaintiff testified to, was this: That at one time she started to reach for a telephone on the table to call her husband, and that the telephone was pushed beyond her reach. This is absolutely denied, and rests solely upon her own evidence, and is disproved by two facts, namely, that when she was voluntarily remaining in the rest-room for 30 minutes, after the confession was all completed, she had no desire to, and did not, telephone her husband, and that when she voluntarily went back later to the office of the manager of the store to talk the matter over with him, and he asked her if she ought not to call her husband, she replied that her husband was not at home.

The evidence appears to show that this investigator was careful and cautious, his business was to detect stealing on the part of dishonest employees, and that from past experience, if for no other reason, he avoided the very things charged in this case. When she did confess, without any threats being made to her, by her own testimony, to the taking of the first $1.10 which she did not ring up because she needed it to pay bills because of sickness, he naturally asked her whether she had ever taken any other money belonging to the firm, and she admitted that she had been taking about $5 a day, and signed a written confession of this fact. This was her own confession, sitting quietly in the office, and of a fact not known to the investigator at all. The burden was upon the plaintiff to prove an unlawful restraint of her liberty. Taking her own testimony that she was called to the manager's office and talked with an investigator in a room to which the door was closed a portion of the time and open a portion of the time, and the only force used, according to her own testimony, was in pushing a telephone beyond

her reach, all of which facts are entirely unsupported by any other evidence, such evidence, I submit, does not prove her case by a preponderance of the evidence, and I am still of the opinion that our first opinion was right.

D. M. JOYCE, APPELLEE, V. CHARLES H. TOBIN ET AL.: JOHN C. SPRECHER, INTERVENER, APPELLANT.

FILED MARCH 9, 1934. No. 28863.

1. Bill of exceptions will be quashed which was not served on other party for examination and which was not settled as provided by statute. Comp. St. 1929, sec. 20-1140.
2. Appeal. Where there are no assignments of errors in appellant's brief, an affirmance is justified.
3. ———. Briefs which are not prepared in accordance with supreme court rule 13 may not be considered by court.
4. ———. Where bill of exceptions has been quashed, it will be presumed that evidence supports finding of fact of trial judge.
5. ———. Without bill of exceptions, the only question which can be presented to this court is sufficiency of pleadings to support judgment.

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

John C. Sprecher, for appellant.

George W. Wertz, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

DAY, J.

This case was commenced by filing a petition for attachment and garnishment. John C. Sprecher intervened claiming title to the fund. The district court found for plaintiff and sustained the attachment and garnishment. The intervener appeals.

The bill of exceptions was heretofore quashed by this court on motion of appellee for that the purported one

(1) was not submitted to the adverse party for examination at any time, (2) was not presented to the trial judge for settlement, (3) and was not signed and settled by trial judge or another judge or by clerk of court, which is all provided for and required by section 20-1140, Comp. St. 1929. *Palmer v. Mizner,* 70 Neb. 200; *Madsen v. Norfolk Mill Co.,* 15 Neb. 644.

Briefs which are not prepared in accordance with supreme court rule 13 may not be considered by this court. *Pierce v. Domon,* 98 Neb. 120. The appellant's brief is not prepared in conformity to rule 13 of this court. There are no propositions of law set out. There are no assignments of error, and under the decision of *Gorton v. Goodman,* 107 Neb. 671, and *Dingle v. Gilbert,* 117 Neb. 237, an affirmance would be justified.

The only assignment of error which the brief could be construed to present is the insufficiency of the evidence to support the findings of the trial court. With the bill of exceptions quashed in the appellate court, it will be presumed that the evidence supports the findings of fact by the trial judge.

The only question which then remains is the sufficiency of the pleadings to support the judgment. *Gaines v. Warrick,* 113 Neb. 235. The sufficiency of the pleadings is not questioned.

AFFIRMED.

ERICK LARSON V. STATE OF NEBRASKA.
JOHN SKIDMORE V. STATE OF NEBRASKA.
LEE LYCAN V. STATE OF NEBRASKA.

FILED MARCH 9, 1934. NOS. 29056, 29057, 29058.

1. **Bail.** Recognizance given to perfect an appeal by defendant convicted of misdemeanor in county court which is not conditioned that defendant appear before the district court forthwith and from day to day thereafter, confers no jurisdiction on district court.

2. ———. Recognizance which provides that defendant convicted in county court shall personally appear forthwith on the first day of the next regular term and from day to day thereafter, and where court sits during present term, is not substantial compliance with statute regulating appeals, which provides that condition of bond shall require defendant to appear forthwith and from day to day thereafter.

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

T. F. Nolan and *E. L. Hyde,* for plaintiffs in error.

Paul F. Good, Attorney General, and *George W. Ayres, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

DAY, J.

These cases present the identical problem. The evidence is identical, and they were argued together.

The plaintiffs in error were convicted in the county court of Keith county of the unlawful sale of intoxicating liquor—a misdemeanor. They attempted to appeal to the district court, but their appeals were dismissed upon motions of the state for that the recognizances filed were not in conformity with provisions of section 29-611, Comp. St. 1929. From these dismissals, plaintiffs prosecute proceedings in error to this court.

The recognizances were identical except as to names, and the condition is: "The condition of this recognizance is such that if the said (defendant) shall personally appear forthwith and without further notice at the district court of said Keith county, state of Nebraska, on the first day of the next regular term thereof and from day to day thereafter until the final disposition of such appeal to answer the complaint against him, and to abide the judgment of the district court, and not depart therefrom without leave until the final determination of the aforesaid cause wherein the said (defendant) is charged with the

crime of sale of intoxicating liquor then this recognizance to be void, otherwise to remain in full force and effect." Section 29-611, Comp. St. 1929, provides that defendant's recognizance shall be "conditioned for his appearance, forthwith and without further notice, at the district court of such county, and from day to day thereafter until the final disposition of such appeal."

In the case of *Killian v. State,* 114 Neb. 4, this court said: "A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is conditioned for his appearance at the district court on the first day of the next term, instead of forthwith, as the statute requires, is invalid and confers no jurisdiction on the district court."

In the more recent case of *Murray v. State,* 121 Neb. 278, it is said: "A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is not conditioned as the statute requires, is invalid and confers no jurisdiction on the district court."

Recognizance given to perfect an appeal by defendant convicted of misdemeanor in county court, which is not conditioned that defendant appear before the district court forthwith and from day to day thereafter, confers no jurisdiction on district court.

Plaintiffs in error contend that the bonds given substantially comply with the statute. This court held in *Abbott v. State,* 117 Neb. 350, that a substantial compliance, as where the first day of the next term was the first day upon which the court sat, was sufficient.

This is not the situation here, since the court actually sat two days, and the term did not adjourn until the next term commenced. There is no question of substantial compliance here.

Recognizance which provides that defendant convicted in county court shall personally appear forthwith on the first day of the next regular term and from day to day thereafter, and where court sits during present term, is

not substantial compliance with statute regulating appeals, which provides that condition of bond shall require defendant to appear forthwith and from day to day thereafter.

The judgments of trial court conform to the law.

