REPORTS OF CASES

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1934, AND JANUARY TERM, 1935

VOLUME CXXVIII

HENRY P. STODDART
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
LINCOLN, NEBRASKA
1935

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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JAMES R. DEAN, Associate Justice
EDWARD E. GOOD, Associate Justice
GEORGE A. EBERLY, Associate Justice
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IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1934

FEDERAL TRUST COMPANY, APPELLANT, V. JOHN W. BAXTER, APPELLEE.

FILED NOVEMBER 23, 1934. No. 29021.

1. Trusts: ATTORNEY AND CLIENT. "An attorney who induces his client to execute deeds whereby the attorney acquires, without consideration, legal title to the client's lands, and thereafter treats the lands as his own, will, in a suit by the client against the attorney, be held to be a trustee, holding the legal title in trust for his client." *Federal Trust Co. v. Ireland*, 124 Neb. 369.
2. ———. "A recreant trustee, or those dealing with him with knowledge of the trust, will not be permitted to make a profit out of the trust property at the expense of the beneficial owner." *Federal Trust Co. v. Ireland*, 124 Neb. 369.
3. Judgment: RES JUDICATA. "A former judgment is conclusive when the parties and the question involved in the two suits are the same, although the property claimed in them may be different." *Hanson v. Hanson*, 64 Neb. 506.
4. Trusts: CONSTRUCTIVE TRUSTS: RELIEF IN EQUITY. "Where one person obtains property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge." *Logan v. Aabel*, 90 Neb. 754.
5. ———. Where a trustee mingles trust funds with his own, the whole mass may be resorted to by the beneficiary to restore the trust fund. *State v. Farmers State Bank*, 121 Neb. 532.

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

H. N. Mattley and *Herman Ginsburg*, for appellant.

Stewart, Stewart & Whitworth, contra.

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

GOSS, C. J.

Plaintiff sought foreclosure of a second lien arising out of advancements to apply on interest due on a first mortgage for $98,000. This mortgage had been executed by W. A. Gillan, record owner of the land. Plaintiff pleaded that John W. Baxter claimed some interest in the land.

Baxter filed an answer and cross-petition, alleging that he had conveyed the lands by deeds in blank as to the consideration and grantee to Rolland F. Ireland, as his attorney, to be held in trust by him for Baxter; to induce the deeds Ireland falsely represented that Baxter's relatives were planning to have a guardian appointed so as to deprive Baxter of the power to sell the real estate; Ireland was authorized, in event of such application for guardianship, to insert his own name in the deeds as grantee, otherwise to use the deeds by inserting the name of the purchasers when the lands were sold at a price named by Baxter; the deeds were made about May 29, 1924, and on or about November 21, 1924, in pursuance of his fraudulent scheme to procure the title, Ireland inserted substantial considerations in each of the deeds, wrote his own name therein, and caused the deeds to be recorded in the various counties in which the lands were situated; on May 28, 1928, plaintiff and Ireland, with intent to cheat and defraud Baxter, caused the lands involved to be conveyed by Ireland and wife to defendant Gillan for a named consideration of $98,000, which was much less than the actual value of the land, and on the same day caused Gillan to execute the first mortgage for that sum; Gillan acquired title for the benefit of plaintiff, the proceeds of the mortgage became a trust fund belonging to defendant, but plaintiff wrongfully paid a part thereof to Ireland, who is insolvent, and kept the

rest; at all times plaintiff had full knowledge that the lands belonged to Baxter; that Baxter did not discover the fraud of Ireland until the fall of 1929 and the participation of plaintiff therein until the summer of 1932; on June 27, 1929, Federal Trust Company commenced an action against Ireland and wife in Lancaster county to foreclose a real estate mortgage on land acquired by the Irelands in exchange for a part of the lands so deeded by Baxter to Ireland, and Baxter intervened in that suit claiming to be the owner of the real estate and that Ireland held the land as Baxter's trustee; the decree in that case finds that the Baxter lands were fraudulently acquired by Ireland in trust; that plaintiff learned in May or June, 1926, that Baxter was the real owner; that Ireland had no interest in the lands and that Federal Trust Company accepted the mortgages with full knowledge that Baxter was the owner of the real estate; and that on appeal by plaintiff to the supreme court the judgment was affirmed with a reduction in the amount of the judgment. See *Federal Trust Co. v. Ireland,* 124 Neb. 369. Baxter pleads that judgment as an adjudication of the rights of the parties here. Baxter prayed in the instant case that plaintiff be decreed to hold in trust the proceeds of the $98,000 mortgage and to account to Baxter for the actual value of the land at the time it was sold; and for such other relief as may be equitable.

Stating the substance of the decree briefly, the trial court found generally in favor of Baxter on his cross-petition and held that Ireland procured the deeds from Baxter fraudulently, paid no consideration and held the title in trust; that the case between the same parties in Lancaster county constituted an adjudication of the issue of notice to Federal Trust Company that Baxter was the real owner of the land and that Ireland had no interest except as trustee; that on May 21, 1928, plaintiff and Ireland, with intent to defraud Baxter, caused the deed from Ireland to Gillan and the mortgage by Gillan to be executed and delivered; that the proceeds of the $98,000

mortgage constituted a trust fund belonging to Baxter and he is entitled to a judgment for that sum less the encumbrance then existing, amounting to $73,482.30, or $24,517.70, with interest at 7 per cent. from May 21, 1928, to May 10, 1933, and at the rate of 6 per cent. from May 10, 1933, to June 10, 1933, the interest being $8,756.15, making a total of $33,273.85 with interest from June 10, 1933, at 6 per cent., which amount was decreed as now held by Federal Trust Company in trust for Baxter.

The trial court further found and decreed that plaintiff holds bonds in the principal sum of $5,000 on which there is due $600 of interest as of April 26, 1933, secured by the $98,000 mortgage, and that this constitutes a part of the trust fund due Baxter as aforesaid and Baxter is entitled to a first lien for the amount due thereon concurrent with the lien allowed Federal Trust Company in the decree allowing the lien of the balance due on the principal mortgage.

On the main issues as to the fraud of Ireland in procuring Baxter to convey the land and the notice of that fraud to Federal Trust Company the proof here is similar to that in the case of *Federal Trust Co. v. Ireland,* 124 Neb. 369. The decision in that case fully adjudicates those questions and makes it unnecessary to report the statement of the evidence here. Suffice it is to say the evidence was ample to support the findings of the trial court. Any other finding would be erroneous. It calls for the application here of the rules laid down in the former case to the effect:

"An attorney who induces his client to execute deeds whereby the attorney acquires, without consideration, legal title to the client's lands, and thereafter treats the lands as his own, will, in a suit by the client against the attorney, be held to be a trustee, holding the legal title in trust for his client. * * *

"A recreant trustee, or those dealing with him with knowledge of the trust, will not be permitted to make

a profit out of the trust property at the expense of the beneficial owner."

Appellant argues that the trial court erred in holding that the prior case between the parties was an adjudication binding upon the parties here. Originally Baxter had about 10,000 acres of land in Nebraska. Ireland, through his confidential relation as attorney, influenced Baxter to deed the land to him, without consideration, but upon a promise to convey the land to Baxter's nominees and to account to Baxter for the proceeds. Part of this land was involved in the former case and part in this. The former adjudication that Ireland held the lands in trust and that Federal Trust Company was informed as to the trust relations in 1926 is binding upon Federal Trust Company, which was a party both there and here and litigated the question with Baxter to the court of last resort. Only the property involved was different. "A former judgment is conclusive when the parties and the question involved in the two suits are the same, although the property claimed in them may be different." *Hanson v. Hanson,* 64 Neb. 506.

Appellant thinks the court erred in not finding that no adjudication existed in its favor by reason of a judgment offered by plaintiff in a case between the two parties in Kansas. The trial court was right. The Kansas mortgages were executed in 1925, a year before appellant learned that Baxter was still the owner of the lands standing in Ireland's name. The mortgage in the instant case was given in 1928.

Appellant argues that the court erroneously granted appellee inconsistent remedies and recoveries. It must be kept in mind that this was a trust *ex maleficio.* The trust company stands in the place of Ireland, who, as a recreant trustee, violated his confidential and fiduciary relationship to Baxter. The trust company in 1926 learned that he held title to the particular lands in trust. The beneficiary has a right to follow the trust *res.* "Where one person obtains property of another by theft

or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge." *Logan v. Aabel,* 90 Neb. 754. See *United States v. Dunn,* 268 U. S. 121. The land had been conveyed to Gillan, who in turn mortgaged it to the trust company. The proceeds of the mortgage belonged to Baxter. He has followed the proceeds and finds part of it in the augmented assets of the trust company and $5,000 of it in bonds unsold still held and owned by the trust company. The other bonds secured by the $98,000 mortgage had been sold to innocent purchasers and could not be reached by Baxter. The court gave Baxter in its decree the $5,000 worth of bonds (which with interest constitute a lien concurrent with that of other bonds secured by a mortgage on the lands) and directed appellant to pay the other proceeds to Baxter. The judgment as to the balance was not given as damages but as a substitute for the rest of the bonds. Where a trustee mingles trust funds with his own, the whole mass may be resorted to by the beneficiary to restore the trust fund. *State v. Farmers State Bank,* 121 Neb. 532. The recovery is consistent with equity.

Other errors have been assigned. Those considered worthy of discussion and not specifically mentioned are merged in those already discussed. The judgment of the district court is

AFFIRMED.

F. C. HOGG, ADMINISTRATOR, APPELLEE, V. ELIZABETH MACDONALD, APPELLANT.

FILED NOVEMBER 23, 1934. No. 29008.

1. **Automobiles:** FAMILY PURPOSE DOCTRINE. The family purpose doctrine in the law applicable to automobile accidents and resulting damages is recognized in Nebraska.
2. **Master and Servant:** INJURY TO THIRD PARTY: LIABILITY OF

MASTER. "The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept." *Stevens v. Luther*, 105 Neb. 184.

3. ———: AUTOMOBILES: FAMILY PURPOSE DOCTRINE. The family purpose doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the common use of the automobile, with the owner's permission, by members of his family for whom he provides and maintains it.

4. ———: ———: ———. To extend the family purpose doctrine in automobile law to an employer with whom employee makes his home, there being between them no ties of blood, it is essential to show that employer was under obligation to support employee, that the car was maintained by employer, that employee had general authority to use it for his own convenience, and that he used it for a purpose for which it was maintained at the time his actionable negligence arose.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Chambers & Holland, C. Russell Mattson, Prince & Prince and *Lewis W. Heyde*, for appellant.

H. G. Wellensiek and *B. J. Cunningham, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $25,145 for alleged negligence causing an automobile accident in which Andrew Y. McMullen was fatally injured. The accident occurred about four miles north of Shelton, in Buffalo county, October 14, 1932, at an intersection of two highways, one running north and south and the other east and west. McMullen died October 18, 1932, as a result of his injuries, leaving surviving him his widow, two sons and three daughters. F. C. Hogg, administrator of decedent's estate, is plaintiff and Elizabeth MacDonald is defendant.

While Charles Flynn was driving north alone in a Buick sedan owned by defendant, it collided with a Dodge coupé owned and driven by John D. Stack, in which McMullen was riding at the time of the collision. Due care on the part of decedent and Stack, who came to the intersection from the east and there turned south, was pleaded in the petition, which alleged that defendant approached from the south in a reckless and negligent manner on the west side of the highway at approximately 70 miles an hour, thus causing the collision and the resulting injuries; that Flynn, when alone, was by habit a reckless and careless driver of the Buick sedan at a high rate of speed, a fact known to defendant who entrusted him with her car; that she was a childless widow residing on a farm and that her family consisted of herself and defendant, who made his home with her; that her Buick sedan was a family car purchased, used and maintained as such by her for the joint use of herself and Flynn; that with her knowledge and consent it was being used by him at the time of the collision for the purpose for which it was purchased and maintained.

In an answer defendant admitted that an accident occurred about the time and place pleaded in the petition and denied each and every other allegation therein. Defendant alleged also that the accident was caused by the negligence of Stack and decedent, giving details, who were then engaged in a joint enterprise. The reply to the answer was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $16,863.30, which was reduced by remittitur to $13,473.30. From a judgment for the latter sum, defendant appeals.

On appeal it is elaborately argued by defendant that the following instructions given by the court to the jury contain prejudicial error, when considered with the evidence:

"You are instructed that one who furnishes an auto-

mobile for the pleasure and convenience of his family makes the use of such vehicle for such purposes his affair or business, and any member of his family driving the vehicle with his consent, either express or implied, and for the purpose for which it is furnished, is the owner's agent and the owner is liable for his negligence.

"You are instructed that the question whether or not Charles Flynn, at the time of the accident and injury complained of, was a member of the family of Elizabeth MacDonald, is to be determined by you from the evidence and all the facts and circumstances in the case, and in this regard you are instructed that to be a member of a family it is not essential that a person be a relative of other members of the family. It is essential, however, that he should occupy a position in the household analogous to that usually held by a relative living with other relatives in a family. He should have assumed the duties and have been accorded the privileges of such a relative. The fact that a person is living in a household, as an employee, does not in itself make him a member of a family within the rule of the family purpose law. The bond between him and the head of the family must be stronger than that between master and servant, the duties assumed by him must be different than those of a hired employee and the privileges accorded him in the family other than those usually accorded a servant for satisfactory service."

The family purpose doctrine in the law applicable to automobile accidents and resulting damages has been recognized in Nebraska, the rule being first stated as follows:

"The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept." *Stevens v. Luther*, 105 Neb. 184.

A reviewer of decisions recently said:

"The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the invention of the automobile, and its common use, with the owner's permission, by the members of his family for whom he has provided it." 64 A. L. R. 879.

The principle under consideration and the reason for it were stated in an opinion by Judge Flansburg in this form:

"Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called 'family purpose' doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner." *Linch v. Dobson,* 108 Neb. 632.

The jury in the case at bar were told in effect that whether or not Flynn was a member of defendant's family should be determined from the evidence and all the facts and circumstances and that to make defendant liable for his negligence he should occupy a position in the household "analogous to that usually held by a relative living with other relatives in a family." The instructions quoted would extend the family purpose doctrine to remote kindred and to persons not so related, if Flynn's position was analogous to "that usually held by a relative living with other relatives in a family." While the instructions say that "He should have assumed the duties and have been accorded the privileges of such a relative," what constitutes a family, within the meaning of the family purpose doctrine, is a question left by the instructions largely to the determination of the jury in view of the evidence, facts and circumstances. In another jurisdiction it was held that a subordinate member of a household, not related by blood to the head of the family, created by

negligence a liability of the latter for damages, where the former had general authority to use a car actually maintained for her convenience. *Smart v. Bissonette,* 106 Conn. 447. That ruling, however, does not justify the instructions given in the case at bar.

The instructions do not give defendant the full benefit of recognized limitations on the family purpose rule. The supreme court of Minnesota said:

"We are now asked to extend the (family automobile) doctrine to cases where an employer permits a favored employee to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business. * * * If we were to hold as requested, it would tend to put an end to the praiseworthy custom of many employers who permit faithful employees to use occasionally, for their personal enjoyment, automobiles kept and ordinarily used in carrying on the employer's business. * * * But, aside from this particular consideration, we think both reason and authority are opposed to plaintiff's contention. The extension of the family automobile doctrine to other relationships cannot well be justified upon any principle of the law of master and servant or principal and agent. The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way." *Mogle v. A. W. Scott Co.,* 144 Minn. 173. This view was adopted in *Ebers v. Whitmore,* 122 Neb. 653.

Rules for determining the existence of the family relation, as contemplated by law, were adopted by the supreme court of Texas as follows:

"1. It is one of social status, not of mere contract.

"2. Legal or moral obligation on the head to support the other members.

"3. Corresponding state of dependence on the part of other members for their support." *Roco v. Green,* 50 Tex. 483.

These tests of the family relation, as contemplated by law, were applied to the family purpose doctrine in the law relating to negligence in the use of automobiles. *Rogers v. Kuhnreich,* 247 Mich. 204.

The instructions in the present case were erroneous, because they did not inform the jury directly that the general use of the car by Flynn and the maintenance thereof by defendant for his convenience or for the convenience of both were essential to a verdict in favor of plaintiff. Whether the error was prejudicial to defendant depends on the evidence.