AFFIRMED.

IN RE ESTATE OF WILLIAM W. HOAGLAND.
MARGARET B. SHOTWELL, APPELLANT, V. FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES.

FILED MARCH 9, 1934. No. 28796.

1. **Executors and Administrators.** When a nonnegotiable note, containing the words "For value received," is filed as a claim against an estate, the claimant is required to support the claim by proof of its execution and delivery.
2. **Appeal:** DIRECTION OF VERDICT. This court must assume the existence of every material fact favorable to the appellant, and give her the benefit of every reasonable inference therefrom, when the trial court has taken the case from the jury and directed a verdict at the close of her evidence.
3. **Bills and Notes.** If a nonnegotiable note contains the words "For value received," the note itself is evidence, not only of the promise, but *prima facie* of the consideration.
4. **Evidence.** A *prima facie* case means a case which has proceeded upon sufficient proof to that stage where it will support a finding if evidence to the contrary is disregarded, and, therefore, must be submitted to the jury, and not decided as a matter of law.

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

George B. Thummel and *Richard Mackey,* for appellant.

Bryce Crawford, Jr., and *Finlayson, Burke & McKie, contra.*

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

PAINE, J.

This action is founded upon a claim, filed against decedent's estate, upon a nonnegotiable promissory note, which recites, "For value received." The claim was rejected in the county court, and, upon appeal to the district court, trial was begun to a jury, but a judgment was entered discharging the jury and rejecting the claim.

William W. Hoagland, of Omaha, died December 9, 1931, and Margaret B. Shotwell filed a claim against his estate, founded upon a note executed by Hoagland, which read as follows:

"November 20, 1931.

"For value received I promise to pay to Margaret B. Shotwell the sum of fifty thousand dollars ($50,000.00) six months from date, with interest at 6%.

"In case of accident or death I request said Margaret B. Shotwell to present this promissory note to my executors.

"Margaret dear you have given me the only happiness I have ever known.

"W. W. Hoagland"

The executors filed many objections to the allowance of the claim in the county court. The county judge made an application to the county board to appoint a special county judge to hear these objections, and the county board, under authority of section 27-507, Comp. St. 1929, appointed L. J. TePoel as special county judge, with power to hear and determine said matter.

On June 6, 1932, an order was made in the county court, disallowing the claim, and it was stipulated that the cause should be tried in the district court upon the same pleadings. Upon January 9, 1933, a jury was duly impaneled in the district court, but at the close of the claimant's evidence the executors moved that the jury be discharged and judgment entered in their favor, which was accordingly done. The claimant appeals to this court on many grounds, among them being that the court erred in holding that the claimant had not made out a *prima facie* case.

The first evidence in the district court was that of Jay Fordyce Wood, of Chicago, as given in the county court. He testified that by profession he had been an examiner of disputed documents since 1910. He said he had read all the books published on the subject, and conducted a laboratory for such research. Bryce Crawford, Jr., admitted that upon request he had furnished Mr. Thummel with 26 checks, signed by W. W. Hoagland, which had been paid by the bank.

Mr. Wood then testified he had examined the promissory note under different degrees of magnification, and made photographs of it, and also photographs of the said 26 checks, a series of checks being photographed, with the signature on the note. He made answer to question No. 33 as follows: "My opinion was that the signature on plaintiff's exhibit number 1 was written by the same person who signed the name W. W. Hoagland to the checks, the signatures of which appear in enlarged form on exhibit number 4." Exhibit No. 1, of the county court, is the same as exhibit No. 2 of the district court, each referring to the $50,000 note in question. He testified that in his opinion the signature was made on the note, exhibit 2, after all of the typewriting had been completed.

The attorney for the executors consumed a great deal of time in the cross-examination of expert Wood in showing a fact plainly evident to the most casual observer, that the last two lines of typewriting in the note did not exactly line up horizontally with the other lines, showing that the old Underwood typewriter had slipped at one end in rolling up the paper, or that the paper had been adjusted, or possibly had been released, or even taken from the machine for a moment before completing. To enlarge upon this fact, a large-size photograph had been made for the executors, and upon five separate occasions attempts were made in vain by executors to get this photograph of theirs into the evidence. However, this photograph, not admitted in evidence, is printed as of page 13 of the appellees' brief, filed in this court. This statement

is made by them: "We feel that this question can be brought out more clearly to the court by a copy of the note, which has been lined both horizontally and vertically and which will show conclusively that the first six lines are not in line with the last two lines." Then follows this naive conclusion: "Therefore, there is no proof that the signature W. W. Hoagland on the instrument is in fact a signature to the note itself."

The claimant, being disqualified under section 20-1202, Comp. St. 1929, was not called as a witness. Her daughter, Margaret C. Shotwell, testified to seeing Mr. Hoagland in a sitting-room at their home on November 20, 1931, being the date of the note; that he was sitting on a couch beside her mother, who had the note in her hand, and that he was there from just before noon, perhaps a quarter of 12, until he left, between 2 and 2:30 p. m.; that both had been crying; that her mother stated in the presence of Mr. Hoagland that she was very blue; that she handed her the note and said, "Look what Uncle Will has done." This witness also testified that she had called Mr. Hoagland "Uncle Will" for as many as 15 years; that she read the note through, and that it contained all of the typewriting now on it, and also contained the signature, "W. W. Hoagland," at that time. At the close of her evidence the claimant rested, and Bryce Crawford, Jr., made a motion to dismiss the case, stating among other grounds that there was no sufficient evidence, and that the court had not been given an opportunity to sufficiently scrutinize the claim, and that the note, on the face of it and in the testimony, is indicative of a gift of a promissory note, which is unenforceable, and for the further reason that the claim is against public policy and against public morals.

After argument, the trial court made the following ruling: "The instrument on which this claim is founded is not a negotiable note, nor, in my judgment, a nonnegotiable note. It is a mere promise on the part of the signer to pay an amount to the one who presents the

claim against the estate. This being the case, it is in no wise controlled or governed by the law of this state in relation to negotiable instruments. If it is a mere promise to pay, then the words 'For value received' are a mere admission against interest sufficient only to create a presumption that there may have been a consideration for the promise. This is insufficient. In my judgment proof of consideration is necessary. For this reason the motion of the defendant for a directed verdict will be sustained." From this statement we see that the trial judge treated it merely as a claim against the estate, and not as a nonnegotiable note.

1. An examination of this note shows clearly that it is a nonnegotiable promissory note under the law of Nebraska, and that the law relating to nonnegotiable instruments applies to this note. When this claim was filed against the estate of the maker of the note, the claimant was required, in the first instance, to support the claim founded upon the note by proof of its execution by the maker and delivery to the payee; that, in addition thereto, consideration must be proved, but in this case, as the note bears on its face the words "For value received," it was not necessary for the claimant to prove consideration in making out her *prima facie* case in the first instance; and it has been held that, even where the petition did not state that it was given for a consideration, these words import a consideration, and that even the allegation thereof was not necessary. *Baker v. Thomas,* 102 Neb. 401.

2. It has been held in this state that this court must assume the existence of every material fact favorable to the appellant, and give her the benefit of every reasonable inference therefrom, when the trial court has taken the case away from the jury at the close of her evidence and directed a verdict. *State v. Havel,* 120 Neb. 832; *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Nothdurft v. City of Lincoln,* 66 Neb. 430. When the claimant has established such a *prima facie* case, it is error to take the case away from the jury and dismiss the claim. Did not the trial

court draw inferences from the evidence which were not borne out by any proof introduced before it?

Much was made in the argument of a blue picture-card, to which the note was pasted permanently, entitled "Sweetheart of Mine," and which had printed upon it a light, sentimental verse. Is this fact, taken into consideration with all the other circumstances surrounding the note, sufficient to rebut the presumption that there was a consideration for this nonnegotiable note?

The second objection filed in the county court charges that his physical and mental condition was such that he was incapable of entering into such a transaction. In the brief it states that he was an old man, within three weeks of death; yet, when the demand was made by the claimant's counsel to furnish genuine signatures to send to the Chicago expert on disputed documents, 26 bank checks were furnished by the executors, which had been signed by him, 23 of the checks being drawn upon his personal account and 3 checks drawn by him upon the corporation account of Geo. A. Hoagland & Co., and the evidence shows that all of these 26 checks were dated either November 17 or November 18, 1931, being within 3 days of the time that he signed the note in dispute, thus clearly showing that at about the date of the note he was mentally acute and able to conduct many transactions daily for himself, as well as transactions for his corporation, in the payment and settlement of the matters which these checks completed.

In the century-old case of *Dugan v. Campbell,* decided in the December term, 1823, 1 Ohio, 115, we have a note reciting "For value received," and these words: "Payable in the currency of this place, if the said Dugan does not take it out in store goods at the same rate." The court said: "It is not necessary to decide whether the note in this case is or is not negotiable, or to adopt or reject the principles of the cases cited on either side; for if it were not negotiable within the rules of decision, we should nevertheless consider it a promissory note, im-

porting in itself a consideration. * * * Although the writing thus executed may want words of negotiability, or may contain conditions that destroy its negotiable character, the promisee rests in security upon his written contract, as evidence of his claim, and preserves no other proof of the transaction upon which it was founded. By common consent, actions have always been brought and sustained upon such instruments without setting forth or proving the consideration. Were the court now to establish a different doctrine, great mischief might ensue."

In *McKnight v. Cornet*, 143 So. (La. App.) 726, it is held: "Only where suspicion is cast on reality of note by party pleading want of consideration does burden of proving consideration shift to plaintiff." In *Killeen's Estate*, 310 Pa. St. 182, the court said: "The suspicious circumstances which would warrant the court in casting the burden of proving consideration on the obligee of a sealed nonnegotiable note should be such circumstances as amount to fraud on the maker, and nothing short of fraud should have that effect. * * * The law presumes against fraud and in favor of innocence."

3. *Bourne v. Ward*, 51 Me. 191, held that if the note contained the words "Value received," the note itself will be evidence, not only of the promise, but *prima facie* of the consideration.

The claimant was only required, in the first instance, to make out a *prima facie* case. How is that term defined?

"*Prima facie* evidence means sufficient evidence upon which a party will be entitled to recover if his opponent produces no further testimony." *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268.

Prima facie evidence means evidence that warrants the inference, but does not compel it; that calls for explanation or rebuttal and may make a case to be decided by the jury, but does not convert the defendant's general issue into an affirmative defense. *Gallup & Co. v. Rozier*, 172 N. Car. 283; *Purity Ice Cream & Dairy Co. v. Adams Express Co.*, 217 Mich. 593.

A *prima facie* case is that which is received or con-

tinues until the contrary is shown, and one which in the absence of explanation or contradiction constitutes an apparent case sufficient in the eyes of the law to establish the fact, and if not rebutted remains sufficient for that purpose. *Gilmore v. Modern Brotherhood of America,* 186 Mo. App. 445.

The establishing of a *prima facie* case, that is, a case which has proceeded upon sufficient proof to that stage where it must be submitted to the jury and not decided against the plaintiff as a matter of law, does not shift the burden of proof or necessarily mean that the judgment goes in favor of the plaintiff as a matter of law, but the jury are still the judges of the sufficiency of the showing, having in view the fact that the plaintiff has the burden of proof. *Smith Sand & Gravel Co. v. Corbin,* 75 Wash. 635.

"A *prima facie* case is one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all of the evidence to the contrary be disregarded." *Schallert v. Boggs,* 204 S. W. (Tex. Civ. App.) 1061.

Perhaps the best statement of a *prima facie* case is this: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 5 Wigmore, Evidence (2d ed.) sec. 2494.

The executors submit two New York cases, which they claim support the trial court in the case at bar. The first is the case of *Dougherty v. Salt,* 227 N. Y. 200, in which it was shown that an elderly aunt, in the presence of an eight-year-old boy, suddenly decided to make provision for him, and the evidence of the claimant discloses all of the facts of the aunt's inquiry in regard to his school work and of her desire to do something for him, and of her finally putting that desire in the form of a note. The evidence of the claimant excluded all thought of any consideration of any kind, and there certainly could not have been any transactions of a business nature be-

tween this child and his aunt on the occasion of this visit or prior thereto. She was not paying a debt, she was conferring a bounty, and it is held that nothing is consideration that is not so regarded by both parties. The facts in that case justify the disposition made by Judge Cardozo.

The other New York case, involving the same questions, is that of *Blanshan v. Russell,* 32 App. Div. 103, 52 N. Y. Supp. 963, in which case it appears that Mr. De Witt executed and delivered to claimant a promissory note, which contained the recital "For value received." Upon trial of the claim, the plaintiff introduced testimony that the note was signed on the same day the maker of it died, and was given to her with the statement that "he had given her the note as a reward for what she had done for him."

It is quite evident that neither of these cases presents a situation like the case at bar.

This court has recently held that "presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference." *Lebs v. Mutual Benefit Health & Accident Ass'n,* 124 Neb. 491.

We find a discussion in 3 R. C. L. 924, 925, secs. 121, 122, which sets out that it is fundamental that an instrument given without consideration does not create any obligation at law or in equity in favor of the payee, but that bills of exchange and promissory notes are distinguished from all other simple contracts in regard to the proof of consideration, as it is an established principle that such instruments import a consideration; in other words, the law presumes a consideration, and proof thereof is unnecessary in the absence of evidence to contradict the presumption.

In 35 A. L. R. 1372, in discussing the burden of meeting a *prima facie* case, it says: "Whatever may be the true rule as to the burden of proving want of consideration in the sense of the risk of 'nonpersuasion,' there is no doubt that the defendant has the burden, in the sense

of going forward with the evidence and rebutting the *prima facie* case as to consideration, made out by the production of the instrument and its introduction into evidence."

This court has said that where evidence if uncontradicted would support a verdict, it is the duty of the court to submit the case to the jury. "It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go." *Blackwell v. Omaha Athletic Club*, 123 Neb. 332; *Glarizio v. Davis*, 110 Neb. 679. It is the function of the jury to weigh the evidence, and not the prerogative of the court.