The record contains testimony tending to prove the following facts: Defendant was a widow 68 years of age. She resided on a farm in a five-room house near Shelton. At the time of the accident Flynn was alone in defendant's car. He was then 21 years old; was not related to her by the ties of blood or affinity; was employed by defendant at $25 a month with board, room and washing; did chores, mowed, hauled hay and grain, repaired fences, worked in a grove, sawed trees; sometimes worked for others by the day and received compensation from them; drove the car for defendant and for himself; occupied the room used by former employees of defendant in her house; had no individual key to house or car; never used the car without asking permission; always bought the gasoline and oil when using the car for himself. There is testimony tending to prove what is thus narrated. The summary is confined to only a small part of the evidence and is not a determination of facts but a mere basis for testing the instructions quoted. For the same purpose it may fairly be inferred from the record that the relation existing between defendant and Flynn was created by a contract of employment; that board, room and washing were parts of the compensation for work; that the relation of defendant to Flynn was not analogous to that of parent and child; that defendant was not under a legal or moral obligation to support him; that he was not dependent upon her for support; that he had no general authority to use the car

for his own convenience, business or pleasure; that she did not wholly maintain it when operated by him alone; that he was not on any mission of his employer at the time of the accident, but was then in the pursuit of his own pleasure. With the record in the condition outlined the erroneous instructions were prejudicial. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

RETAIL SECTION OF CHAMBER OF COMMERCE OF PLATTSMOUTH, APPELLEE, V. WILLIAM G. KIECK, COUNTY ATTORNEY, APPELLANT.

FILED NOVEMBER 23, 1934. No. 29037.

1. **Pleading**: DEMURRER. General demurrer admits only such facts as are well pleaded, and does not admit mere conclusions of the pleader.
2. **Injunction**: PLEADING. In petition for injunctive relief, an allegation that plaintiff has no adequate remedy at law is not sufficient. Facts must be alleged from which inadequacy of legal remedy is apparent.
3. **Lotteries**. A lottery is a scheme for the distribution of prizes by chance, and where the winner must give something of value for the chance.
4. ———. Coupons, good for a drawing by chance of something of value, that are given with the purchase of merchandise constitute a lottery.

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

Paul F. Good, Attorney General, and *Paul P. Chaney,* for appellant.

W. A. Robertson, contra.

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

GOOD, J.

This is an action for injunction. Defendant's general demurrer to the petition was overruled. He refused to further plead. Injunction as prayed was decreed by the trial court. Defendant has appealed.

We are required to determine whether the petition stated sufficient facts to entitle plaintiff to injunctive relief.

From the petition it appears that plaintiff is an unincorporated association of retail merchants in the city of Plattsmouth; that defendant is the qualified and acting county attorney of Cass county; that the members of plaintiff have formulated and are operating what they term a gift program and advertising enterprise. The plan of operation, as briefly summarized, is that the members of the plaintiff issue a free gift coupon with each 25-cent purchase by any of their customers; that these coupons are placed in a ballot box and a weekly drawing from the gift coupons is held and the winner thereof is given gift tickets which are redeemable in merchandise at the stores of any of the members of plaintiff. Defendant, as county attorney, has threatened to stop said practice of plaintiff, to interfere with the ballot boxes where the gift coupons are deposited, and to interfere with plaintiff's members, its agents, servants and employees in the operation of the practice, and the threat of defendant to interfere with and stop said enterprise was interfering with the business of the members of plaintiff, and they had no adequate remedy at law. Plaintiff prayed that defendant be enjoined from, in any way, interfering with plaintiff in the operation of such program and practice.

Defendant contends that the petition shows that plaintiff had an adequate remedy at law, and therefore was not entitled to injunctive relief, and, secondly, that the program and enterprise being carried on by plaintiff and its members was a lottery and not a lawful enterprise. On the other hand, plaintiff contends that the mere allegation in the petition that plaintiff had no adequate remedy at

law was a sufficient allegation of fact and that the demurrer admitted this fact, and further contends that the program and enterprise being operated by plaintiff and its members was a lawful enterprise and not a lottery.

With respect to the first proposition, it is a familiar rule that a general demurrer admits the truth of all well pleaded allegations in the pleading to which it is directed. It is an equally familiar rule that such a demurrer does not admit a mere conclusion of the pleader. *Busboom v. Schmidt,* 94 Neb. 30; *Dodson v. Woolworth Co.,* 118 Neb. 276. "In fact a bare allegation that there is no adequate remedy at law is not sufficient; facts must be alleged from which the inadequateness of the legal remedy is apparent." 13 Standard Ency. of Procedure, 84.

From the entire petition and the briefs, it is apparent that the act of the county attorney which plaintiff seeks to enjoin is prosecution of the members of the plaintiff for a violation of the lottery statute. There is no contention that this statute is invalid or unconstitutional, no allegation that defendant intended to resort to any other than a legal prosecution for an alleged violation of a criminal statute. In our opinion, the petition fails to set forth sufficient facts to show that plaintiff was without remedy at law.

But the principal question is: Does the practice being indulged in by the members of plaintiff constitute a lottery?

Section 28-962, Comp. St. 1929, provides: "Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses, lands or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims or any thing or things of value whatever, shall be fined in any sum not exceeding five hundred dollars."

In *State v. Nebraska Home Co.,* 66 Neb. 349, this court held:

"To constitute a lottery it is necessary that a prize be offered, and something of value be given for a chance to obtain the prize.

"The prize may be anything of value; a preference or privilege in the distribution of a common fund among those entitled thereto, may constitute a prize."

In Bouvier's Law Dictionary lottery is defined as "A scheme for the distribution of prizes by chance. * * *

"A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor." A similar definition of lottery may be found in 38 C. J. 287, and in 17 R. C. L. 1209, sec. 2.

It has been held that coupons, good for a drawing of something of value, that are given with the purchase of goods, constitute a lottery. *Lohman v. State,* 81 Ind. 15; *United States v. Olney,* 1 Abb. (U. S. C. C.) 275.

Entertainments at which each holder of an admission ticket is entitled to a chance to win a prize are deemed lotteries. *Thomas v. People,* 59 Ill. 160. It has been held that a scheme to increase the number of subscribers to a newspaper by giving to each paid-up subscriber a numbered ticket, which will entitle him to a drawing for certain prizes, to be given away by the newspaper to the holders of the winning tickets, is a lottery. *United States v. Wallis,* 58 Fed. 942.

While plaintiff terms its scheme a gift program and advertising enterprise, it is more than a commonly-called gift enterprise. Strictly speaking, a gift enterprise, in a broad sense, is a scheme under which prizes are given to purchasers of goods as an inducement to buy, a familiar example of which is the green trading stamp, but in such a scheme there is no element of chance. If the scheme requires the goods to be sold for their market value, but, by way of inducement, each purchaser is given a chance to win a prize, the enterprise comes within the

meaning of a lottery. We think that, under the principles announced, the program and enterprise, being carried on by the members of the plaintiff, constitutes a lottery and is in violation of the lottery statute.

We have no doubt that the members of plaintiff, in good faith, believed that their plan of operation was not a lottery and that it was lawful to carry it on, but in this they were mistaken.

For the reasons already given, the injunction should not have been granted. The judgment is reversed and the action dismissed at the costs of plaintiff.

REVERSED AND DISMISSED.

THERESA MCDONALD, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 23, 1934. NO. 29054.

1. **Street Railways**: INJURY TO PEDESTRIAN: PROXIMATE CAUSE. When a pedestrian, approaching a street railway track, stops in a place of safety, and observes an oncoming street car a few feet away, still in motion, the act of such pedestrian in stepping directly in the path of such car, and being struck thereby, is the proximate cause of the accident.
2. **Negligence**: DIRECTION OF VERDICT. If the evidence clearly shows that the plaintiff is guilty of more than slight negligence, which will defeat a recovery, it is proper to sustain a motion for an instructed verdict for the defendant.
3. **Appeal**. Where the evidence discloses that the only permissible verdict was the one directed by the lower court, it will be affirmed.

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

Reed, Ramacciotti & Robinson, for appellant.

Edward J. Shoemaker and *Kennedy, Holland & DeLacy, contra.*

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

PAINE, J.

This is an action for personal injuries, which occurred when plaintiff was knocked down by a street car, the action being founded upon the alleged negligence of the motorman. At the close of plaintiff's testimony, the defendant's motion for an instructed verdict was argued for several hours, whereupon the court sustained the motion, and directed a verdict for the defendant.

The facts in the case may be briefly stated as follows: On March 18, 1932, the plaintiff and her friend, Miss Ruth Smith, walked west on Farnam street in Omaha to the corner of Park avenue, at which place Miss Smith intended to take a street car approaching from the east, that being a regular stopping point. The plaintiff left her friend and walked to the corner, and started to turn south, in front of the approaching street car, to cross the street. The car at that time was still in motion, and within perhaps seven feet of her. She took a couple of steps upon the track, and testifies that the car plunged forward and hit her, knocking her down, but stopping before it reached her feet, which were lying across the rail. There is no dispute in the evidence but what she suffered serious injuries. The humerus of her left arm was fractured, her left clavicle and scapula were torn loose from their attaching ligaments, her wrists were sprained, and she received numerous bruises, which necessitated her remaining in the hospital for some weeks and incurring a large bill for X-rays, doctor bills, and hospital care. Miss Smith testified that the car slid along fairly fast past the place where she was standing, and slowed up "very jerky."

In order to constitute actionable negligence, there must exist three essential elements: The duty, or obligation, which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. A person who is upon a public street, of which a street railway company has

been permitted to use a portion, does not become a trespasser by entering upon the track of the company on such street, since travelers have an equal right with the street railway company to use such street. A motorman must at all times so regulate the speed of his car as to have it under reasonable control, particularly when approaching a street crossing. *Langenfeld v. Union P. R. Co.*, 85 Neb. 527; *Mercer v. Omaha & C. B. Street R. Co.*, 108 Neb. 532; *Westover v. Hoover*, 94 Neb. 596; 60 C. J. 384.

The third paragraph of the answer filed by the defendant in this case reads as follows: "For further answer, the defendant affirmatively alleges that the plaintiff did carelessly and negligently step into the path of the oncoming street car from a position of safety, at a time when she saw or should have seen the oncoming street car, and that the alleged injuries said to have been received from said accident were due entirely to the negligence of this plaintiff."

The defendant insists that the evidence discloses that the plaintiff stopped two steps away from the street car track; that she observed the street car approaching her about seven feet away, and that it was still in motion, somewhat jerkily, and that she then stepped forward two steps, and the street car struck her; and insists that, even though the plaintiff thought the car was slowing down to a stop, the proximate cause of the accident was her own contributory negligence, which was more than slight.

In the case of *Troup v. Porter*, 126 Neb. 93, Judge Troup came from the sidewalk between two parked automobiles and stepped in front of the car of Mrs. Porter before she had time to put brakes on, and this court held that his negligence was, as a matter of law, more than slight when compared to the negligence of the defendant.

This comparative negligence statute, section 20-1151, Comp. St. 1929, has been before this court many times,

and in *Morrison v. Scotts Bluff County,* 104 Neb. 254, it was stated: "The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of the plaintiff was slight and the negligence of defendant was gross in comparison therewith."

It has been the settled rule in this state, that, where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but on the other hand, where the evidence shows beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant. *Anderson v. Altschuler,* 125 Neb. 853; *Kudrna v. Sarpy County,* 125 Neb. 83; *Allen v. Omaha & S. I. R. Co.,* 115 Neb. 221; 25 R. C. L. 1283, sec. 135; *De Griselles v. Gans,* 116 Neb. 835; *Richardson v. Southern P. R. Co.,* 88 Cal. App. 648.

While, as stated, cases involving contributory negligence should ordinarily be submitted to the jury, yet this is not necessary if the trial judge has decided in his own mind and the evidence clearly shows that the plaintiff is guilty of more than slight negligence, which will defeat a recovery, and require the setting aside of any verdict returned, if a motion for a new trial is filed.

We hold in this case that reasonable minds could not find from the evidence that plaintiff's negligence was but slight in comparison with the negligence of the defendant, and that the action of the trial court, in directing a verdict for the defendant, was right, and the same is hereby

AFFIRMED.

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

FILED NOVEMBER 27, 1934. No. 28971.

1. **Trial:** INSTRUCTIONS. In a law action, material issue of fact concerning which the evidence is conflicting should be submitted to the jury.
2. **Damages:** INSTRUCTIONS. In a personal injury action, an instruction is prejudicially erroneous if it permits the jury to allow damages for future pain and suffering which has not been proved with reasonable certainty.

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

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

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

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

GOOD, J.

This cause is before us on rehearing. The former opinion is reported in 127 Neb. 599, reference to which is made for a more complete statement of the issues and facts than appears herein.

Plaintiff recovered a judgment for personal injuries alleged to have been sustained by reason of defendant's negligence in removing a trolley pole and leaving unfilled a hole into which plaintiff stepped and received injuries of which she complains. Defendant denied that it removed a pole and left unfilled a hole at the place where plaintiff was injured. From the judgment entered below, defendant has appealed.

The factual controversy is as to whether the hole into which plaintiff stepped was one from which defendant removed a pole.

Defendant contends that the evidence is insufficient to sustain a finding that the hole into which plaintiff stepped was one left by defendant from which it had

removed a trolley pole. In this view we cannot concur. Two witnesses, residing in the immediate vicinity of where the accident occurred, testified that defendant had removed a pole at the location of the hole, and one of such witnesses testified that the pole hole had been left unfilled until after plaintiff was injured. The hole in question was located in the parking space between the curb and the sidewalk and had existed for several years. Grass and weeds had grown up and about it so that it was not easily visible. Plaintiff, in crossing this space to enter an automobile, stepped into the hole and received the injuries complained of. Defendant's evidence tended to prove that it had never had a pole at the location of the hole into which plaintiff stepped, thereby causing her injuries. This presented a conflict for the jury to resolve.

Defendant complains of the admission of rebuttal evidence as to the fact that at other places in the immediate vicinity defendant's trolley poles were placed at about the same distance from the street corner as was the hole in controversy. Defendant had introduced testimony and a plat showing the location of its trolley poles, indicating that they were set at a greater distance from the corner than was the hole in question. The rebuttal evidence tended to negative the evidence offered by defendant, and we think it was properly received.

Defendant complains of an instruction given by the court relative to the measure of damages to which plaintiff was entitled if recovery was awarded her. In the instruction it was said that if the jury found for plaintiff she should be awarded compensation for her pain and suffering endured "and that it is reasonably established will in all probability be endured by her as a result of her said injuries." The rule applicable to future pain and suffering has been considered on several occasions by this court.

In *Chicago, R. I. & P. R. Co. v. McDowell,* 66 Neb.

170, it was held: "In an action for personal injuries compensation can be recovered for only such future damages as are shown with reasonable certainty to be consequent thereon."

In *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60, a similar instruction to the one given was held to be erroneous. In that case it was said (p. 66): "This was error in so far as it permitted the jury to allow damages for pain which the plaintiff will 'probably suffer in the future.' "

The instruction complained of was prejudicially erroneous in that it permitted the jury to award damages for future pain and suffering which may not have been proved with reasonable certainty.

Complaint is made that the verdict is excessive. Since the judgment must be reversed for the erroneous instruction given, it is unnecessary to consider this and other assignments, since they are not likely to occur on a new trial.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

ELLA PEABODY, APPELLANT, V. CONTINENTAL LIFE INSURANCE COMPANY, APPELLEE.

FILED NOVEMBER 27, 1934. No. 29019.

1. Suicide is the intentional taking of one's own life.
2. Insurance: SUICIDE: PRESUMPTION. Natural love of life raises a presumption, in the absence of evidence to the contrary, that one has not intentionally taken his own life, but this presumption is rebuttable and must yield to proof of facts clearly inconsistent with it.
3. ———: ———: MOTIVE. Lack of motive is a circumstance to be considered in determining whether a person committed suicide or died from an accidental cause, but proof of motive is not essential to sustain a finding of suicide, where the evidence clearly points to suicidal death.

4. **Evidence.** A verdict may not rest on mere conjecture or speculation.
5. ———: PRESUMPTION. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption.

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

Charles E. Foster, Frank C. Yates and *Francis M. Casey,* for appellant.

Montgomery, Hall & Young, contra.

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

GOOD, J.

This is an action on an accident insurance policy by the beneficiary therein designated. Case, the insured, met his death on a Maryland highway in a collision with a moving motor car. The defense relied on is that Case committed suicide by throwing himself in front of a rapidly-moving automobile, thereby intentionally causing his death. At the conclusion of all the evidence, the trial court, on defendant's motion, dismissed the action. Plaintiff has appealed.

The policy provided that it did not cover loss in case of death by suicide, whether insured was sane or insane.

The decision of this cause hinges upon the question of whether there was sufficient evidence to warrant the submission of the cause to the jury. The record reflects the following pertinent facts:

Case was an ex-service man. Some time in May, 1932, he left his home in Omaha, and, with a large number of other ex-service men, engaged in a march to Washington, D. C., to demand immediate payment of the soldiers' bonus. The next heard from him was a letter he wrote and mailed in St. Louis to his sister in Omaha in which he asked that a remittance of a

small sum of money be sent to him in Washington, stating that he expected to be there in about four days. The next heard from him was at a police substation between Cumberland and Frostburg in Maryland. He entered this station at about 5:30 in the afternoon and asked for something to eat. A meal was furnished him. The police officers testified that while in the station Case was nervous, restless and complained several times about the noise caused by the honking of automobiles, and that he asked why the police did not stop such noise; that he seemed to be disgusted because he had become separated from his "buddies" and was undecided whether he would go on to Washington or return to his home in Nebraska. One of the officers testified that his talk was incoherent and hard to understand and that he seemed to be deranged. The police sergeant testified that he took out a pocketbook and handed it to him, stating, in substance, that if he should be killed on the highway the officer would hear of it and return the pocketbook to his mother. The sergeant returned it to Case, who threw it on the desk. The sergeant insisted on Case taking the pocketbook, which he apparently did. Mr. Case also threw his overcoat on a chair or desk and said he would not need that now, but apparently he picked it up and started westward towards Frostburg.

The highway on which Case was walking was a well traveled public highway consisting of 16 feet of macadam in the center, adjacent to which on each side was a concrete shoulder 3 feet wide, and outside of the concrete a dirt shoulder of like width. When about a mile from the police station, Case was walking on the left-hand side of the highway on the concrete shoulder. One Harvey was driving an automobile from the opposite direction on the same side of the highway. In the car with Mr. Harvey were a Miss Thomas, who later became his wife, Mr. and Mrs. Croyle and their three children. Harvey and Mrs. Harvey, Mr. and Mrs. Croyle and their two older children testified respecting the accident. Their

testimony was to the effect that as Case and the car were approaching each other Case stepped either to the extreme edge of the concrete shoulder or possibly onto the dirt shoulder, and when the car was only a few feet from him he threw his overcoat on the ground and threw himself or dived in front of the moving automobile. Harvey swerved his car to the left, but could not avoid striking Case, who was severely injured and died that same evening. It also appears that Harvey's car was traveling on the right-hand side of the macadam portion of the highway; that, had Case and the driver of the car each pursued his course, there would have been no collision. Several of the witnesses who were in the car designated Case's act as diving in front of the car as though he were diving in water. Mr. Harvey thought that Case's head was struck by the right front hub of the car. Other witnesses testified that he threw himself in front of the car and that the car ran over him. The evidence shows that Mr. Harvey was driving at the rate of 30 to 35 miles an hour. It was daylight and the visibility was good.

There was evidence on behalf of plaintiff that Case was of a cheerful, sunny disposition; that prior to his starting on the march to Washington he had contemplated moving to Oklahoma and engaging in chicken raising; that he had been gassed in the service of his country; that he sometimes had dizzy spells due to heart attacks and sometimes fainted or collapsed from heart attacks. Plaintiff also attempted to show that automobiles traveling over the macadam highway would sometimes throw gravel or small stones onto the concrete shoulder, and that persons stepping thereon might slip or lose their balance. Plaintiff argues that because of heart attacks, resulting in dizzy spells, to which Case was subject, he might have fallen into the path of the moving car, or that he might have stepped onto a small stone and lost his balance, thereby causing him to fall in front of the car. It may be observed, however, that there is nothing

in the record to show that Case stepped upon gravel or stones and thereby lost his balance, or that there were any stones or gravel on the concrete shoulder at that place. The record fails to show that Case was afflicted with dizziness or a heart attack at the time. In fact, the evidence of the eyewitnesses negatives any such contention.

Plaintiff argues that, since no motive is shown for Case to commit suicide and it is fairly proved or admitted that he died from an external violent cause, the presumption obtains that his death resulted from accident and was not suicide.

Suicide is the intentional taking of one's own life. *Sampson v. Ladies of the Maccabees of the World,* 89 Neb. 641. It may be conceded that love of life raises a presumption, in the absence of evidence to the contrary, that one does not intentionally take his own life, but this presumption is rebuttable and must yield to proof of physical facts clearly inconsistent with it. *Hardinger v. Modern Brotherhood of America,* 72 Neb. 869.

Lack of motive is a circumstance to be considered in determining whether a person committed suicide or died from an accidental cause, but proof of motive is not essential to sustain a finding of suicide, where the evidence clearly points to suicidal death. *Stempel v. Oregon Life Ins. Co.,* 157 Wash. 678.

Plaintiff's argument, that Case may have stepped on gravel or a small stone which caused him to lose his balance and fall in front of the moving car, finds no support in the evidence and rests on conjecture or mere speculation. A verdict cannot rest on mere conjecture or speculation. "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.

In the instant case the competent evidence of eyewitnesses clearly shows that Mr. Case intentionally

threw himself in front of the rapidly-moving automobile. His conversations and acts while at the police station a very short time before tend to show that he was contemplating an early death on the highway. He would not have wanted to leave his pocketbook with the officer, to be sent to his mother, unless he had anticipated death within a reasonably short distance from where the police station was located. Presumably, he had carried the pocketbook with him from the time he left home until he had reached a point in the state of Maryland. That he would want to leave the pocketbook there, to be sent to his home in case of his death, would be rather strange. In view of his subsequent death in the manner in which it occurred, we think it plainly indicates that he was then contemplating suicide.

In our opinion, the competent evidence adduced in the case would admit of no other finding than that his death was caused by his intentional act. In no view of the case could a verdict for plaintiff have been sustained. We think the trial court properly withdrew the case from the jury and dismissed the action.

There are other assignments of error relating to the introduction and exclusion of evidence, but they are not argued in the briefs, and an examination of the record fails to disclose any prejudicial error.

AFFIRMED.

GEORGE A. BERLINGHOF, APPELLANT, V. LINCOLN COUNTY, APPELLEE.

FILED NOVEMBER 27, 1934. No. 29032.

1. **Counties and County Officers: CONRTACTS: ARCHITECT: COMPENSATION.** Where an architect makes plans and specifications for a complete county courthouse and supervises the construction for an agreed commission on its cost, and the county lets a valid contract to another for the complete construction of the courthouse according to such plans and specifications, and the county pays the contractors in full and pays the archi-

tect for his commissions on the cost, the architect is not entitled to further commissions for the preparation of such plans and specifications, under a levy made four or more years after the completion of the building under the original contract.

2. ———: ———. A county board cannot make a valid contract to bind a county to pay for services that may be rendered or to be paid for at some future undertermined date, and which are contingent on the rendition of such services or their rendition many years thereafter.

3. ———: ———: ARCHITECT: COMPENSATION. A county board by a contract made with an architect in 1921 cannot bind the county to pay commissions to the architect under a levy made in 1931.

4. ———: ———: ———: ———. An allegation in a petition that the county board is using and permitting a newly employed architect to use the architect's original plans and specifications does not give the architect the right to recover further commission on remodeling or finishing a county courthouse under his contract made ten years before such new architect was employed, and which original contract for building a courthouse had been fulfilled some years before the new work was undertaken.

5. Contracts: ARCHITECT'S PLANS. "An architect ordinarily has no right to the ownership of a plan furnished to, accepted by, and paid for by another, and plans forming an essential part of the building contract, unless proved to be the property of the architect, are deemed to be the property of the employer." 5 C. J. 259.

6. Counties and County Officers: CONTRACTS: TAX LEVIES. "A county board is not authorized to levy taxes to pay the expenses of subsequent years, nor to contract with reference to levies of subsequent years, nor to create an obligation which would bind the county to levy taxes in the future, unless authorized by a vote of the electors." *Roberts v. Thompson*, 82 Neb. 458.

7. ———: ———: ARCHITECT: COMPENSATION: PRESUMPTION. When a county agrees to pay an architect a commission on the cost of a new courthouse for preparing plans and specifications for such building, and the county board lets a valid contract for the erection of a new complete courthouse according to such plans and specifications, and the county thereafter pays the contractors and the architect's commission therefor, it will be presumed after a lapse of four or more years thereafter that there was a complete fulfilment of the agreement between the county and the architect.

8. ———: ———: ———: ———. Under such circumstances,

the county is not liable to the architect for a further commission on his plans and specifications if the county some years later expends more funds to change, modify or finish the building under a new tax levy for that purpose.

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

Mockett & Finkelstein and *James T. Keefe,* for appellant.

William E. Shuman and *C. S. Beck, contra.*

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

RAPER, District Judge.

George A. Berlinghof, plaintiff, brought this action against Lincoln county, and bases his right to recovery on a written contract entered into by him and Lincoln county for services as an architect in the construction of a new courthouse for Lincoln county.

In his petition, filed December 15, 1932, he alleges that on July 22, 1919, Lincoln county voted a five-mill levy to build a new courthouse for Lincoln county, to cost from $225,000 to $250,000, and after that date plaintiff prepared preliminary sketches and elevations for the board's consideration, and that on April 18, 1921, the defendant county employed plaintiff to render services to make plans and specifications and estimates for and superintending as customary for architects for the erection of a county courthouse at North Platte at an estimated cost of $200,000; that, immediately after, the plaintiff prepared plans and specifications for the entire work under direction of the county board, and the courthouse building has progressed in its construction without any substantial deviation from said plans, except certain changes directed by the board, which changes are set out in detail, but are not necessary to be here stated, and he alleges that he prepared all the plans and specifications and superintended the construction of the building as provided for under his contract up to the

time the building operations ceased, and that the defendant county agreed to pay to plaintiff for his services the sum of 3½ per cent. and in addition thereto, for superintending the construction of said courthouse as customary to architects, the sum of 1½ per cent. as set forth in said contract; that the county board requested plaintiff to prepare plans and specifications for the courthouse building on a cost basis of $200,000, including metal and wood furniture, the furniture estimated at $25,000, but was eliminated at the time by the county board, and bids were asked for on the plans and specifications for the construction of the building only, and the plans and specifications for the furniture were approved and held by the county board for future use. The petition then sets forth letting of general contract for a completed courthouse to McMichael Brothers on October 31, 1921, for $174,990, but this was later changed to $148,000, to which was to be added certain alterations which increased the sum to be paid for completed building, and contractors were in six months to complete the building for the original bid of $174,990, and that on February 3, 1922, the county board changed the construction of the building which called for expenditures greater than McMichael Brothers' contract to the amount of $18,853, and some items were not mentioned in the resolution, and neither the copy of the resolution nor the contract gives the cost of the items changed. The petition further alleges that the McMichael Brothers' supplementary and accepted contract amounted to $174,990, and plans and specifications later ordered for extras and additional construction added to McMichael Brothers' last contract, dated December 17, 1931, amounted to $55,736. The items constituting this amount are set out, but it is not necessary to copy them here. It is further alleged that all of said drawings, plans and specifications were and are being used by Lincoln county and were first approved by the county board and accepted by it, and the defendant county has paid out money and

contracted to pay out money on constructions of original contract and additional contracts let by it in the sum of $332,851.09; that, up to the time of letting the final contract for completing the courthouse according to changes and modifications made and authorized by the county board, plaintiff was the architect in charge under his contract with the county, but the present county board, in violation of plaintiff's contract, employed one C. C. Coursey as architect and superintendent and permitted said Coursey to use the plaintiff's original plans and specifications in order for him to prepare his own drawings, plans and specifications, but defendant county refuses to pay plaintiff the contract price thereof of 3½ per cent. for their preparation, and plaintiff alleges there is due to him on his said contract $4,327.48. It is further alleged that, in regard to the 5 per cent. levy voted in July, 1919, to build a courthouse to cost from $225,000 to $250,000, the funds raised thereby in the years 1919, 1920, 1921, 1922, and 1923 amounted to $178,690.68, and that claims connected with the building were paid out of the county general funds in the sum of $35,313.53. (It is not stated when these sums were paid.) That plaintiff was paid $4,000 out of the said 5 per cent. levy, and the sum of $6,461.34 was paid to him out of the judgment funds of said county, and that in August, 1931, a further levy was made by Lincoln county, as follows: 9/10 of a mill for the year 1931, 1 mill for 1932, and 7/10 of a mill for 1933, to be used in completing the courthouse, which levy is expected to produce about $80,000. On the 14th day of December, 1931, plaintiff filed claim for his services with the county clerk, which was disallowed by the county board on December 5, 1932, and from which disallowance plaintiff duly appealed to the district court. The claim filed by plaintiff is as follows:

"To professional services rendered as follows:

1. On money expended to date $206,269.88
   Five per cent. of same $10,313.49

2. Three and one-half per cent. on estimated cost of writer to finish building	$125,000	
Three and one-half per cent. of same		4,375.00
Total		$14,688.49
(See credits and dates below) amount paid		10,461.34
Balance due and unpaid George A. Berlinghof from Lincoln county		$4,227.15

Credits

Date allowed	Cash Received	Date paid by clerk
Dec. 20, 1921	$2,500.00	
May 26, 1927	1,500.00	6/27/27
Aug. 8, 1927	5,000.00	8/18/27
Dec. 19, 1927	1,461.34	12/28/27
	$10,461.34"	

To this petition the defendant county interposed a general demurrer, which was sustained by the court, and plaintiff electing to stand on his petition, it was dismissed, and plaintiff appealed.

The petition does not state when the contractors were paid the $206,269.88 for the construction of the building, but it was evidently made before the last payment to plaintiff, which was in December, 1927. The petition does not state when, if ever, the contract for the construction of the building was to be completed, nor does it state that the contractors or plaintiff did any work on the building after the last payment made to plaintiff. The petition does not allege when the defendant occupied the building, but in his brief plaintiff says the county has occupied the building since June 1, 1923.

The contract consists of a written proposal of plaintiff and acceptance by the county board, and provides that plaintiff agreed to furnish "complete working drawings, including all 3/4" scale diagrams and all full size detail drawings, also complete specifications for all the different kinds of work and materials entering into or needed in the erection and construction of your new

courthouse building for the sum of three and one-half per cent. and will superintend the construction of the same as customary to architects for the sum of one and one-half per cent., making the sum of five per cent. on the total cost of the building."

Plaintiff is claiming 3½ per cent. commission on his estimate of $125,000, which it would cost to make the changes, alterations and reparations in the building under the new levy for such purposes in August, 1931, and filed his claim before any contract was let for such alterations, reparations, completing or finishing the building (whichever it may be), because he made the original plans and specifications for the building, and that the county permitted the newly-employed architect to use his plans.

It may fairly be deduced from the petition that in July, 1919, a five-mill levy was voted to erect a new courthouse which produced a fund of $178,690.68, and in April, 1921, the plaintiff and defendant county entered into the contract for plaintiff's services as architect and superintendent, and that he prepared plans and specifications for the building. In October, 1921, a contract was let by the county to McMichael Brothers for the erection of a complete new courthouse, for the sum of $174,990; that there was an outlay by the county for the courthouse of $206,269.88, and for plaintiff's services and commissions he received $10,461.34, which was $147.85 more than 5 per cent. of the sum spent for construction. The last payment he received was on December 19, 1927, and the contractors must have been paid the $206,269.88 before December 19, 1927, or plaintiff could not have computed the amount due for his services. Part of the commissions were paid out of a judgment fund, and it is evident that the judgment and levy to pay the judgment must have been made some time prior to August 8, 1927. The county expended not only the amount of the tax levy, but at least $35,313.53 out of the county general fund in building the court-

house. There is no allegation that any work was done on the building by plaintiff or the county later at least than August, 1927, nor until after plaintiff filed his claim with the county clerk. The plaintiff's brief states that the county has occupied the building since June 1, 1923. In August, 1931, a new levy was made for the years 1931, 1932, and 1933, "to be used in completing the Lincoln county courthouse," which levy was expected to produce about $80,000. The county board employed C. C. Coursey as architect and superintendent for the work to be done under the levy of August, 1931, which plaintiff claims was a breach of his contract (the date of such employment is not given), and the county was using and permitting said Coursey to use all of plaintiff's said drawings, plans and specifications which the county had approved and accepted. On December 14, 1931, plaintiff filed his claim as above herein set out. On December 17, 1931, McMichael Brothers were given a contract for the new construction which added $123,582.09 to the original cost of the building, and plaintiff claims he is entitled to 3½ per cent. commission on the sum of $123,582.09.