We are led to the conclusion that the trial court erred in summarily taking this case from the jury and dismissing the same.

REVERSED AND REMANDED.

GOSS, C. J., and GOOD, J., concur in the result.

FRANK HAJEK ET AL., APPELLEES, V. JOSEPH F. POJAR ET AL.: JOHN RUZEK, APPELLANT.

FILED MARCH 9, 1934. No. 28819.

Mortgages: PRIORITIES. "Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgagee merely on the ground of such extension." 41 C. J. 582.

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

Simon A. Simon and *Adolph A. Carl*, for appellant.

Frank C. Charvat, contra.

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

BEGLEY, District Judge.

On August 29, 1925, the defendants Joseph F. Pojar and his wife, Julia, executed a promissory note to the

plaintiffs and appellees, Frank Hajek and Anna Hajek, for the sum of $27,000, due March 1, 1931, with interest at 5 per cent. per annum, and as part of the same transaction executed and delivered to the plaintiffs a mortgage upon the northeast quarter of section 5, township 20, range 5, in Dodge county, Nebraska, which mortgage was promptly filed for record and recorded. On September 5, 1925, the said defendants executed a second mortgage upon the same tract for the sum of $7,300 in favor of the defendants Frank C. Tomka, John Ruzek and the Farmers State Bank of Dodge, Nebraska. This mortgage contained an express recital that it was subject to a mortgage of $27,000. Thereafter the amount due the bank was paid and the interest of the bank in the mortgage was released. On March 1, 1931, when the said loan of $27,000 matured, the plaintiffs and defendants Joseph F. Pojar and wife entered into an extension agreement extending the maturity of said loan for a period of five years. This extension agreement changed the terms of the loan in two particulars: (1) In the place of payment; and (2) it reduced the rate of interest from 5 per cent. to 4 per cent. Subsequently the said defendants defaulted in the payment of interest and taxes, and plaintiffs instituted proceedings to foreclose their mortgage, joining the other defendants as parties to the suit. The bank appeared and disclaimed any interest in the premises involved, and the defendant Frank C. Tomka defaulted. The defendant and appellant, John Ruzek, filed a cross-petition setting forth the execution to him of a note of $2,000 and the execution and delivery to him of the said mortgage and default in the payment of the same and prayed that it be adjudged a first lien on the premises because it was of record at the time when the extension agreement was made, and asked for a foreclosure. The court found that the plaintiffs' mortgage of $27,000 constituted a first lien on the premises and that the defendant John Ruzek had a second lien in the sum of $2,000. From this decree John Ruzek has appealed.

The sole question for determination in this court is whether or not by the extension of its mortgage the plaintiff lost the right of a first lien and whether the appellant thereby acquired a first lien upon the premises.

In 41 C. J. 582, it is said: "Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgagee merely on the ground of such extension."

The extension agreement continued the lien of the Hajek mortgage and all their rights and remedies thereunder for the new period, and having reduced the rate of interest on the first lien and the appellant having accepted a mortgage subject to said first lien, it cannot be said that the appellant has been injured by reason of the extension agreement.

Under the circumstances shown in this case, the plaintiffs and appellees did not lose their priority by merely extending the time of payment of their mortgage which was admitted to be prior to the mortgage of the appellant.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. DWIGHT STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: PLUM CREEK TOWNSHIP, INTERVENER, APPELLEE.*

FILED MARCH 9, 1934. No. 28674.

1. **Depositaries: TOWNSHIP FUNDS.** In order for a bank to become a legal depository, under the statute, for township

* On rehearing, paragraphs 1 and 2 of syllabus withdrawn. See opinion, p. 884, *post*.

moneys, it must make application therefor, and the governing body of the township must take positive action approving such application.

2. **Banks and Banking:** DEPOSIT OF TOWNSHIP FUNDS: TRUSTS. Where public moneys are left with a bank by a township treasurer without such bank having made application for a deposit of such funds, or being designated by the governing body of the township as a depository, and which funds are mingled with the general assets of the bank, such assets will be impressed with a trust to the extent of any balance in favor of the township as against the receiver of the bank.
3. **Depositaries:** TOWNSHIP FUNDS. Mere acquiescence by members of a township board, after knowledge that the township funds had been deposited in a bank, is not, of itself, sufficient to constitute such bank a legal depository of such funds.
4. **Banks and Banking:** TRUSTS. Where a bank receives moneys unlawfully, and such moneys are mingled by the wrong-doer with its general assets, and such assets are augmented as a mass to the extent of such moneys received, equity will impress the general assets with a trust in favor of the owner of such moneys so unlawfully received.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye, G. E. Price and *Phillip A. Tomek,* for appellant.

Coufal & Shaw and *Ray E. Sabata, contra.*

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

CHASE, District Judge.

This is a suit in equity by which the intervener, Plum Creek Township, seeks to have its claim in the receivership of the Dwight State Bank declared a preferred claim by reason of an alleged trust relationship between the bank and the intervener.

On September 4, 1931, the Dwight State Bank was judicially declared to be insolvent and E. H. Luikart, secretary of the department of trade and commerce, was appointed receiver over the assets of the defunct corporation. In the receivership proceedings Plum Creek Town-

ship intervened, and by its petition it seeks to have the general assets of the bank in the hands of the receiver impressed with a trust in its favor for the sum of $855.59. A trial was had upon the issues presented by the petition of intervention, and the court found that the Dwight State Bank was a trustee for the intervener and allowed the intervener's claim in full. From such finding the receiver has prosecuted an appeal to this court.

The facts are not seriously in dispute. It appears that, for a number of years prior to the closing of the bank, Plum Creek Township had used this bank as its depository for its public funds. In January, 1931, one Prochaska assumed the duties of treasurer of the township, at which time he settled with the outgoing treasurer and had a balance in the bank to the credit of the township in the sum of $2.70. On January 21, 1931, the treasurer deposited with the Dwight State Bank the sum of $802.70, and on May 14 and June 13 of the same year he deposited $2,500 and $1,150, respectively. Checks were honored against this deposit from time to time, and when the bank closed there was left in the account to the credit of Plum Creek Township the sum of $855.59. When Prochaska became treasurer, one Novak, who was then president of the bank, called upon the treasurer and requested him to continue depositing the funds of the township in the bank. The treasurer followed the practice of the former treasurer and carried his official account there until the bank was finally closed. It also appears that no affirmative application was ever made by the Dwight State Bank to the governing body of the township for the privilege of keeping the township moneys on deposit in the bank, nor was there any affirmative action taken on the part of the governing body of the township approving the Dwight State Bank as a depository for its funds.

A determination of the question presented by the pleadings necessitates a construction of the recent enactments of the legislature on the subject of depositories for public funds.

Section 77-2525, Comp. St. Supp. 1931, provides: "That any school district treasurer or township treasurer may deposit the money received or held by him by virtue of his office in some state or national bank situated in such school district or township or in some nearby city or village which has been approved as such depository by the governing body of such school district or township."