These facts indicate quite clearly that the building was constructed as a complete courthouse on or before December, 1927. There is no allegation that the first contract with McMichael Brothers was left unfinished, nor any action taken by the county board that indicated the contemplation of the changes, alterations or reparations or finishing of the courthouse, until August, 1931, when the new levy was made, which was 10 years after the date of plaintiff's contract. Under these conditions it is apparent that the first contract with McMichael Brothers was complete and at an end, and it follows that plaintiff's contract was fully performed by him and Lincoln county on or before December, 1927. That being established, plaintiff has no further claim on the county, and the trial court rightly sustained the demurrer. Plaintiff does not allege that he retained ownership in the

plans and specifications, and the county using or permitting C. C. Coursey to use the plans and specifications does not give the right to his commission for their use.

"An architect ordinarily has no right to the ownership of a plan furnished to, accepted by, and paid for by another, and plans forming an essential part of the building contract, unless proved to be the property of the architect, are deemed to be the property of the employer." 5 C. J. 259.

Further, the county board could not lawfully contract with plaintiff in 1921 to pay him commissions on his plans and specifications at some future and undetermined date, as in this case ten years later. In *Roberts v. Thompson*, 82 Neb. 458, this court held: "A county board is not authorized to levy taxes to pay the expenses of subsequent years, nor to contract with reference to levies of subsequent years, nor to create an obligation which would bind the county to levy taxes in the future, unless authorized by a vote of the electors."

Section 26-116, Comp. St. 1929, makes it unlawful for a county board "to make any contracts for or to incur any indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county in excess of the tax levy for county expense during the current year; nor shall any expenditure be made, or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund."

The appellee asserts that under this statute plaintiff was not entitled in any event to receive commissions on any sum in excess of $178,690.68, which was the amount raised by the five-mill levy made in 1929, and which five-mill levy was the maximum amount that could be voted to build the courthouse. It will not be necessary to pass on this question in view of our finding that, when the courthouse was completed and occupied and both the contractor and plaintiff paid therefor, it was a completely fulfilled contract and plaintiff had no further rights to commission for his plans.

Plaintiff has been paid his full commission on the $206,269.88, which the county expended in building the new courthouse, and also the additional sum of $147.85.

The judgment of the district court sustaining the demurrer and dismissing the plaintiff's petition is

AFFIRMED.

MAY HOLTMAN JOHNSON, APPELLANT, V. OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE: ALICE A. HOLTMAN, INTERPLEADER, APPELLEE.

FILED NOVEMBER 27, 1934. No. 28982.

1. Gifts. To constitute a valid gift *inter vivos* there must be an intention to give, coupled with a completed, irrevocable gift, property delivered and title passed beyond the control and dominion of the donor.
2. Witnesses: COMPETENCY. Any party so placed in a litigation that he is called upon to defend that which he obtained from a deceased person and to make the defense which the deceased might have made if living may be said to represent the deceased person within the contemplation of section 20-1202, Comp. St. 1929.

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

John W. Cooper, for appellant.

Sidney W. Smith, James E. Rait and *L. B. McDonald, contra.*

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

RYAN, District Judge.

This is an action brought by May Holtman Johnson as plaintiff against Omaha Loan & Building Association, a corporation, defendant, seeking to recover a certificate of the capital stock of the defendant, known as No. C-34553, being a certificate for twenty-five shares of

capital stock of the value of $200 each. The defendant filed a motion and affidavit for interpleader, in which it alleged that Alice A. Holtman also claimed to be the owner of said certificate and pass-book by inheritance from Dr. A. A. Holtman, deceased, and had made demand upon the defendant for the same; that defendant is ready to place to the credit of the plaintiff or Alice A. Holtman, as the court may direct, the full value of said certificate and pass-book, and, upon surrender of said certificate and pass-book No. C-34553, to issue and deliver to either of said persons as the court may direct a new certificate and new pass-book representing the full value thereof. The court thereupon made an order requiring Alice A. Holtman to appear and interplead on or before February 20, 1933, and maintain or relinquish her claim against the defendant in respect to said certificate and pass-book. Alice A. Holtman filed her answer alleging that she was the owner by inheritance of said certificate and pass-book. For convenience she will be referred to in this opinion as the defendant. Her answer further alleged that the property represented by said certificate and pass-book was accumulated by Dr. A. A. Holtman during his lifetime; that he at all times remained the owner thereof and made deposits and withdrawals to said account; that, although he used the name May Holtman at one time with reference to said account, he did not give the pass-book or any right, title or interest in said account to the plaintiff, but, on the contrary, exercised exclusive dominion over said property at all times as his own; that this interpleaded defendant is the widow and residuary legatee of said Dr. A. A. Holtman and is the owner of said certificate and pass-book. A reply was filed by plaintiff, specifically denying the allegations of said answer.

Dr. A. A. Holtman was a practicing physician and surgeon in Omaha and accumulated a substantial estate. He died testate on October 10, 1926, and his will was probated in Douglas county. In his will he bequeathed $20,000

to his brother and two sisters and left the residue of his estate to his widow. The plaintiff, May Holtman Johnson, is one of the two sisters and the defendant Alice A. Holtman is the widow. Dr. Holtman invested his funds largely in building and loan association stocks and this litigation grows out of the certificate described in plaintiff's petition. On August 20, 1921, Dr. Holtman subscribed for twenty-five shares of stock in the Omaha Loan & Building Association and deposited $609.73 and received a certificate or pass-book No. C-34553, which was issued to him in his own name. He made other deposits on August 22 and August 25, and on September 1, 1921, there had been deposited and credited on said certificate the sum of $1,100.73. On September 1, 1921, he assigned the certificate to May Holtman, the plaintiff in this action. At the same time he had a reassignment blank made out for signature, reassigning the certificate to himself. On December 20, 1921, this reassignment appears to have been returned to the Omaha Loan & Building Association, bearing the name "May Holtman." It appears from the record that this name was written by the defendant Alice A. Holtman on the reassignment at the request of Dr. A. A. Holtman. Dr. Holtman continued making deposits in this account until November 3, 1925, when the total deposits reached $5,000 and the stock became matured. From then on he drew the dividends regularly up to the time of his death.

The record discloses that Dr. Holtman also carried accounts with the Conservative Savings & Loan Association. These were handled in much the same manner during the year 1921, except that he used the words "special" or "agent" after the name "May Holtman" in dealing with that association. It appears quite clearly from the record, and the trial court so found, that Dr. Holtman at one time designed and intended to accumulate for the plaintiff a deposit with the Omaha Loan & Building Association in the sum of $5,000. This appears from the assignment to her and also from the testimony of J. Harry Sinclair, an

insurance salesman to whom the doctor confided his intention. It does not definitely appear, however, that he intended her to have this particular account, for the reasons that he did not create a joint account, which would be payable to the survivor, and that he at no time surrendered control of the funds represented by this account No. C-34553.

Plaintiff insists that the evidence is sufficient to show a completed gift. The only evidence which tends to support any delivery of the pass-book and certificate in question is that of the plaintiff herself. She was permitted to testify, over the objection of the defendant, as to a conversation had with her brother in his office in October, 1921, at which time she testifies that he told her of this account and of his desire to do something special for her in consideration of what she had done at home and for him and their father. She testifies that he showed her the pass-book, and that she had it in her hand, and that he requested her to return it to him, as he had to present it when making deposits.

Plaintiff contends that this testimony was admissible and was not within the ban of section 20-1202, Comp. St. 1929, nor under the decisions interpreting that statute, for the reason that "in the case at bar the interpleader does not derive or obtain ownership to the fund represented by stock certificate C-34553 by right of inheritance from a deceased person, but by right of survivorship, if at all," and she is not therefore called upon to defend ownership or title obtained from Dr. Holtman, for she obtained none from him. The only evidence we are able to find in the record to the effect that Dr. Holtman placed this account in his own name jointly with his wife, Alice A. Holtman, is exhibit "6," which is a photostatic copy of a joint subscription for twenty-five shares in the Omaha Loan & Building Association under date of December 20, 1921, and bearing the number C-34553. This is the same date that the purported reassignment from May Holtman to A. A. Holtman appears to have been executed. As to

that exhibit "6," the signature of Alice A. Holtman is not identified. The only question in the record bearing upon this appears in the cross-examination of Clifford C. Rucker, who was, at the time of these transactions, assistant secretary of the association. He was asked: "Handing you exhibit '6' I will ask you to examine exhibit '6' and state whether the signatures shown thereon are the signatures of Dr. A. A. Holtman and Alice A. Holtman. A. That is Dr. Holtman. I couldn't say about Alice Holtman." The trial court evidently considered the evidence insufficient to show a joint account with right of survivorship, because he found in his decree that "at his death it was a part of his estate" and that "Alice A. Holtman as residuary legatee under the will of her husband, Dr. A. A. Holtman, is the owner of the money in the hands of the defendant, Omaha Loan & Building Association, a corporation, which money is identified as account C-34553." From a careful study of the record we conclude that the court was correct in this finding.

Section 20-1202, Comp. St. 1929, reads as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." The situations in which this statute applies and wherein a litigant or witness may be said to be "the representative of a deceased person," as contemplated by this statute, have been the subject of much controversy, but are quite well settled by the decisions of this court. It is not necessary that the personal representative of the deceased in the sense of being the administrator or executor of the estate be a party. The rule is stated in *McCoy v. Conrad*, 64 Neb. 150, and cited with approval in *McEntarffer v. Payne*, 107 Neb. 169, in this language: "If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made if living, * * *

then he may be said, in that litigation, to represent a deceased person." These principles apply to the present case and we conclude that the evidence of the plaintiff in regard to the purported delivery of the pass-book was inadmissible. Furthermore, it is our opinion that, even though this testimony should be admissible, it is wholly insufficient to support the contention that a completed gift was made, for, to constitute a valid gift *inter vivos*, dominion over and title to the gift must pass to the donee by the voluntary, intentional act of the donor. It must be such a delivery as will wholly pass title to the property which is the subject-matter of the gift and place it entirely beyond the control and dominion of the donor.

The judgment of the trial court is correct and is

AFFIRMED.

MARTHA ECCLES, APPELLANT, V. DURLAND TRUST COMPANY, APPELLEE.

FILED DECEMBER 7, 1934. No. 29025.

Cause tried *de novo* and judgment affirmed.

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

Deutsch & Young, for appellant.

M. S. McDuffee and *Mapes & Mapes, contra.*

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

GOSS, C. J.

Plaintiff appeals from an adverse judgment in her suit for an accounting, for rescission of the purchase of a real estate mortgage and for judgment for the amount she invested therein with interest from the date of purchase.

Plaintiff lived at Norfolk. She was widowed in 1912, and soon thereafter began investing her money through

defendant, a trust company of the same place engaged in making farm loans. Her investments went well, so far as the record shows, until the one here made on January 25, 1922, when she purchased from defendant a $2,000 mortgage made by Emil K. Belgum and wife on the east half of a section of land in Kimball county. The mortgage was dated October 10, 1921, and was one of three mortgages made by the Belgums to defendant on their farm of which the land involved here was a part. The mortgage was a first mortgage on the land. There were no buildings on it. After plaintiff had received three payments of interest the makers defaulted. February 26, 1926, Durland Trust Company brought a suit to foreclose all the mortgages in one action. Plaintiff authorized the suit to be brought in the name of the trust company. Her mortgage was set up in the third cause of action. A decree was entered May 4, 1926, allowing $2,658.75 on this mortgage. March 28, 1927, the land was sold at sheriff's sale, bid in by the trust company, and on April 13, 1927, was conveyed to it by the sheriff. Thereafter plaintiff, claiming to have discovered in the summer of 1930 that the loan was unsound and that at no time during its tenure was the land worth the amount thereof, brought this suit to rescind the purchase and for a judgment against the trust company for her money expended and interest thereon. She alleges that there was a fiduciary relationship of trust and confidence, that defendant breached its duty to her and she has elected to rescind the purchase and to demand her money back with interest.

Defendant's answer was to the effect that plaintiff purchased the mortgage relying upon her own judgment.

The chief cause of the trouble is that the land is not now worth the amount of the mortgage lien against it. If it were, there probably would be no controversy. There is a conflict of evidence as to what the land was worth on October 10, 1921, when the mortgage was made, or on January 25, 1922, when it was sold to plaintiff.

William L. Bates, real estate, Kimball, testified by dep-

osition on behalf of plaintiff that, in January, 1922, the land was not worth over $3.50 an acre and is not worth more now. He had inspected the land. M. Havens, who invests his own money in mortgage loans, testified for plaintiff on the trial. He had been in Kimball county, but had not seen the land. He testified that a half section of "pasture land" would be worthless. When asked why it would be worthless, he answered: "Simply because you can't dispose of it." Frank A. Smith, in the real estate business, testified by deposition for plaintiff that the half section of land was worth from $1,250 to $1,350 now and it might have been a little higher in January, 1922. Guy W. Forsling, in the real estate business, testified on behalf of plaintiff, by deposition, that in 1922 the half section was worth $800.

The following persons testified by deposition, on behalf of defendant, as to the value of the half section in 1922: Gus Rieseberg, farmer, $20 an acre; E. G. Meredith, farmer and county commissioner, the plow land $30 an acre, the grazing land $10 an acre; Frank A. Travis, farmer, $10 an acre.

Leonard L. Wilson, with seven years in the college of agriculture, county agent for Kimball county for nearly four years, made a thorough examination of the land and produced a map, made by him, which was introduced in evidence. He testified that there are 84 acres of plowed land and about 62 acres more that is tillable, making a total of 146 acres. It is mostly Sidney loam, the most prevalent soil in Kimball county. It is a soil that has considerable fertility and depth. The 84 acres are good potato land and would compare favorably with any potato land in the county. The land not tillable is pasture land. The tillable land would make fair wheat land, but is of the type that potatoes, corn and beans would grow on more readily than wheat.

Glen Hunt, a graduate of the college of agriculture, and formerly county agent of Kimball county, owning and operating about 1,500 acres of land, buying and shipping

potatoes, had examined the land, and his testimony as to the character of the land and quantity of tillable land was much like that of Leonard L. Wilson. He estimated, on cross-examination by plaintiff's counsel, that the land was worth $10 an acre.

Much has been said about the rough character of the land. We quote from the testimony of Leonard L. Wilson: "Through the west third of the half section there is a draw that runs generally north and south, draining from the south to the north; along the edges of this draw there are considerable areas of grass land mounting up to the higher table land on either side; at the break of the table land there are some outcroppings of lime rock, and as you mount up on the table land you find areas of flat land, some of which are plowed, some that are tillable; this I have designated on the map."

Mrs. Eccles testified that she took her money out of a bank and turned it over to the trust company. That Mr. Nicola, the president of the trust company, told her this mortgage was "a very good investment, in fact the best he had." The evidence shows she withdrew the money from her bank and took it to the trust company on January 20, 1922, and did not get her papers until January 25, 1922, because the mortgage had been put up as collateral elsewhere and had to be sent for. Mr. Nicola testified, and was corroborated by Mr. Lederer, that he went to California January 14, 1922, and did not return until late in the spring. Mr. Lederer, the treasurer of the company, testified that plaintiff's dealings were with him. He testified that Mrs. Eccles selected the Belgum loan from a list of loans on hand. He showed her the list. It contained some $2,000 loans and some loans of larger amounts in bonds of $1,000 each. The company had $100,000 capital and had a surplus. Practically all was then invested in loans. He told Mrs. Eccles the company considered it a good loan. In rebuttal Mrs. Eccles answered in the negative to the following question: "Never talked with them about investing or recommending to you how your funds should be

invested?" But she testified that Mr. Nicola called her up in December, she gave the bank thirty days' notice, and, when she got the money, took it to the trust company on January 20, and insists that the transaction was with Mr. Nicola, who had all the papers ready. She says she just left the selection to him.

Assuming that Mr. Nicola, or Mr. Lederer, as the case may be, told her the loan was considered by the trust company a good loan, or words to that effect, we think the case made out falls short of being actionable. No "fiduciary relation" between the trust company and plaintiff has been shown to exist in the sense that plaintiff would have us declare and apply that term. Plaintiff had her money in a bank drawing 5 per cent. She went to the bank in August, 1921, to withdraw it because she wanted a better return. The bank persuaded her to leave it at 6 per cent. She left it until December, when she "heard the bank was shaky," gave notice and on January 20, 1922, bought the present mortgage. The loan was considered good as loans with so high a rate of interest went, and that was what she wanted. The company had loaned money in Kimball county for years. Interest was paid promptly for some time. That county had a real estate setback in 1922 and was just recovering when the depression of 1929 arrived.

As to the testimony taken by deposition, the trial court and this court had equal opportunity. As to the other testimony, the trial court observed the witnesses, which we cannot do. The burden was upon plaintiff to make out a case. Taking into consideration all the evidence upon this trial *de novo* and the finding of the trial court against her, we are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

FRANK A. BURNHAM, APPELLEE, V. LINCOLN COUNTY, APPELLANT.

FRANK A. BURNHAM, DOING BUSINESS AS ARNOLD HOSPITAL, APPELLEE, V. LINCOLN COUNTY, APPELLANT.

FILED DECEMBER 7, 1934. NOS. 29059, 29060.

Paupers: EMERGENCY OPERATION: LIABILITY OF COUNTY. In an emergency requiring an operation to save the life of a pauper, the surgeon should, if reasonably possible, attempt to communicate with the proper county authorities charged with the care of the poor, but, if the emergency demanding immediate operation be exigent, the necessary services may be rendered, and the law imposes an obligation upon the county to pay the reasonable value of such services.

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

C. S. Beck, for appellant.

Hoagland, Carr & Hoagland, contra.

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

GOSS, C. J.

These two causes were consolidated and tried together in the district court. In the first Frank A. Burnham sued for $75 and was given a judgment for $60, and in the second Frank A. Burnham, doing business as Arnold Hospital, sued for $95 and was given a judgment for that amount.

The basis of the first cause is an operation on Bennie Hopkins and that of the second his hospitalization. Both services were rendered at Arnold, in the northwest corner of Custer county. The patient resided in the northeastern part of Lincoln county.

The patient was 16 years old. He lived with his father and other children, rent free, in a house belonging to John H. Miller. His mother was dead. The father, C. L. Hopkins, had received $20 a month during the summer,

but was out of work. The family was aided by the Red Cross. They might be said to be destitute. The evidence shows they had no means with which to pay for the services of a physician.

C. L. Hopkins had no car. Early in the morning of November 26, 1932, he solicited Mr. Miller to take Bennie to a doctor in Arnold, and Miller's daughter took him with his father and two brothers. When Dr. Burnham examined him he had been vomiting, had a temperature of 97, a very slow pulse, a hard, rigid abdomen, and symptoms of great pain. These signs indicated a rupture of some kind of the alimentary tract and suggested an immediate operation. Dr. Dunn gave the anæsthetic. It was discovered that the abdomen was full of fluid and food particles floating free. A hole about the diameter of a lead pencil was found about an inch above the lower opening of the stomach through which the food was escaping into the abdominal cavity. There was a great deal of inflammation. Peritonitis had already set in. The opening in the stomach was closed, the abdomen was cleaned, and a rubber tube was inserted for drainage. The patient's condition was very grave. It was not known for 36 hours whether he would survive. A nurse stayed with him constantly during that period. After that he had the usual hospital attention. Pneumonia set in and lasted a week. He was in the hospital three weeks.

The claim before the county commission for the operation was $75 because that is the fee allowed in Custer county in such cases. The hospital claim so filed was for $95. Both were disallowed by the county commissioners of Lincoln county, the appeal therefrom resulting in this action. It was tried to the court, jury being waived. The district court found that Bennie Hopkins was a pauper within the meaning of the statutes and a resident of Lincoln county. There can be no dispute about this finding. The court cut the claim for the operation to $60 because that was the amount conventionally allowed by Lincoln county for abdominal operations. The claim for

hospital services was allowed for $95 as pleaded. The evidence shows both amounts to be reasonable.

No authorization for the operation or hospital services was secured by plaintiff. There was no time for that. The condition of the patient was critical and the necessity for immediate operation was emergent. The boy was already suffering severely from the shock. To have refused the operation and to have required Miss Miller to drive him to a hospital at North Platte (a much greater distance from the home than to Arnold) would have caused much more food to "have been shaken out of the stomach; the operation would have been delayed that much more, and the shock would have increased." As the doctor put it, "That simply isn't done" where it is "suspected the patient has a rupture." The ethical, the professional, the humane, the conventional thing is to operate at once.

Under the statutes it would have been the duty of the authorities of Lincoln county to provide the necessary medical services for the patient in their own county. On the authority of *Miller v. Banner County*, 127 Neb. 690, it would have been the duty of the county authorities of Lincoln county to have authorized the operation and hospitalization of this patient in Custer county. After the services were rendered the board of county commissioners refused their consent by disallowing reasonable bills for these services. The refusal was, in the rather unusual circumstances, arbitrary. In the *Miller* case, above cited, we said: "In an emergency requiring an operation to save the life of a pauper, the surgeon should, if reasonably possible, attempt to communicate with the proper corporate authorities charged with the care of the poor, but if an arbitrary refusal is given, or if such corporate authorities be noncommittal, the necessary services may be rendered notwithstanding, and the law imposes an obligation upon the county to pay the reasonable value of such services."

It makes no difference that the emergency operation was performed in another county. As applied to the instant case, the rule may be stated in these words: "In an

emergency requiring an operation to save the life of a pauper, the surgeon should, if reasonably possible, attempt to communicate with the proper county authorities charged with the care of the poor, but, if the emergency demanding immediate operation be exigent, the necessary services may be rendered, and the law imposes an obligation upon the county to pay the reasonable value of such services."

The judgment of the district court is

AFFIRMED.

JENNIE TURCO, APPELLEE, V. JOSEPH TURCO, APPELLANT.

FILED DECEMBER 7, 1934. No. 29065.

Cause reviewed and judgment affirmed.

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

John A. McKenzie and *Edgar S. Hickey*, for appellant.

Grenville P. North, contra.

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

GOSS, C. J.

Plaintiff was granted a decree of divorce, alimony in the sum of $1,000 payable $20 a month, additional attorney's fees of $250, and certain other amounts for the support of two children, depending on whether they were with their mother or maternal grandmother; the decree found and adjudged the parties each to be the owner of an undivided half interest in the described home, awarded its use to plaintiff so long as she lived there, and ordered a referee's sale thereof if she moved out and that half of the net proceeds of the sale be paid to her. Defendant appealed and plaintiff cross-appealed.

While the parties in their briefs debated the question of divorce, on the oral argument they at least tacitly

agreed that it might as well stand. There was evidence to support that portion of the decree. Appellant however assigns error in awarding plaintiff $1,000 for herself and $250 attorney's fee, on the ground it is too much, and appellee cross-appeals and assigns error on the ground that these allowances are too small and that plaintiff should have been given ownership of the entire title to the home.

During the period they lived together, husband and wife carried on as bootleggers. He sometimes had three stills and was evidently quite a producer and distributor of illicit liquor. She did her part by keeping the books. After national repeal he had a beer garden in East Omaha, which is in Iowa. She testified that his place was well patronized, and he testified that it had to be closed at the end of the summer and that it produced only $200 profit for him and his partner in two months. When their separation occurred, she testified he had about $12,000 in a safety deposit box. He claims he lost it in his business. It is impossible from the evidence to trace appellant's assets so as to find any substantial amount in his hands at the time of the trial.

We think the court was justified in assuming that any man of defendant's business and qualities would be able to secure and pay the alimony decreed. The monthly payments for support of the children are subject to change and to modification by the district court on proof of changed conditions. The allocation of title in the home and the possession thereof by the wife were wise and proper. The attorney fee was not unreasonable in such a case.

The judgment of the district court is affirmed, with an allowance of $100 attorney fee for appellee in this court.

AFFIRMED.

LEAH HIMELBLOOM, APPELLANT, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 7, 1934. No. 29038.

1. Insurance: POLICY: CONSTRUCTION. The rule to construe ambiguous or inconsistent terms of a life insurance contract in favor of insured, because insurer selected the language used, does not justify the imposing of insurance risks not assumed.
2. ———: ———: ———. In construing terms of an insurance contract, pertinent provisions of the entire instrument should be considered.
3. ———: ———: ———. In a life insurance contract, an agreement by insurer to waive premiums in the event of total and permanent disability of insured may be made to depend on continuance of that condition for six months and the policy in suit is so construed.

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

Leon & White, for appellant.

Harley G. Moorhead and *LeRoy A. Lincoln, 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 3,000-dollar policy of life insurance issued May 7, 1932. Ben Himelbloom was the insured and his minor son, Yale Himelbloom, was the beneficiary. Insured died February 13, 1933. Leah Himelbloom, guardian of the beneficiary, is plaintiff. Metropolitan Life Insurance Company, insurer, is defendant. The district court sustained a demurrer to the petition and, upon failure of plaintiff to plead further, the action was dismissed. Plaintiff appealed.

The sufficiency of the petition to state a cause of action for insurance is the question presented by the appeal. A copy of the insurance contract is part of the petition and requires consideration in determining the issue. The insurance risk was in the form of a 20-year endowment

policy to which was attached a waiver of premiums in the event of insured's total and permanent disability as defined in the instruments executed. The policy required payment of half the annual premium, or $80.67, on the seventh day of November and of May each year for 20 years or until the prior death of insured. Half the first annual premium was paid and kept the insurance in force until November 7, 1932, with 31 days of grace. The premium payable November 7, 1932, was never paid. The following provisions under the heading, "Total and Permanent Disability—Waiver of Premiums," were parts of the insurance contract:

"Metropolitan Life Insurance Company,

In consideration of the application for this contract, as contained in the application for said policy, the latter being the basis for the issuance hereof, and in consideration of four dollars and forty-four cents, payable ½ annual as an additional premium herefor, such payment being simultaneous with, and under the same conditions as, the regular premium under the said policy, except as hereinafter provided,

"Hereby agrees that, upon receipt by the company at its home office in the city of New York of due proof—in writing—that the insured has become totally and permanently disabled as herein defined, and under the conditions and provisions herein stipulated,

"It will waive the payment of each premium becoming due under said policy and this supplementary contract, during the continuance of such disability beginning with the premium the due date of which next succeeds the date of commencement of such disability, provided, however, that no premium shall be waived, the due date of which is more than one year prior to the date of receipt at the home office of the company in the city of New York of written notice of claim hereunder.

"In case any premium on said policy and this supplementary contract is in default before receipt at the home office of the company in the city of New York of

written notice of claim hereunder, waiver of premium hereunder shall be made only if such notice is so received within one year of the due date of the first premium in default, and either, (a) the total disability for which claim is made commenced prior to the due date of such first premium in default, or, (b) the total disability for which claim is made commenced subsequent to the due date of such first premium in default but within the grace period allowed by said policy for payment of such premium, in which case however the insured shall be liable to the company for such premium in default with interest at 6 per cent. per annum compounded annually which amount may be deducted from any amount payable under said policy.

"Total and Permanent Disability Defined—Total and permanent disability is disability resulting from bodily injury or disease which disability wholly prevents the insured from engaging in any and every business or occupation and from performing any work for compensation or profit and which disability has continued uninterruptedly for a period of at least six months (such disability of such duration being deemed to be permanent only for the purpose of determining the commencement of liability hereunder)."

The petition contains pleas that the policy and the waiver of premiums were executed and delivered; that the premium of $80.67 and the additional consideration of $4.44 for waiver of premiums were paid; that the policy was in force November 1, 1932; that insured, by infection of his gall bladder and by abscesses of his liver became totally and permanently disabled November 1, 1932, and remained in that condition until February 13, 1933, when he died; that premiums after November 1, 1932, were waived; that plaintiff performed all obligations which the contract imposed upon him; that the insurance was in full force from the date of the policy until the death of insured. The beneficiary stated his position as follows:

"The insured was totally and permanently disabled within the meaning of the policy, and a construction of the policy consistent with reason warrants the finding that the policy was in force at the time of the insured's death. This case presents one proposition—Was the insured relieved from the payment of the premium which became due after November 1, 1932, and at a time when the insured was totally and permanently disabled?"

On this proposition it was argued at length that the insurance contract provides for the waiver of premiums in the event of total and permanent disability and thereafter attempts, inconsistently, by definition, to make the waiver inoperative unless the disability continues uninterruptedly for a period of six months; that the limiting definition is not exclusive; that the death of insured, had it occurred during the period of grace, without payment of the premium due November 7, 1932, would have established beyond question the right of recovery on the policy; that the disability was no less total and permanent because insured did not linger for the entire period of six months; that the supplemental agreement for the waiver of premiums in consideration of $4.44, in view of the entire insurance contract and the alleged total and permanent disability beginning November 1, 1932, while the policy was in force, and continuing until the death of insured February 13, 1933, waived the premium payable November 7, 1932.

On the other hand, insurer's advocate stated at the bar that there was no waiver of premiums unless total and permanent disability of insured continued for six months. Why that plain, simple and direct language was not inserted in the contract instead of the lengthy, involved provisions hereinbefore quoted from the written instruments in controversy is not explained.

Waiver of premiums and the terms of the waiver were lawful subjects of contract. The right of competent persons to enter into lawful contracts is fundamental. Parties to contracts may express their agree-

ments in their own language unless specific forms are prescribed by law. It is not the province of courts to make contracts for parties or to extend by interpretation written language therein beyond its proper import. The rule to construe ambiguous or inconsistent terms of an insurance policy in favor of insured, because insurer selected the language used, does not justify the imposing of insurance risks not assumed. In the present instance fraud is not alleged. There is nothing to show that the writings are at variance with the agreements actually made. Reformation of the policy is not sought. The action is based on the insurance contract as executed. The claim of plaintiff is a demand for insurance under the terms of the policy. Liability was limited by the insurance contract to the period for which the premium was paid. Plaintiff has no right to a recovery unless the premium payable November 7, 1932, was waived; insured's death having occurred after the period of grace expired. The insurance contract shows on its face that it does not anywhere contain an unconditional promise to waive any premiums in the event of total and permanent disability. The waiver and the consideration therefor are limited by such conditions, phrases and clauses as "Except as hereinafter provided;" "Under the conditions and provisions herein stipulated;" "Provided, however, that no premium shall be waived." The promise is followed by a definition that what is meant is a total and permanent disability which continues for six months. The limitations and conditions as well as the promise of a waiver are parts of the contract and their true import cannot be disregarded. While insured was in fact totally and permanently disabled November 1, 1932, and remained in that condition until his death, February 13, 1933, he did not so remain for six months within the meaning of the policy. There does not seem to be such an ambiguity or inconsistency in the insurance contract as to require a construction binding insurer by a waiver of premium.

AFFIRMED.

DOROTHY SMYTH NIELSON, APPELLANT, V. A. B. KAMMERER, ADMINISTRATOR, ET AL., APPELLEES.

FILED DECEMBER 7, 1934. No. 29033.

Evidence in the record examined *de novo*, and *held* insufficient to sustain plaintiff's cause of action.

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

Littrell & Patz, for appellant.

Dort & Witte, contra.

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

EBERLY, J.

This is an action in equity, in effect to secure the specific performance of a claimed contract of adoption, whereby, it is alleged, Fred P. Smyth, and his wife, Hannah Marie Smyth, stipulated and agreed "that, in consideration of their being permitted to take this plaintiff (Dorothy Smyth Nielson, who will also be referred to herein as "Dorothy") into their home as their own child, that they * * * would adopt this plaintiff and make her as their own child and daughter." These allegations were denied by the defendants who are the natural heirs of Fred P. Smyth. It is also admitted in the record that Fred P. Smyth died intestate on June 23, 1931, and the defendants named are his surviving legal heirs and next of kin. This issue was tried to the district court and determined in favor of the defendants. Plaintiff appeals.