Section 77-2526, Comp. St. Supp. 1931, provides: "Any such bank may apply for the privilege of keeping such moneys. All such deposits shall be subject to payment on check when demanded by the district or township treasurer. It shall be the duty of the school district board or township board to act upon such application."

Section 77-2527, Comp. St. Supp. 1931, provides: "No such treasurer shall be liable on his bond for money on deposit in a bank and by direction of the proper legal authority."

The receiver argues that no formal application is necessary on the part of the bank, and no formal designation as a depository on the part of the governing body of the township is necessary under the law, where the depository knows the public character of the funds and the governing body of the political subdivision knows that the funds have been and are still being deposited in the bank; that such acquiescence and ratification, as a matter of law, are equivalent to a formal application and designation.

In applying the usual canons of statutory construction to the act, we do not believe that the receiver's interpretation is well-founded. The legislative intent is quite clearly expressed by the language it employs. This language is not susceptible of a dual meaning. By the plain wording of the statute, the governing body of such a political subdivision as the intervener must approve the depository. The approval contemplated by the statute requires some positive or affirmative action on the part of the governing body from which the intent to designate is manifest. Mere silence on the part of the governing

body or each individual member thereof, with knowledge of the facts, is not such an approval as is contemplated by the statute. The approval necessary under the statute must result from positive action on the part of the board, and not from mere inaction. If the failure of the board to act could be clothed with any legal significance, it would be more in the nature of a disapproval than an approval, since it is negative in effect. The account of the intervener was solicited by the bank officers and carried in the bank in the name of Plum Creek Township, and the corporation knew at all times that these funds belonged to the intervener.

It is argued on behalf of the receiver that to hold the bank as an insurer of these funds, when it made no application therefor, is too unjust to receive equitable sanction. If any injustice flows from such a situation, it is brought about by the bank itself. If the bank desired to avoid liability under the statute, it had the privilege of refusing to receive the funds. This it did not choose to do; therefore, it must accept the liability which it assumed by voluntarily accepting the funds.

Under the theory of trustee and beneficiary which the intervener seeks to apply to this situation, the depository never acquires title to the money, but merely holds it as an equitable bailee with an obligation to return upon demand. The relationship is not one of debtor and creditor as grows out of an ordinary deposit. The rule adopted by this court in recent cases is to the effect that, where a bank receives money under circumstances of which it could not become a legal depository, the law will impress the funds thus received with a trust in favor of the owner of the fund. The bank treated these funds as an ordinary deposit, mingled the same with the general assets of the bank, and $855.59 thereof it had on hand to the credit of the intervener when it was closed. In the recent case of *State v. Bank of Otoe*, 250 N. W. 547 (125 Neb. 414), which we take to be controlling in this case, the court

laid down the following rule: "Bank, not designated as depository, receiving deposit of funds from school district treasurer, who was also active managing officer of bank, held funds as trustee, entitling school district to preference on bank's insolvency." While the above case has special reference to school districts, townships are included in the same section of the statute.

It is also argued by the receiver that it became the duty of the township board to act upon the bank's application for the deposit of funds. We find nothing in the record indicating that the bank ever applied to the governing body of the township for the privilege of keeping its funds. The only place the record hints of such a fact is where the president, Novak, asked the treasurer to keep the money in his bank. We cannot feel justified in holding the township guilty of such dereliction of duty in failing to act upon an application when no such application was ever made.

The receiver further argues that the intervener has not sufficiently traced the funds entitling it to impress the assets of the bank with a trust. The ancient equitable doctrine requiring the tracing of trust funds has been somewhat relaxed by our recent decisions. In *State v. Farmers State Bank,* 121 Neb. 532, it was held that, where the trust funds were traced into the general assets of the bank, and the assets were augmented as a mass to the extent of the funds received, notwithstanding the identical money was mingled with other corporate funds, the funds were traced sufficiently to impress the general assets with a trust, and the amount of the funds so mingled was an asset belonging to the intervener and never became an asset of the bank.

Applying the doctrine to the instant case the judgment is

AFFIRMED.

STANDARD INVESTMENT COMPANY, APPELLANT, V. MARTIN FISHER, APPELLEE.

FILED MARCH 16, 1934. No. 28832.

1. **Trial.** Questions of disputed facts are for the jury.
2. **Bills and Notes: FRAUD: BURDEN OF PROOF.** In an action against the maker by an indorsee of a promissory note, where defendant pleads and there is any evidence tending to show fraud in the inception of the note, the burden is on plaintiff to show that it is a *bona fide* holder; and where, from the evidence, reasonable minds may reach different conclusions, the question of good faith is for the jury. *Union Nat. Bank v. Moomaw*, 106 Neb. 388.

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

Harry R. Ankeny, for appellant.

J. C. McReynolds, contra.

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

GOSS, C. J.

Plaintiff sued Martin Fisher and N. F. Babson upon a promissory note. Babson, though served, defaulted. The jury returned a directed verdict against Babson and returned a verdict in favor of Fisher. From a judgment in favor of Fisher, plaintiff appealed.

On May 15, 1931, Fisher executed and delivered the note for $199, due September 1, 1931, to N. F. Babson and Vic Christensen. On May 29, 1931, these payees, for value, indorsed and delivered the note to plaintiff, which sued as owner and holder in due course. Babson and Christensen were insurance solicitors for United Insurance Company of Lincoln, Nebraska. They took the note to pay the premium for a 60 months' policy providing Fisher with indemnity for certain injuries, if accidental, and for loss of time by disease. The policy was issued May 16, 1931, and delivered before the note was sold to plaintiff. Fisher undertakes to rescind, now claiming fraudulent rep-

resentations by Babson and Christensen as to the insurance, though in his correspondence with Babson and with the insurance company he seems to have based his desire to have the note and policy canceled because of his financial inability. He finally returned the policy to the company on June 13, 1931, requesting its cancelation and that the note be returned. The insurance company wrote him the policy would be held subject to his order.

By his answer defendant denied that plaintiff was a holder in due course; alleged that plaintiff was not the real party in interest, but that it is a dummy corporation owned and controlled by the insurance company, which was the real party in interest; that there was fraud in the inception of the note whereby Babson and Christensen represented to defendant that the full amount of "one year's premium" on a policy was the sum of $172, but by deceit and fraud they wrote into the note and made it out in the sum of $199. There were other recitals in the answer, but it is not necessary to notice them as they were not submitted to the jury and are not involved in the assignments of error.

Section 62-402, Comp. St. 1929, says: "A holder in due course is a holder who has taken the instrument under the following conditions: First, That it is complete and regular upon its face; Second, That he became the holder of it before it was over-due and without notice that it had been previously dishonored if such was the fact; Third, That he took it in good faith and for value; Fourth, That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The fourth instruction to the jury is assigned as erroneous. It was as follows:

"Under the pleadings and evidence in this case the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that it acquired title to the note in controversy as a holder in due course. It has failed to establish the good faith required by that burden

in that it has not made the investigations required of it to affirmatively establish that its representatives acted in good faith.

"This does not remove from the jury the issue that misrepresentations were made as to the amount of the insurance premium as represented in the note given. That question is to be considered by you just the same as if this note still remained in the hands of the original payees."

By the second sentence of the instruction the court specifically decided as a matter of law that plaintiff failed to establish the good faith necessary to support the burden of proof required, in that it did not make the investigation required of it to establish that its representatives acted in good faith. Appellant assigns that this instruction was erroneous because by the instruction the court decided as a matter of law that plaintiff was not a holder in due course. The officers of the investment company and of the insurance company seem to be the same persons and to hold to a considerable extent the same offices in both companies. That, however, is not incompatible with good faith on the part of plaintiff in becoming a holder in due course. Sale or pledge of a promissory note given to pay an insurance premium is unlawful prior to the delivery of the policy. Comp. St. 1929, sec. 44-1119. When Babson offered the note for sale and plaintiff purchased it on May 29, 1931, the officer asked Babson if the policy had been delivered and was answered in the affirmative. There is other evidence that the policy had been delivered to the insured and was then in the possession of the insured. As shown by the fourth, sixth and seventh instructions, the only defense submitted to the jury was the writing of the note for $199 instead of $172. All others were specifically withdrawn from the jury. Fisher's pleading and testimony, as well as the evidence and circumstances generally, make the whole matter of good faith and representations, both of Fisher and the insurance solicitors, peculiarly a question for the jury. Plaintiff was

handicapped by having its good faith in the purchase of the note decided against it by the court. It seems to us that it was for the jury to decide upon the entire evidence.

The reliance of the appellee is upon *State Bank v. House,* 114 Neb. 681. There a majority of this court reversed and dismissed a cause where there had been a directed verdict for plaintiff. The bank had purchased a note executed for the purpose of paying the first premium on an insurance policy. The insurance solicitor, Fowler, who was payee, never even forwarded the application and of course no policy was ever issued or delivered; in fact, the whole transaction was a fraud on the part of Fowler. The bank took the word of the payee that the policy had been delivered and the cashier did not inquire of the maker, who was a farmer living five miles from town, having a telephone, and known to the cashier for 15 years. The cashier merely asked Fowler, a perfect stranger, if the policy had been delivered and relied upon his affirmative answer without further inquiry. The court decided that this was not sufficient evidence to authorize a judgment which would allow the consummation of a fraud. But, in the instant case, the policy was delivered; and there is a dispute between Fisher and Babson as to the alleged misrepresentations about the amount of the premium, the truth of which is certainly not a matter which all men would unhesitatingly decide in favor of Fisher's version. Some ordinary, fair-minded jurors might reasonably draw other inferences from the evidence. He said in his answer the policy was to cost for one year's premium $172 and no more. The application signed by him recited the premium as $199 for 60 months. In his testimony he thought the amount was $171 or $172. In his letters he sought to have the policy canceled because his farm and chattels are mortgaged and farm prices are low, because it would take 600 bushels of wheat to pay the premium, and the like. These letters were written at and after the time the note was purchased by plaintiff. Can it be said as a matter of law that Fisher would have made

any other answers to plaintiff if plaintiff had inquired of him? He did not then claim his contracts were invalid. He was seeking their cancelation. A good jury might infer that his defenses are afterthoughts and spurious. So we do not think the facts are at all parallel with those in the *House* case. In such cases the good faith of plaintiff is for the jury. *Ostenberg v. Kavka*, 95 Neb. 314; *Union Nat. Bank v. Moomaw*, 106 Neb. 388; *Auld v. Walker*, 107 Neb. 676.

For the failure to submit the cause to the jury the cause must be reversed. The sixth instruction referred to a "material alteration" in the note. As applied to negotiable instruments, that phrase is defined in section 62-807, Comp. St. 1929. It refers to changes made in a negotiable instrument after the instrument is originally executed. The instrument here was never altered. The court in stating the issues raised by the answer did not include any plea that the note had been altered. The answer did not allege it. The real issues were whether plaintiff was a holder in due course and whether, if it was not a holder in due course, the note was unenforceable because, by misrepresentation and fraud, the maker was induced to sign a note for a larger and different amount than he claims was agreed upon as the amount of the premium for his insurance policy. On another trial this phrase will probably not be used.

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

REVERSED.

E. H. LUIKART, RECEIVER, APPELLANT, V. HARRY TIDRICK ET AL., APPELLEES.

FILED MARCH 16, 1934. No. 28846.

1. **Fraudulent Conveyances: BURDEN OF PROOF.** Where husband transfers property to wife, which prevents his creditors from enforcing payment of their claims, it is presumptively fraudu-

lent as to them, and the burden is upon wife to prove otherwise.

2. ———: CONSIDERATION. 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.

4. ———: ESTOPPEL. Evidence in this case does not establish an estoppel by misrepresentation, silence or laches.

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

F. C. Radke, Barlow Nye and *James E. Brittain,* for appellant.

H. E. Siman, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

DAY, J.

This is a suit brought by the receiver of the Merchants State Bank of Winside, as judgment creditor, against Harry Tidrick, as judgment debtor, and Mae Tidrick, his wife, in the nature of a creditor's bill to set aside, in aid of execution, two bills of sale of personal property given by the husband to his wife. The receiver appeals from an order dismissing the suit.

The allegations of the receiver's petition are that on July 28, 1932, he recovered two judgments against Harry Tidrick on notes given to the bank prior to December 10, 1931; that executions had been returned *nulla bona;* that the instruments were executed March 7 and May 28, 1932, respectively, for the purpose and with intent to hinder, delay and defraud his creditors, especially the plaintiff; that there was no consideration and no change of possession of the personal property; that at the time these instruments were executed Harry Tidrick was indebted to plaintiff; and that the credit had been extended, relying upon his ownership of this personal property and owing his wife nothing as represented by his property

statements, which facts were known to his wife and estopped her from asserting a claim to this personal property.

The answer of defendant, Mae Tidrick, alleges that her husband was indebted to her, which was a good and sufficient consideration for the bills of sale. Both defendants denied fraudulent intent, and that the bank extended credit relying upon Harry Tidrick's ownership and lack of any indebtedness to his wife. The reply alleges that the purported debt was not a legal obligation of the husband to his wife; that she was estopped to assert a claim to the personal property; and that such claim was barred by her laches.

The Tidricks have lived for 35 years upon a 320-acre farm which has at all times been the property of Mrs. Tidrick. Mr. Tidrick operated the farm and borrowed money from various banks. In 1921 he was indebted over $8,000 to the Farmers State Bank of Winside when that bank was closed for insolvency. In May, 1921, Mae Tidrick executed a mortgage on the 160 acres of her land, not occupied by the buildings as a homestead, to the Forgan Investment Company to secure $8,000 to pay Harry Tidrick's debt to the bank.

Subsequent to this, Harry Tidrick commenced doing business with the Merchants State Bank, and the indebtedness represented by the receiver's judgments was contracted during the years since. It seems that he was continuously indebted to the bank during this time, sometimes for a larger amount than others. From time to time he signed property statements for the bank. When the Merchants State Bank was closed, it held two notes of Tidrick, dated August 12, 1931, and September 4, 1931, for $550 and $630, respectively, due February 12 and March 4, 1932.