We are committed to the doctrine that a contract to adopt the daughter of a stranger, made by parties otherwise competent to contract and established by sufficient satisfactory evidence, may be enforced by specific performance, where she has fully performed her part, and its nonfulfilment by the promisors would amount

to a fraud on the party who has thus fully performed. *Kofka v. Rosicky,* 41 Neb. 328; *Pemberton v. Heirs of Pemberton,* 76 Neb. 669; *Peterson v. Bauer,* 83 Neb. 405; 1 C. J. 1376.

Sections 43-101 to 43-112, Comp. St. 1929, provide for adoption. It is obvious that a contract to adopt made in this state must be construed in reference to these provisions, and that the limitations embodied therein, express or implied, are necessarily applicable to contracts to adopt. Valid contracts may be made and entered into only by parties who, in view of the subject-matter, are competent to make them. The provisions of section 43-102 prescribe at least by fair implication the qualifications of one assuming by contract or by court proceeding to relinquish custody and control of a minor child, and consent to its adoption by another. In consideration of this section, this court in *Tiffany v. Wright,* 79 Neb. 10, 14, employed the following language:

"For the beneficent purpose of providing homes for homeless infants, all of the states of this Union have enacted statutes of adoption, which are of civil and not of common-law origin. These statutes are all primarily based upon the consent of the child's parent, or parents, if living and accessible, and the exceptions, which permit adoption without such consent, must clearly come within the provisions of the statutes. *Furgeson v. Jones,* 17 Or. 204; Rice, American Probate Law and Practice, pp. 551, 552."

In the present case plaintiff's evidence is, in effect, in part as follows: That her father died on November 3, 1909, and her mother died on February 6, 1914. At the time of her mother's death plaintiff was seven years of age, and her older sisters, Mate Henning and Phame Claussen, were married, Mrs. Henning living in Fairbury, Nebraska, and Mrs. Claussen residing in North Platte, Nebraska. At the time of her death plaintiff's mother called plaintiff's elder sisters together and gave the custody and care of plaintiff and her younger

brother into their keeping. Mrs. Claussen, after the mother's death, took the baby boy, and Mrs. Henning kept plaintiff in her home in Fairbury for three years. In 1917 Mrs. Henning permitted plaintiff to go out in the country with a family by the name of Kneider to perform domestic services. In October, 1917, Mrs. Henning with her husband was compelled to remove to North Platte on short notice. Before leaving Fairbury, Mrs. Henning had a brief talk over the telephone with plaintiff and arranged with a Mrs. Marietta to look after Dorothy until such time as she could send for her; that she did not abandon Dorothy nor did she give Mrs. Marietta custody of her. However, Dorothy becoming dissatisfied with her surroundings at the Kneider home, at Mrs. Henning's request, Mrs. Marietta sent for Dorothy, brought her to Fairbury, and placed her in the home of a Mrs. Blachert. She arrived in Fairbury about October 17, 1917, and remained in the Blachert home from October 19, 1917, to February 14, 1918. At this time plaintiff entered the Smyth family under arrangements made orally by Mr. and Mrs. Smyth with Mrs. Blachert, which were in turn approved by Mrs. Marietta. The exact nature of the engagements entered into at this time is a matter of disputed evidence. However, we deem this question of no practical importance. The child was then 12 years of age, and as a minor was within the purview of section 43-102, Comp. St. 1929. Her parents having died, and no guardian having been appointed, the applicable provision was: "Sixth. Any person, corporation or association that shall have had the lawful custody or control of any minor child for the period of six months last preceding, for the support of which neither parent shall without just cause or fault have contributed anything whatever during such period, may consent to its adoption." Comp. St. 1929, sec. 43-102, subd. 6. Obviously, neither Mrs. Marietta nor Mrs. Blachert, under the statutory limitation quoted, were persons competent to make a contract for adoption or

consent to adoption in February, 1918. Therefore, it would follow that any contract of adoption, if then made, would have been invalid for want of competent parties. That no contract for adoption had been entered into by the Smyths with these parties prior to February 25, 1918, may well be inferred from Mrs. Marietta's letter written to the Smyths on that date, in reference to plaintiff, after a demand had been made by her sisters on the Smyths for the return of Dorothy to North Platte, Nebraska. In this connection, Mrs. Marietta says in this letter, in part: "However, you have Mr. Smyth have some one in Pawnee county appointed guardian right away, some good friend of yours. Then he can control the child, or Mr. Smyth himself can be appointed guardian as Dorothy is an orphan child and has no legal guardian. Should you want to adopt her at some future time it would perhaps be better to have some one else appointed as guardian, then it would be easier to take out adoption papers later."

Not only were Mrs. Marietta and Mrs. Blachert at this time incompetent to consent to the adoption of Dorothy, because of lack of qualifying custody and control for the statutory period of six months, but the letters in evidence, written contemporaneously by Mrs. Marietta, contain expressions wholly inconsistent with the theory that an actual contract of adoption had been entered into by the Smyths with these parties at or prior to the dates thereof. This fact tends to negative the conclusion that such a contract was ever attempted to be made by any of these parties, and furnishes corroboration of the positive denial thereof by Mrs. Smyth.

It follows that the evidence relating to this point, taken as an entirety, must be deemed to fairly establish that at least prior to February 25, 1918, no valid contract of adoption binding upon the Smyths existed.

However, plaintiff claims that a valid contract of adoption was made thereafter by letters exchanged between the Smyths and Mrs. Henning. On this subject plaintiff's

evidence tends to establish, in substance, that, after Dorothy had been left with the Smyths, Mrs. Marietta notified Mrs. Henning at North Platte of what had been done. Mrs. Henning immediately repudiated the transaction, whatever its legal effects may have been, and wrote to plaintiff, inclosing $15, and requested her to leave the Smyths and come to her sister's home (Mrs. Henning's home) in North Platte. The Smyths thereupon returned the $15, and in a correspondence that followed, it is claimed, offered various inducements and promises to faithfully adopt Dorothy as their own child in consideration of her being permitted to remain with them as such. After Mrs. Henning had received many letters from the Smyths, in which it is claimed they pleaded for permission to keep Dorothy and promised to adopt her, Mrs. Henning sent her sister, Mrs. Claussen, to the Smyth home, for the purpose of investigation, where she visited for three days. To her, it is claimed, the promises of the Smyths as to adoption were reiterated, but Mrs. Claussen's evidence is to the effect that she then made no contract, but informed the Smyths that it was necessary that Mrs. Henning consent. Mrs. Claussen thereupon went back to North Platte and reported the situation to her sister, Mrs. Henning, who thereafter, in reply to a letter from the Smyths asking permission to adopt Dorothy, by a letter written by her consented to such adoption. The sisters, Mrs. Claussen and Mrs. Henning, each claim to have read all letters received from the Smyths relating to this subject, and to have personal knowledge of all letters sent in reply to these letters thus received from the Smyths. The plaintiff likewise claims to have been present in the Smyth home when these letters were written and received, and thus to have obtained knowledge of the contents thereof.

Plaintiff's witnesses testify that these letters have been destroyed or lost, and upon the basis of this foundation testify to the statements of the Smyths therein

contained. None of the letters sent to the Smyths on the subject of the adoption, in the year 1918 or later, could be found or produced. The trial court then properly permitted secondary evidence of the contents of all these communications. While plaintiff's witnesses testify that the letters of, and which were signed by, "Mr. and Mrs. Smyth" contained direct offers to adopt plaintiff, Mrs. Smyth positively denies this testimony and asserts no adoption agreement was ever made or proposed by her husband and herself, or ever assented to by her or her husband. Mrs. Smyth further testifies that in response to a letter written by herself and husband, substantially contemporaneous with the sending of a telegram in February, 1918, relative to keeping Dorothy in the Smyth family, Mrs. Henning replied as follows: "She (Mrs. Henning) said you can keep Dorothy but you can't adopt her because mother made us promise before she died, either said before she died on her death bed or before she died not to let any one adopt those two little ones." She also testifies that nothing was done by the Smyths towards the adoption of the plaintiff, no adoption proceedings were ever had, and no offer or agreement to adopt was ever made by the Smyths; further, that the child was taken into their home; that both her husband and herself loved Dorothy, they became much attached to her, and treated her, while she was living with them, in all respects as a natural daughter would have been treated by them. It will be remembered that this conflicting evidence was entirely oral and was adduced in the presence of the trial judge.

In this connection, Mrs. Grace Thoman, a Red Cross nurse employed in Pawnee county, testified that in 1923 or 1924, while she was sharing Dorothy's room at the Smyth home, in a conversation had with Dorothy, the following statement was made by the latter: "She (Dorothy) told me very definitely and proudly * * * she said that she wasn't an adopted child because her mother

had requested definitely they weren't to be,—the younger children were not to be adopted."

So, also, Rev. Isaac Crawford Rankin, aged 73 years, a retired minister of the United Presbyterian Church and a resident of Kansas at the time of testifying, but who followed his calling at Burchard, Pawnee county, Nebraska, from 1924 to 1928, testified that, during seasons of bad roads in 1924 and 1925, Dorothy, the plaintiff, sometimes remained at the parsonage in Burchard for the night; that on one of these occasions he testifies the following occurred: "We were talking about her name Dorothy Smyth, and she said, 'My name is not really Smyth.' She said, 'My name is really Inman.' She said, 'I have been making my home at the Smyths and I am generally called Dorothy Smyth,' but she said, 'I have never been adopted by the Smyths.' Then she went on to state in the progress of the conversation that her mother had made her sisters, as I remember, two older sisters, promise not to permit any one to adopt either herself or her brother." Mrs. Haddie E. Rankin, wife of Rev. Rankin, was present when the foregoing statements were made, and fully corroborates her husband's evidence as to what was said. However, plaintiff positively and unequivocally denies the occurrence of these conversations.

The testimony of Mrs. Claussen, sister of plaintiff and a witness in her behalf, given on this subject, upon cross-examination, may be enlightening:

"Q. Mrs. Claussen, you say that a letter was written by Smyths to you or Mrs. Henning after they sent a telegram to you, about Dorothy's not coming home in response to some request that you had made? A. I did. Q. Now, did you write them a letter in answer to that? A. No; I did not. Q. Do you know whether your sister did? A. She did. Q. You know that she did? A. I do. Q. Was that the letter in which you said that you told the Smyths that, or that the Smyths were told that, you wouldn't permit the Smyths to adopt her,

that your mother had requested you to keep the family together, or words to that effect? A. Well, something to that effect. Q. There was such a letter written to the Smyths, was there not, by you or your sister? A. My sister. Q. Yes; in which you explained to them why you didn't want to consent to Dorothy's adoption? A. I think so. Q. And that was because your mother had requested you and your sister to keep the family together? A. The two children. Q. Yes; Dorothy and the smaller boy? A. Yes, sir. * * * Q. And you and your sister, Mrs. Henning, were both satisfied in the summer of 1918 after your visit with the Smyths to permit your sister Dorothy to remain there, weren't you? A. Yes. Q. And whether Smyths made an agreement to adopt Dorothy or not, you and your sister were perfectly willing that Dorothy remain with them, weren't you? A. Yes, sir. Q. So that the so-called adoption agreement that you speak of had nothing to do or did not change your mind, your attitude with reference to leaving Dorothy at the Smyth home, did it? A. No."

We do not attempt to abstract or epitomize the evidence in this record, which covers 885 typewritten pages. It unquestionably discloses that the Smyths received the plaintiff into their home and accorded her the love and advantages that a natural daughter might hope to receive. They called her their daughter, and introduced her as such to their friends. She addressed them as her parents. The advantages of schools and instruction were placed at her disposal. However, the crux of this case was the existence of an actual contract of adoption made and entered into by parties who were competent to contract. The burden of proof of this fact, as determined by the issues, is upon the plaintiff. The competent evidence on this point is oral, and was testified to by witnesses in the presence of the trial court. It is in irreconcilable conflict. It is axiomatic that mere numbers of witnesses do not necessarily determine the question of the preponderance of the evidence. Under the circumstances

presented by this record, the applicable principle appears to be the following:

"Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317. See, also, *State v. Delaware-Hickman Ditch Co.*, 114 Neb. 806; *City of Wilber v. Bednar*, 123 Neb. 324.

It follows that, on a trial *de novo*, it is now determined that the plaintiff in this case has not successfully carried the burden of proof, and the judgment of the district court is

AFFIRMED.

LLOYD P. WOLCOTT, APPELLEE, V. J. LESLIE WILES ET AL., APPELLANTS.

FILED DECEMBER 11, 1934. No. 29045.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676.

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

James E. Bednar, for appellants.

C. E. Tefft, contra.

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

GOSS, C. J.

This was an execution sale. Defendants appeal from the confirmation on the ground (1) that the order of confirmation is not supported by the evidence; and (2) that the sale was for less than one-fourth of the decree and to allow a deficiency judgment for three-fourths of the decree would be inequitable and unconscionable.

The land is 104 acres with no buildings. It was bid in by plaintiff and sale confirmed at $6,000.

Appellants' evidence consists of three affidavits: One from a farmer, fixing the value at $7,500; one from the manager of an elevator, fixing the value at $7,500; and the third from a banker, fixing the value at $7,800. Appellee's evidence was the testimony of one engaged in the real estate and mortgage loan business, fixing the value at $65 an acre. This is all the evidence. There is no offer of any kind in any way assuring a higher bid in case of another sale.

"Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White,* 122 Neb. 676. The spread between the sale price and the value fixed upon the land by the witnesses is not so great as to produce either of these results.

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: FIRST NATIONAL BANK OF OMAHA, INTERVENER, APPELLEE.

FILED DECEMBER 11, 1934. No. 29073.

1. **Banks and Banking:** CERTIFIED CHECKS. A certified check operates as an assignment of funds to the credit of the drawer with the bank. Comp. St. 1929, sec. 62-1606. Merely changing its credits or its creditor does not augment the assets of the bank.

2. ———: ———: TRUSTS. In the absence of special circumstances creating the relation of trustee and beneficiary, the holder of a certified check is a creditor of the certifying bank and a holder of exchange, and not the beneficiary of a trust. *State v. Farmers & Merchants Bank*, 123 Neb. 358.

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

F. C. Radke, Hanley & O'Brien and *Barlow Nye*, for appellant.

Finlayson, Burke & McKie, contra.

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

GOSS, C. J.

E. H. Luikart, receiver of the State Bank of Omaha, appeals from a judgment allowing, as a trust fund, with priority over all other creditors, the claim of the First National Bank of Omaha.

This claim was based on a check for $1,371.60, drawn by Vincent Grain Company on its account in the State Bank of Omaha, to take up a draft, with bill of lading attached covering a car of grain, of which check claimant had become the owner in due course of business. Vincent Grain Company presented its check to the First National Bank on August 8, 1931. Vincent Grain Company was asked to get the check certified, which it did on the same day. The First National Bank accepted it and surrendered the bill of lading. This certified check was duly presented for payment and was refused for the reason that the State Bank of Omaha had been taken over by the department of trade and commerce at the close of business on August 8, 1931. The above facts are taken from the bill of exceptions, which contained nothing but a short stipulation of facts.

There was and could be no augmentation of the assets of State Bank of Omaha by the process described. When the check was certified it operated as an assignment to

the holder of $1,371.60 of the funds to the credit of Vincent Grain Company in the bank. Comp. St. 1929, sec. 62-1606. Merely changing its credits or its creditor did not augment the assets of State Bank of Omaha.

In the absence of special circumstances creating the relation of trustee and beneficiary, the holder of a certified check is a creditor of the certifying bank and the holder of exchange, and not the beneficiary of a trust. *State v. Farmers & Merchants Bank,* 123 Neb. 358; *State v. First State Bank of Alliance,* 123 Neb. 23; *State v. South Omaha State Bank,* 126 Neb. 46. No special circumstances are shown.

The judgment of the district court is reversed and the cause remanded for a decree in conformity with this opinion.

REVERSED.

GUY E. TATE, APPELLANT, V. LOUIS J. KRENTZ ET AL., APPELLEES.

FILED DECEMBER 11, 1934. No. 29063.

1. **Specific Performance.** Specific performance of an unrecorded contract to purchase real estate, the price not having been paid, is not demandable as a matter of right and depends on the circumstances of each particular case and the sound discretion of a court of equity.
2. **Vendor and Purchaser: CONTRACT: ABANDONMENT.** The parties to an unrecorded contract for the sale and purchase of real estate, the price not having been paid, may destroy the written instrument itself or abandon it by parol.

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

Charles W. Haller and *Guy E. Tate,* for appellant.

Gray & Brumbaugh, contra.

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

ROSE, J.

This is a suit in equity for specific performance of a contract obligating Louis J. Krentz to sell and convey to Guy E. Tate, plaintiff, lots 7 and 8, block 105, with the dwelling-house thereon, in the village of Bellevue. Louis J. Krentz, owner of the lots, Margaretta Krentz, his wife, Jesse Cunningham and Mary Cunningham are defendants. Plaintiff Tate resided in Omaha, Nebraska, and defendants Krentz in Cheyenne, Wyoming. It was alleged in the petition that, beginning March 2, 1933, and ending May 20, 1933, a contract of sale and purchase, for the consideration of $1,000, subject to encumbrances, was made by correspondence pleaded in full; that plaintiff tendered $1,000 and otherwise complied with the terms of his purchase; that Louis J. Krentz refused to convey the lots to plaintiff; that on May 17, 1933, A. B. Bachelder, as agent for Louis J. Krentz, without authority, agreed to sell the same real estate to Jesse Cunningham who placed the agreement on record, thus clouding the title; that Jesse Cunningham, with knowledge of plaintiff's purchase, entered into the Bachelder contract of sale.

Defendants Krentz, in their answer, admitted the correspondence terminating in the agreement to sell the lots to plaintiff, but alleged among other defenses that Louis J. Krentz went to Omaha on May 22, 1933, to make the transfer, delivered to plaintiff the abstract of title and the key to the premises and was ready and willing to comply with the contract pleaded in the petition, but that plaintiff refused performance on his part, returned the key, arranged for the redelivery of the abstract, abandoned his contract and so stated; that thereafter Louis J. Krentz accepted Jesse Cunningham's offer of purchase and delivered to him a warranty deed before learning of plaintiff's present claim or suit.

Defendants Cunningham admitted the making of the Bachelder contract and alleged that it was approved by Louis J. Krentz; that under it they went into possession

of the premises and afterward received a warranty deed from the owner before the bringing of the present suit and are now owners of the fee. The replies to the answers amount to denials of matter not admitted in the petition.

Upon a trial of the cause the district court found the issues in favor of defendants and dismissed the suit. Plaintiff appealed.

The assignment of error is that "the decree is not supported by the evidence and is contrary to law." The making of the contract pleaded in the petition is definitely shown by the proofs. Whether the circumstances were such as to justify the conclusion that the parties abandoned it is the material inquiry on the issues of fact. There is evidence tending to prove good faith on the part of Louis J. Krentz in an attempt to carry out his agreement. He wired he would arrive soon in Omaha to sign the papers. He delivered to plaintiff the abstract and the key promptly and said he was ready to make the deed. Early in the negotiations plaintiff was confronted with the necessity of prompt and decisive action on his part. He had been warned by wire to make immediate reply to the terms of sale offered or a deal with another party would be closed. He had been told a sale was necessary. Knowing Jesse Cunningham and Bachelder were engaged in negotiations, plaintiff, without conferring with them, carried on his correspondence with the owner at Cheyenne, Wyoming. In this situation there is testimony tending to prove that plaintiff never paid to Louis J. Krentz any pecuniary consideration for the property. The contents of tender, if properly made, remained in the hands of plaintiff. His contract was not recorded. Before the owner refused to make a conveyance to plaintiff, the latter knew Jesse Cunningham, who had been negotiating with Bachelder as agent, was in possession making improvements. Plaintiff had received the abstract and the key with assurance that the owner was ready for immediate performance. In this

connection there is testimony that plaintiff said to the owner, when returning the key, there "was quite a mess down there;" that "I guess this lets me out;" that the abstract was also returned to the owner who testified he relied on these statements and the attitude of plaintiff as thus implied, closed the deal negotiated by Bachelder and deeded the lots to Jesse Cunningham. Neither the agent nor the grantee acted in bad faith or in fraud of plaintiff's rights. The deed was placed on the public records and the legal title was in the grantee before the present suit was brought. While plaintiff's testimony is to the effect that he did not regard the accepting and returning of the key as an emblem of possession or of the surrender of possession and that he did not abandon his rights under his contract of purchase, the better view of the entire record seems to be that the owner of the lots was justified, under the circumstances, in treating the statements and attitude of plaintiff as an abandonment of his contract and in acquiescing therein.

It is a salutary rule that specific performance of an unrecorded contract to purchase real estate, the price not having been paid, is not demandable as a matter of right but depends on the circumstances of each particular case and the sound discretion of a court of equity.

Another rule of equity is that the parties to an unrecorded contract for the sale and purchase of real estate, the price not having been paid, may destroy the written instrument itself or abandon it by parol.

In view of these precepts and the conclusion reached on the facts, plaintiff was not entitled to a decree for specific performance. It follows that the suit in equity was properly dismissed.

AFFIRMED.

ORA WALTER LAWRENCE ET AL., APPELLANTS, V. EQUITABLE LIFE INSURANCE COMPANY OF IOWA, APPELLEE.

FILED DECEMBER 11, 1934. No. 29047.

1. **Contracts**: CONSTRUCTION. Construction and legal effect of a written contract are governed by the law of the state in which it is made, if the parties thereto are residents of, and the contract is to be wholly performed in, such state.
2. **Insurance**: CONTRACT: CONSTRUCTION. Under the law of Iowa, "A policy which provides for benefits if the insured becomes 'wholly and *permanently* disabled' does not embrace recovery for a disability which has been total for years, but which has *terminated* at the time action for recovery is instituted." *Hawkins v. John Hancock Mutual Life Ins. Co.*, 205 Ia. 760.
3. **Evidence**. Under the law of Iowa, parol evidence is inadmissible to prove the meaning of terms of an unambiguous written contract.

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

Raymond N. Klass and *Sam E. Klaver*, for appellants.

Brogan, Ellick & Shoemaker, *R. B. Hamer* and *Phineas M. Henry, contra.*

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

GOOD, J.

This is an action to recover indemnity under a supplemental agreement incorporated in a life insurance policy. After all the evidence had been adduced, the trial court discharged the jury and entered judgment for defendant. Plaintiff has appealed.

Plaintiff and defendant are, and were at all times material to this cause, residents of Iowa. The policy was issued and delivered in that state. The premiums were payable to the defendant and any benefits accruing to plaintiff were payable in Iowa. There is no substantial conflict in the evidence.

The allegations of the petition, material to a determination of this controversy, are: That the policy was

issued February 25, 1929; that March 20, 1929, plaintiff became totally and permanently disabled by sickness, as a result of which he was totally, continuously and permanently disabled from performing and was unable to perform any of the duties of, and did not engage in, any gainful occupation for wage or profit; that said total and permanent disability continued until October 1, 1930; that plaintiff performed all conditions required by the policy and had made demand for the payment of indemnity, which defendant refused, on the ground that insured's disability was not of such a permanent character as was covered by the disability provision of the policy.

Defendant admitted the issuance and delivery of the policy, the residence of the parties, and also that said contract of insurance is an Iowa contract and governed by the laws of that state; that, under its law and decision of the supreme court of that state in *Hawkins v. John Hancock Mutual Life Ins. Co.*, 205 Ia. 760, no recovery can be had for total and permanent disability benefits when the action to recover same is commenced after total disability of insured is terminated. In his amended reply plaintiff alleged that at the time the application was executed plaintiff made an oral agreement with the agent of defendant, to the effect that the term, "total and permanent disability," as used in the policy, would mean, in the event said insured should suffer a total disability, the continuance of such disability for a period of 60 days, and if, at the end of said 60 days, such total disability continued, such fact would be accepted by defendant as permanent total disability and would entitle the plaintiff to disability benefits for the period of such disability, and that the instant case was ruled by the case of *Kurth v. Continental Life Ins. Co.*, 211 Ia. 736. Plaintiff further pleaded several sections of the Iowa statute which defined the terms, "soliciting agent" and "general agent" of an insurance company, and also other sections providing against discrimination or distinction between persons insured in the same class and

equal expectancy, and further pleaded the statute, which is similar to our own, that, when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

The supplemental agreement, under which plaintiff seeks a recovery, provided:

"If during the lifetime of the insured and the continuance of this policy and before its maturity or default in payment of the premium * * * due proof is furnished to the company at its home office that the insured has become totally disabled by bodily injury or disease so that he will thereby be permanently, wholly and continuously prevented from engaging in any occupation whatsoever for remuneration or profit and that such disability has then existed for not less than sixty days, * * * it (the company) will, during the continuance of such disability,

"(a) Waive the payment of the premium falling due on each anniversary.

"(b) Pay to the insured each month a sum equal to $10 for each $1,000 of the face amount of the policy."

It was further provided: "The company may at any time and from time to time, but not oftener than once a year, demand due proof of such continued disability and upon failure to furnish such proof, or if it appears that the insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made." There was a further provision that the face amount of the policy should not be diminished on account of any premium waived or disability income payments made, nor should such waived premium or income payments be deducted in any subsequent settlement of the policy.

Plaintiff contends that the quoted provisions are ambiguous as to the meaning of the term "permanent;" that the provision is susceptible of two constructions:

(1) To continue during life of insured; (2) that, if the total disability continues for 60 days, it will be deemed permanent, and that parol evidence may be introduced to determine the meaning of an ambiguous expression used in the contract. A number of decisions of this and other courts are cited, tending to sustain the contention that such a provision is ambiguous.

The policy in controversy was an Iowa contract between Iowa residents and to be wholly performed in the state of Iowa. The Iowa law, so far as applicable to the policy, became a part thereof as much as though it had been incorporated in the policy. The policy and its provisions must be interpreted pursuant to the laws of that state. If it is ascertained that no recovery can be had under the policy under the laws of Iowa, then it follows that no recovery can be had in this state, and it is wholly immaterial what the holding of this or any state, other than Iowa, may be with reference to the same or similar provisions in policies of insurance.

Defendant pleaded the opinion and decision in the case of *Hawkins v. John Hancock Mutual Life Ins. Co.*, 205 Ia. 760. In that case the supreme court of Iowa had under consideration a policy of insurance, containing provisions so similar as to be substantially identical with those presented in the instant case. In that case the court held: "A policy which provides for benefits if the insured becomes 'wholly and *permanently disabled*' does not embrace recovery for a disability which has been total for years, but which has *terminated* at the time action for recovery is instituted."

In that case plaintiff alleged that on or about the 1st day of March, 1922, he became wholly and permanently disabled and remained wholly and permanently disabled until November 1, 1925. The policy also contained provisions for waiver of premiums and payment of benefits during the continuance of such disability, and that such waived premiums and benefits should not be deducted from the amount payable under the policy at maturity,

and in all material respects was like the policy under consideration in the instant case. In the opinion it was said (p. 764):

"'Permanent' cannot be given the meaning of its antonym, 'temporary.' Unless it means 'permanent,' it has no practical significance.

"In the light of these considerations, we are of the opinion that the plaintiff must fail. The proofs offered by him to the company in support of his claim show that, at the time they were made, the insured was not wholly disabled."

The effect of the holding is that the terms "permanent" and "permanently," as used in the policy, must be given their usual and ordinary meaning, and that, if the total disability continued for more than six months, but thereafter terminated, it could not be considered to be permanent, within the meaning of the policy. It would necessarily follow that if the term could be given but the one meaning there was no uncertainty or doubtful meaning, and therefore no ambiguity.

However, plaintiff argues that the holding in the *Hawkins* case has been superseded by a later decision of the supreme court of Iowa in the case of *Kurth v. Continental Life Ins. Co.*, 211 Ia. 736. In that case the terms of the policy were different. The court there held: "A policy of insurance which, *inter alia,* provides for indemnity 'if the insured shall furnish satisfactory proof that he has been wholly disabled * * * for a period of not less than 60 days, and that such disability is presumably permanent, and that he will be wholly and continuously prevented thereby from pursuing any gainful occupation,' does not require the proofs for initial indemnity to show that the disability is and will remain absolutely permanent and continuous." In the course of the opinion, in commenting upon a number of cases cited and relied upon by the defendant, the court said (p. 749): "In the *Lyon, Hurley,* and *Corsaut* cases, *supra,* this court was not required to take into consideration the

fact that the insurance company had by its own volition set a comparative standard for measuring total and permanent disability as respects the ability to pursue any gainful occupation. In the instant case, we are compelled to take such comparative measure into consideration. We are not receding from our former holding, but, by reason of the difference in the language of the contract in this case, the above cases relied upon by appellant are not controlling." In the *Kurth* case the *Hawkins* case was not specifically referred to, but other Iowa cases, holding to a like tenor, were mentioned. It appears clear that in the *Kurth* case the Iowa court was not receding from its holding in the *Hawkins* case. The construction given by the supreme court of Iowa to the policy provisions is controlling in this case.

On the trial plaintiff offered to prove that the agent, soliciting the insurance at the time of the application, thereafter stated to insured that the disability provisions of the policy of insurance meant, and were understood to mean, that, in the event plaintiff suffered a total disability which extended beyond the 60-day period, he was entitled to the benefits provided by the disability provisions of said contract, and that it was so understood by both the agent and plaintiff. Plaintiff cites and relies on section 11,275 of the 1931 Iowa Code which provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it"—and contends that the court erred in excluding the proffered evidence.

In a long line of decisions the supreme court of Iowa has held that the statute quoted above has no application to a written contract, unless it is of doubtful meaning, subject to more than one construction, or is ambiguous. Among the cases so holding are the following: *Rouss v. Creglow*, 103 Ia. 60; *Inman Mfg. Co. v. American*

Cereal Co., 133 Ia. 71; *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83; *Barnett v. Lovejoy*, 193 Ia. 678; *Iowa Coal Washing Co. v. Consolidation Coal Co.*, 204 Ia. 202; *Commercial Nat. Bank v. Crissman & Linville*, 214 Ia. 217. Under the Iowa law, the evidence was properly excluded, and that must control in a trial of the case in this state.

Plaintiff further contends that the construction placed upon the contract by the parties was ratified because the defendant, after notice of plaintiff's claim as to the construction of the contract, continued to accept the premiums on the policy. Plaintiff evidently overlooks the fact that the policy was still in full force and that plaintiff was but paying for the benefits which the policy provides he was entitled to, and defendant no more ratified plaintiff's construction than plaintiff ratified the construction placed upon the policy by defendant. We think there is no merit in this contention.

From an examination of the entire record, we fail to find any error committed by the trial court.

Whether this court, in construing a Nebraska contract, would make rulings similar to those herein made is not involved and is not decided.

AFFIRMED.

EARL H. WILKINS, GUARDIAN, APPELLEE, V. MARY E. DEAL ET AL., APPELLANTS.

FILED DECEMBER 11, 1934. No. 29031.

1. Guardian and Ward: SALE BY GUARDIAN. A guardian has no authority to sell personal property or invest the funds of the ward's estate without proper order of the county court.
2. ———: BOND OF GUARDIAN. Where a county court directed a guardian to give another bond because of the insolvency of the surety on a prior bond, and the guardian in compliance therewith procures a new bond, but no accounting was then had nor order of the court releasing the prior bond, the later bond is an additional and not a substitute bond.

3. ———: ———: LIABILITY. In such case, where the later bond is conditioned, as required by statute (Comp. St. 1929, sec. 38-110), the surety on such bond is liable for defalcation of the guardian whether the devastavit occurred before or after the bond was given.

4. ———: ———: ACTION ON BOND. "The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's final account by the county court." *Langdon v. Langdon*, 104 Neb. 619.

5. ———: ACCOUNTING: DECREE: CONCLUSIVE ON SURETY. The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties on the bond. *Hughes v. Langdon*, 111 Neb. 508.

6. ———: LIABILITY OF GUARDIAN AND SURETY. A guardian and surety on his bond are liable for the amount of funds of the ward which the guardian has invested without proper authority of the county court.

7. ———: BOND OF GUARDIAN: DUTY OF SURETY. The duty devolves upon the subsequent surety to ascertain the condition of the ward's estate before binding himself as surety on the bond.

8. ———: ———: LIABILITY OF SURETY. Where there are two sureties of a guardian given at different times, both are answerable for breaches committed prior to the execution of the second bond.