About February 1, 1932, the receiver's agent, in charge of the bank, notified Tidrick that these notes were due. It was suggested that he give a chattel mortgage on his personal property or secure Mrs. Tidrick's signature on a

note. This was not done. The receiver threatened to sue and shortly thereafter commenced action and secured judgments July 28, 1932.

Meanwhile the $8,000 mortgage Mrs. Tidrick had given on her land to pay Harry Tidrick's debts in 1921 had been renewed twice and had not been paid or reduced in amount, but was not due at this time. Mrs. Tidrick knew about the letters from the receiver to her husband and insisted that he give her some security for the debt. Tidrick then gave his wife two bills of sale of his personal property located on the farm where the parties resided.

The appellant rightly contends that the law is that where a husband transfers property to his wife, which prevents his creditors from enforcing payment of their claims, it is presumptively fraudulent as to them, and the burden is upon the wife to prove otherwise. *Glass v. Zutavern,* 43 Neb. 334; *La Borde v. Farmers State Bank,* 116 Neb. 33, and many other cases too numerous to cite. "This court has frequently held that a deed by a debtor to an immediate member of his family is presumptively fraudulent as to existing creditors, and in litigation between him and the grantees on that issue the burden is on the vendee to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, and cases cited therein." *Peterson v. Wahlquist,* 125 Neb. 247. However, this is merely a rule of evidence which has for its purpose the prevention of fraud and recognizes the natural tendency of relationships which sometimes induce them to protect each other from the legitimate claims of creditors. But the law does not prohibit business transactions between husband and wife. It merely recognizes that, where the transactions intervene the right of creditors of the husband, they shall be closely scrutinized.

Did the appellees in this case sustain the burden of proof and establish by a preponderance of the evidence that the sale was not fraudulent? There was a good and sufficient consideration for the bills of sale. In 1921 the

wife executed a mortgage on her individual property to secure $8,000, every dollar of which was paid to the receiver of the Farmers State Bank of Winside on her husband's debt. That mortgage had been renewed twice without reduction and was not due at the time the bills of sale were executed. The wife testified, as also did the husband, that he had agreed to pay back this amount. He had paid the interest all the time. It was unquestionably a *bona fide* debt. A *bona fide* debt due from husband to wife is a sufficient consideration to support conveyance of property as security for such debt. *Farmers & Merchants Irrigation Co. v. Brumbaugh,* 77 Neb. 702; 27 C. J. 562.

A debtor may, in the absence of fraud, prefer one creditor over another. The rule is stated in 27 C. J. 634: "An actual preference of a valid debt is not rendered fraudulent by the fact that it was made and accepted with the intent to defeat a judgment or execution against the debtor." An insolvent debtor may in good faith pay or secure a valid debt of one creditor to the exclusion of the others. *Kilpatrick-Koch Dry Goods Co. v. McPheely,* 37 Neb. 800; *Farwell Co. v. Wright,* 38 Neb. 445; *Chaffee v. Atlas Lumber Co.,* 43 Neb. 224.

Is Mrs. Tidrick estopped in this case to claim the personal property against the creditors? The appellant grounds his proof of estoppel on the part of the wife upon a property statement made by the husband to the bank January 22, 1931, in which it is claimed he did not list as a debt the $8,000 now claimed due his wife. There is no evidence that Mrs. Tidrick made this statement to the bank or knew anything about it. It does not appear that she had by any act or misrepresentation misled any one to his prejudice. Anyhow the property statement taken by the bank did not mislead any one about anything. We refrain from further comment upon that property statement which is and was in 1931 interesting fiction incapable of deceiving any one, even a banker or bank examiner. There is no evidence of an estoppel by her mis-

representation or by silence when it was her duty to speak.

Is Mrs. Tidrick estopped by her laches to assert her claim against her husband? In this connection the appellant relies strongly upon *Wake v. Griffin*, 9 Neb. 47. The facts distinguish the case at bar from the *Griffin* case which is clearly evident from a reading of the entire case. Even the syllabus refers to the transaction as a pretended loan of money. The evidence is clear and convincing in this case that there was a loan of money. Appellant emphasizes the fact that when the husband inherited considerable money he did not pay the mortgage on his wife's land. The evidence is that they talked about the matter, and she permitted him to pay instead his indebtedness to this same bank, because the interest on the mortgage was lower, and it was not then due. The interest was paid by Mr. Tidrick and until default of payment of interest or principal Mrs. Tidrick was not injured.

An examination of the assignments of error and the argument thereon does not disclose error on the part of the trial judge. Our conclusion is the same as that of the trial court.

AFFIRMED.

FRED WALLER, SR., ET AL., APPELLANTS, V. FIRST TRUST COMPANY, APPELLEE.

FILED MARCH 16, 1934. No. 28975.

Bills and Notes. Where a note has been paid, an action cannot be maintained to recover usurious interest.

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

Sterling F. Mutz and *Edward C. Fisher*, for appellants.

Stewart, Stewart & Whitworth, contra.

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

DAY, J.

This is a suit brought by Fred Waller, Sr., and Fred Waller, Jr., hereinafter called "Waller Signs," for an accounting on a series of loans made to them by the Lincoln Safe Deposit Company to determine the amount due to obtain credit for claimed usurious charges and commissions exacted by the lender. Upon a trial the court found in favor of defendant, First Trust Company, and dismissed the suit.

In May, 1927, Waller Signs required large sums of money for the prosecution of their business. They sought to negotiate a loan of $50,000 with the Lincoln Trust Company and the Lincoln Safe Deposit Company. This loan was made, and bonds were issued and sold to a large number of investors. The method adopted was to make the Lincoln Safe Deposit Company trustee for the bondholders and, as such, Waller Signs executed an agreement and assignment of a signboard contract with the Skelly Oil Company under which payments made by Skelly Oil Company were assigned to the trustee for the purpose of paying these bonds. As additional security for the bonds, Waller Signs also executed to the trustee a chattel mortgage on the signboards. Six months later, while there was due on these bonds $35,000, an additional sum of $32,500 was advanced. Again, in February, 1929, with bonds outstanding in the amount of $38,500, the loan was increased to $107,500, and in November, 1929, certain of these bonds were extended. In February, 1930, an additional $65,000 was added, making total bonds $162,500, and again in October, 1931, with $92,500 outstanding, $2,500 was added, making total $95,000. In each instance, the loans were split into bonds of various denominations and sold generally to the public.

At each advancement of additional sums and also at the

time some of the bonds were extended, the Lincoln Safe Deposit Company or the Lincoln Trust Company, or both, received substantial commissions. The Lincoln Trust Company and the Lincoln Safe Deposit Company were in very close relationship, and the loan papers were executed to the latter, and the former assumed to act as agent in selling the bonds and collecting the commission. On July 6, 1932, both companies were adjudged bankrupt, and on July 21, 1932, the defendant, First Trust Company, was appointed successor trustee. The successor trustee continued to receive payments on the contract of the Skelly Oil Company and pay the Waller Signs bonds until plaintiffs commenced this suit. Since that time, they have received more than $60,000 from the Skelly Oil Company, sufficient to pay all the outstanding bonds.

The plaintiffs base their cause of action largely upon the allegation that the loan was usurious. They complain that the trial court excluded material evidence relating to all previous loans offered to establish that the loans were usurious. The commissions charged upon the various loans, added to the contract rate of interest, rendered the loan usurious. Dealing, as we must, with the outstanding bonds, amounting to a small portion of all the bonds issued, we have this situation: The First Trust Company is the trustee of these bondholders and, as such, has received payments of these bonds from the Skelly Oil Company under its contract with Waller Signs, assigned to the trustee and to its successor trustee by the plaintiffs herein. The plaintiffs in the assignment of this contract with Skelly Oil Company directed it to pay the money due thereunder to the trustee for the bondholders. When Skelly Oil Company made the payments, as directed, to the trustee for the bondholders, it was the equivalent of Waller Signs paying the bonds. Conceding, therefore, that the evidence establishes usury in this transaction, which of course it does not, Waller Signs has paid the bonds affected by usury. True, the bondholders have not

received the money, but their trustee has, and they are entitled to the same and would have it except for this suit. The plaintiffs seek to impound this money in the hands of the trustee due to a few bondholders and take their money to recoup themselves for many thousands of dollars of alleged usurious charges. They evidently are unmindful of the fact that usury is a defense and not the basis of an affirmative action. Comp. St. 1929, sec. 45-105. The law of this jurisdiction is that, where a note has been paid, an action cannot be maintained to recover usurious interest. *Blain v. Willson,* 32 Neb. 302; *First Nat. Bank v. Barnett,* 51 Neb. 397; *New England Mortgage Security Co. v. Aughe,* 12 Neb. 504. If the amounts paid by Skelly Oil Company on the Waller Signs bonds under the contract were insufficient to pay the bonds and it were necessary to proceed against Waller Signs, usury, if any, would be an available defense. But that is not this case.

Since this court takes the view of the case heretofore expressed, other matters argued in the briefs, such as negotiability and ownership of the bonds and the amount of the charge for the money, are not necessary to a decision. Appellants also contend there is a matter of a credit of $2,074 which was paid to the former trustee. If this is a fact, it is a matter for adjustment in the bankruptcy proceedings in the federal court. This court has no jurisdiction over the affairs of that company. The same is applicable to its alleged ownership of some of the bonds involved herein.

The judgment of the trial court in dismissing the case was a proper judgment.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. PLATEAU STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: VILLAGE OF HERMAN, INTERVENER, APPELLEE.

FILED MARCH 16, 1934. No. 28809.

1. **Banks and Banking**: VILLAGE FUNDS: TRUSTS. Where village treasurer deposited funds of village in a state bank which had knowledge of their character, but which had not been designated as depository, bank held funds as trustee, and, on its insolvency, village was entitled to a preferred claim for trust funds which had been mingled with bank's general assets.
2. **Estoppel**. Where there is a positive law prohibiting the village treasurer from depositing village funds in any bank not designated by the board of trustees as a depository, the village is not estopped by any act done in violation of said law by the village treasurer.
3. **Banks and Banking**: INSOLVENCY: TRUST FUNDS: INTEREST. A claim adjudicated to be trust funds payable from assets of insolvent state bank in preference to depositors' claims is in effect a judgment, which bears interest at the rate of 7 per cent. per annum from date rendered until paid.

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

F. C. Radke, Barlow Nye, G. E. Price and *O'Hanlon & O'Hanlon*, for appellant.

Brogan, Ellick & Van Dusen, contra.

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

BEGLEY, District Judge.

The Plateau State Bank of Herman, Nebraska, became insolvent and was closed on February 22, 1932. The vice-president and managing officer of said bank, Earl C. Burdic, was also the village clerk of the village of Herman. At the time said bank was closed the treasurer of the village of Herman had on deposit with said bank certain funds of said village to the amount of $4,713.73. Said money was deposited with said bank without the bank

having complied with the provisions of section 17-515, Comp. St. 1929, as amended by chapter 33, Laws 1931, by giving a bond as therein required, and without having any action taken by the village council in designating said bank as a depository of such money. After the closing of said bank the village of Herman brought an action to establish a preferred and prior claim in its favor by reason of said deposit having been made by the treasurer of the village of Herman, and upon a trial the court found that the village of Herman was entitled to a preferred claim in the sum of $4,859.49 with interest at 7 per cent. per annum from September 21, 1932, the date of the order. From this order of the district court the receiver has appealed.

The receiver first claims error in the finding that said funds were trust funds and entitled to priority. Particularly does he claim error in holding that certain district paving funds held by the village of Herman as trustee for the Herman paving district and deposited in said state bank were held to be trust funds.

It is undisputed that the bank at all times knew that the funds deposited were village funds, not only from the title of the accounts as carried on the books of the bank, but also because the vice-president and managing officer had such knowledge as city clerk. The bank therefore was charged with the knowledge that it was holding the moneys of the village, not as a depository of such funds, but solely as custodian thereof for the benefit of the village, and that consequently the relation of the ordinary depositor to the bank did not arise.

Neither the bank nor the village complied with the provisions of said section 17-515, which provides that it is the duty of such banks as desire to be designated as depositories to apply for such privilege upon certain conditions, and it shall then be the duty of the city council or board of trustees to act on such application, and all banks as may ask for such privilege shall give a bond in such sum as shall be the maximum amount on deposit at any

one time, and the council shall approve such bond, and the city or village treasurer shall not deposit such moneys or any part thereof in any bank or banks other than such as have been so selected by the city council or board of trustees for such purposes. This being a positive law and the city treasurer and the bank having failed to comply with the same, the deposit constituted a trust fund for the benefit of the village, and it would make no difference from what source the money was received by the treasurer so long as it was deposited by him as custodian of the city funds. *State v. Midland State Bank,* 52 Neb. 1; *Nebraska State Bank v. School District,* 122 Neb. 483; *Massachusetts Bonding & Ins. Co. v. Steele,* 125 Neb. 7; *State v. Bank of Otoe,* 125 Neb. 383.

The appellant also contends that the village, by acquiescing in the deposit of the village funds and remaining silent while the transaction continued, is estopped now to assert that same were not legally deposited in said bank. This defense was not pleaded and there is no showing that any one relied to its disadvantage upon any acquiescence or silence on the part of the village trustees; and further the public is not estopped by the unauthorized acts of its officials. In this case there was a positive law prohibiting the village treasurer from depositing village funds in the plaintiff bank. The public had a right to assume that the officers would obey the law and are not bound by any illegal acts upon their part. 21 C. J. 1191.

Finally, the appellant contends that the court had no authority to allow interest on the judgment. This court has already decided that the appellee is entitled to interest from the date of the judgment. *State v. First State Bank,* 124 Neb. 786; *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786; Comp. St. 1929, sec. 45-104.

The judgment of the district court is correct and is therefore

AFFIRMED.