9. ———: ———: ———. The surety on the bond of a guardian, which provides that the guardian shall dispose of and manage the ward's estate and effects according to law and for the best interests of the ward, and shall faithfully discharge her trust as guardian, and at the expiration of her trust shall settle her accounts with the court and pay over and deliver all the estate in her hands or due from her on such settlement to the person or persons who shall be entitled thereto, is liable for the amount of a fund of a ward's estate which the guardian invested in stocks of a corporation without the authority of the county court, even though such investment was made before the bond was given.

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

Lester L. Dunn and *Woods, Woods & Aitken,* for appellants.

Sloans, Keenan & Corbitt, contra.

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

RAPER, District Judge.

Earl H. Wilkins, as guardian of George T. Price, incompetent, brought this action to recover on two guardian's bonds executed by Mary E. Deal, former guardian of George T. Price, incompetent, and her sureties. One of the bonds was given by Detroit Fidelity & Surety Company and the other by the Southern Surety Company of New York. The Southern Surety Company defaulted; issues were joined. Trial was had to the court without a jury, and judgment rendered against all three of the defendants in the sum of $11,665.67, from which Detroit Fidelity & Surety Company alone appeals.

The defendant Mary E. Deal was duly appointed guardian of George T. Price, incompetent, by the county court of Fillmore county, on April 4, 1930, and received the sum of $11,217.54 belonging to said estate from a former guardian whom she succeeded. Mary E. Deal qualified with a bond given by the United States Fidelity & Guaranty Company. On June 4, 1931, the surety on the bond was released and a new bond given, June 4, 1931, by the Southern Surety Company, which bond is conditioned as required by section 38-110, Comp. St. 1929, and also contained a clause which recites that it was substituted for a former bond of said guardian and is to be in force and take effect from and after April 20, 1931. Some time in 1932, the county judge was informed that the Southern Surety Company had been placed in receivership, and he told Mary E. Deal that she must furnish another bond. In a very few days thereafter, a man from Woods Brothers (either Mr. Aldrich or Mr. Adams) appeared and tendered the

bond for $12,000 of the Detroit Fidelity & Surety Company, on which this suit is brought, which bond was duly approved May 17, 1932, and is conditioned as required by section 38-110, Comp. St. 1929. The guardian made no report to the county court at that time.

On March 22, 1932, the supreme court of New York county, New York, placed the Southern Surety Company in the control of the superintendent of insurance, for liquidation, and enjoined the officers and agents of the company from transacting any further business.

The county court in July, 1932, cited the guardian to appear on August 12, 1932, and show cause why she should not be removed as guardian, and to render her account and to show by what authority she invested the ward's funds in an unauthorized investment. This citation was duly served on the guardian and on August 17, 1932, she filed her report which showed that she had invested $11,000 of the ward's funds in 110 shares of the preferred stock of Woods Brothers Corporation. No notice was served on the Detroit Fidelity & Surety Company. The hearing by agreement was continued until August 17, at which time the guardian answered alleging that she had on file a sufficient surety bond executed by the Detroit Fidelity & Surety Company, and that up to the present time (August 17, 1932), the ward had not suffered any loss as a result of the investment she had made. A hearing was had on the last named date at which the guardian was present with counsel and the court took the cause under advisement until September 15, 1932, at which time the court found and decreed that the guardian had made an improper and unauthorized investment of $11,000 in 110 shares of the Woods Brothers Corporation, and that the guardian has failed to restore said funds for the benefit of the ward, and that the guardian also has on hand the sum of $145.55 in cash or its equivalent, and she was discharged as guardian and Earl H. Wilkins appointed in her stead, and the court decreed there was due from

Mary E. Deal as guardian $11,145.55, which she was directed to pay over to her successor.

Woods Brothers Corporation was the agent and furnished the bonds for all three of the companies who became sureties for the guardian. Before the time the Southern Surety Company gave its bond, Mrs. Deal had purchased the 110 shares of Woods Brothers Corporation stock and, when the United States Fidelity & Guaranty Company was discharged, she signed them back to the Woods Brothers Corporation and brought to the court a draft for the $11,000 in lieu of the stock, and the next day, June 5, 1931, she reinvested the $11,000 in the same or like bonds. She then placed the bonds in a safety deposit box in the First Trust Company where they have since remained. Mrs. Deal testified that, while she has the keys to the safety deposit box, a Mr. Adams, who is an officer or employee in the surety department of the Woods Brothers Corporation, has joint control with her of the bonds as agent of the bonding company. She did not tender the stock nor the $145.55.

No appeal was taken from the order of the county court of date September 15, 1932.

Claim has been filed against the Southern Surety Company's receiver or proper officer in New York for the amount of the judgment herein.

Appellant Detroit Fidelity & Surety Company in its answer alleges and claims in its brief that its bond was given as a new bond and in substitution for the Southern Surety Company bond, which company had been dissolved by the New York court and was in effect legally dead, and that Mrs. Deal, the guardian, was in possession and custody of the Woods Brothers Corporation stock when the appellant's bond was given and therefore it is not liable for the investment in said bonds.

The appellant maintains that its bond is a substitute and not an additional bond, and is not retroactive, and it is not liable for a devastavit that occurred before its bond was approved.

The general rule is that where a bond is given during the incumbency of a guardian or administrator, whose term is not fixed, and there is no accounting made and no order of discharge of a former bond, it is an additional and not a substitute bond, and in such case the new sureties become liable for any misappropriation, defalcation or unauthorized investment of the ward's funds which occurred prior to the giving of the new bond. *Bromen v. O'Connell,* 185 Minn. 409, 82 A. L. R. 583; *Brooke v. American Savings Bank,* 207 Ia. 668; *Southern Surety Co. v. Tessum,* 178 Minn. 495, 66 A. L. R. 1136; *Abshire v. Rowe,* 112 Ky. 545, 99 Am. St. Rep. 302; *Newcomb v. Ingram,* 211 Wis. 88; *Maloney v. McCormick,* 181 Wis. 107; *Dugger v. Wright,* 51 Ark. 232, 14 Am. St. Rep. 48; *Southern Surety Co. v. State,* 74 Ind. App. 31.

In 82 A. L. R. 585, is an exhaustive note citing many cases to support the above stated rule. The compiler in that note states that in a great majority of cases the new bondsmen are held liable for a devastavit committed by the principal prior to the giving of the new bond. In some cases sureties are liable because the court construed such to be the intent of the bond; others, because of the express provisions of the statutes; others, because of both the terms of the bond and the statutes; because of the principal's obligation to make true account; and others, because of the principal's obligation to pay over as ordered upon his final accounting; others, because of the obligation upon the bond to account for all the estate.

In this state a guardian has no authority to sell personal property or invest the funds of the ward's estate without proper order of the county court. Comp. St. 1929, sec. 38-506; *Hendrix v. Richards,* 57 Neb. 794; *In re Estate of O'Brien,* 80 Neb. 125.

The duty devolves upon a subsequent surety to ascertain to his own satisfaction with reference to the condition of the estate before binding himself as surety on the bond. *Brooke v. American Savings Bank,* 207 Ia. 668; *Langdon v. Langdon,* 104 Neb. 619.

In support of its contention, appellant cites 28 C. J. 1289, where it is said: "In most states if the bond does not expressly provide that it shall operate retrospectively, the sureties are not liable for property received and converted or wasted by the guardian before the bond was given."

In *Bromen v. O'Connell*, 185 Minn. 409, the same proposition was presented and the citation from 28 C. J. 1289 considered. The court said: "We have given the cases cited in support of that dictum consideration. Some go to the extent stated, and some do not. Some are in point because of dicto rather than decision. To review them here would not be helpful. Of course, in the absence of apt language requiring it, fiduciary bonds are not given retrospective operation." That court's conclusion is sufficient in this present case on that point. Appellant concedes that a guardian's bond does cover property in the guardian's hands at the time it was given, although the guardian received the property before the execution of the bond, and therefore the bondsman is responsible only for the preservation of the property which the guardian had at the time the bond was filed, and that appellant is not liable for the unauthorized investment of the guardianship funds which occurred prior to the time its bond was given, and as the guardian still held the Woods Brothers Corporation stock, there was no breach of its bond in that regard.

The bond contains four conditions: First, to make and return a true inventory of all the estate of the ward; second, to dispose of and manage such estate according to law and for the best interests of the ward, and faithfully discharge her trust as such guardian; third, to render an account under oath of the property in her hands, and of the management and disposition of such property within one year after this appointment, and at such times as the court directs; and fourth, at the expiration of her trust she shall settle her accounts with the court, or with the ward or his legal represen-

tative, and shall pay over and deliver all the estate and effects remaining in her hands or due from her on such settlement to the person lawfully entitled thereto. It will thus be seen that it was the guardian's duty to manage the estate according to law and for the best interests of the ward, and to pay over and deliver to her successor all the estate and effects remaining in her hands. It cannot be gainsaid that the guardian did not manage the estate according to law. She invested a large sum in stocks without the approval of the court, and at the expiration of her trust she did not pay over to the plaintiff guardian the estate due from her on the final settlement. True it is, that she had purchased the stock before appellant's bond was given, but, under the authorities above cited, the appellant was nevertheless bound for her unauthorized investment, and even if there was no breach of the conditions on the first, second and third conditions, the fourth clearly was not complied with.

It could not be finally determined that the guardian was in default until there was a settlement of her account at the expiration of her trust, and no action could be maintained on the bond until such judicial settlement was had by the county court, and that court directed the guardian to pay over to the newly appointed guardian such property or funds as the court found due from her, and that decree of the county court became conclusive upon the guardian and the sureties on both the Southern Surety Company and appellant's bonds. *Langdon v. Langdon,* 104 Neb. 619; *Hughes v. Langdon,* 111 Neb. 508.

There is another feature that merits consideration. Woods Brothers Corporation was agent for every one of the three bonds given by Mrs. Deal, and when appellant's bond was furnished, its agent, Woods Brothers Corporation, knew or must have known that the investment in its stock was unauthorized and that the guardian would be required to account for the funds so invested, and Woods Brothers Corporation had joint control of

the stock through one of its employees, with the guardian, for the bonding company. With such knowledge of the condition of the guardian's acts, the appellant cannot claim exemption from a clear breach of its bond. Notice to an agent is notice to the principal, when such notice is received by the agent while acting in the scope of his authority. *Arendt v. North American Life Ins. Co.*, 107 Neb. 716.

The judgment of the district court is

AFFIRMED.

FRED F. SHIELDS COMPANY, APPELLANT, V. MOLLIE PITLOR ET AL., APPELLEES.

FILED DECEMBER 21, 1934. No. 29066.

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

Frederick L. Wolff, for appellant.

Harry Silverman, contra.

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

Per Curiam.

Plaintiff appeals from an adverse decision of the district court for Douglas county, in an action to foreclose a mechanic's lien. We have carefully examined the record and find the same to be free from reversible error. The judgment of the district court is therefore

AFFIRMED.

COZAD STATE BANK, APPELLEE, V. WILLIAM MCLAUGHLIN, APPELLANT.

FILED DECEMBER 21, 1934. No. 29093.

1. **Bills and Notes.** "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." Comp. St. 1929, sec. 62-201.
2. ———. "Value is any consideration sufficient to support a simple contract." Comp. St. 1929, sec. 62-202.
3. ———: ACCOMMODATION MAKER. "An 'accommodation party' is one who has signed an instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person." Comp. St. 1929, sec. 62-206.
4. ———: ———. "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." *Farmers Nat. Bank v. Ohman*, 112 Neb. 491.
5. **Banks and Banking:** POWERS OF PRESIDENT. "The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced." *Security Savings Bank v. Rhodes*, 107 Neb. 223.
6. **Trial:** DIRECTION OF VERDICT. Facts reviewed, and *held* (1) that plaintiff was not an accommodation payee of the note in suit; (2) that the court did not err in instructing a verdict for plaintiff.

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

Frank M. Johnson, for appellant.

Cook & Cook, contra.

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

GOSS, C. J.

Defendant appeals from a judgment on a note. The verdict was instructed by the court at the end of evidence on both sides.

The note was a demand note for $4,000, made by defendant in favor of plaintiff and dated November 21, 1932. Defendant had first made a like note in favor of plaintiff in October, 1926. About every six months the existing note would be taken up by a renewal signed by defendant and delivered to plaintiff, who was the payee in all of them.

Defendant pleaded that the original note and all renewals, of which the note in suit was the culmination, had been without any consideration; that C. P. Hord, president and managing officer of the bank, induced defendant to sign the first note by representing the bank to be in good financial condition but having certain slow paper or notes which the banking department demanded to be removed from the bank, that the signing of the note "would be an accommodation to the bank and was only intended to enable said plaintiff to remove for the time being the certain notes which had been objected to by the department of trade and commerce; that defendant would never be called upon to pay either the principal or interest on said note."

Defendant further pleaded that, when the first note was given, he asked Hord to have the bank give him its note or memorandum to show that there would be no liability on defendant to pay his note to the bank. Hord stated this could not be done because, if the bank gave defendant a note, it would have to be set up as a bank liability. So C. P. Hord offered to give and did give plaintiff his own personal note, to be held by defendant and returned when defendant's note was returned by the bank. Defendant further alleged that, at Hord's own suggestion, the latter left with defendant 25 shares of stock of plaintiff bank and 12 shares of stock of the T. B. Hord Grain Company, but that this stock was returned to Hord in April, 1930, when a change in the ownership and management of the bank was contemplated.

The evidence showed that defendant had been president of plaintiff bank, but had sold out in 1918 and had re-

moved to California in 1920. He resided there in 1926 when Mr. Hord called upon him and induced him to make the first note of which the note sued upon is the last renewal. Hord exchanged notes with him and a few days later sent him the stock referred to in the pleadings. After various renewals and exchanges of notes the stock was given up to Hord, but defendant still retains the last Hord note. The evidence further shows that, when the first note of defendant was put in the bank, C. P. Hord took out of the bank the certain notes that had been criticized by the banking department and to the extent of its face value substituted defendant's note. He claims to have expected to collect the notes taken out and with the proceeds to pay his note given to defendant, and the fund would, in turn, enable defendant to pay his note held by the bank. But this never happened and the suit resulted when, some time after the bank changed hands, the new management desired payment or security for the McLaughlin note. Defendant testified in substance and effect what he pleaded.

Defendant argues that the question should have been submitted to the jury to determine the weight and sufficiency of the evidence on the question as to whether McLaughlin was not the accommodation maker of the note for the benefit of the payee bank and therefore not liable. Section 62-201, Comp. St. 1929, says: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." Section 62-202, Comp. St. 1929, says: "Value is any consideration sufficient to support a simple contract." Section 62-206, Comp. St. 1929, says: "An 'accommodation party' is one who has signed an instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person." It is undisputed in the evidence that C. P. Hord received notes from the assets of the bank and gave the bank in lieu thereof McLaughlin's note, for which he gave his own note, secured by a pledge of some certificates of

stock. McLaughlin knew he was lending his name to some other person and that he was receiving a valuable consideration when he took Hord's note and the pledge of the stocks. He renewed his note every six months and took a renewal of the Hord note each time for six years, in the meantime surrendering the stock pledged as security.

Treating directly the subject of consideration it is said: "If A, as an accommodation to B, and in consideration of his promise of indemnity, gives his note to C for a debt owing to the latter by B, the note of A does not lack consideration. B's promise to A is a sufficient consideration to support A's promise to C." *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519. There the bank sued Murphey and had judgment against him on a note given by him to the bank. He executed the note (with others) at the request of Warren & Co., which copartnership was indebted to the bank, in pursuance of an agreement between himself and Warren & Co. that the latter would indemnify him for so doing; that is, they would repay him whatever money he paid the bank on the notes. The court said: "The effect of this evidence is that Murphey executed the note in suit as an accommodation for Warren & Co. We do not think he executed the note without consideration." The judgment for the bank was affirmed.

In *Farmers Nat. Bank v. Ohman*, 112 Neb. 491 (Thompson, J.) it was held: "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee."

We are of the opinion that, under the evidence, plaintiff bank was not an accommodation payee of the note and defendant was not an accommodation party, because of the consideration moving from C. P. Hord to him as the maker of the note.

Defendant contends that the cause should have been

submitted to the jury to determine the probative force of the evidence tending to prove that the note was for the accommodation of the bank. He cites many cases wherein such questions have been submitted to the jury. The last case cited is the recent one, *Luikart v. Meierjurgen,* 124 Neb. 816, where the case was submitted to the jury, the verdict was for defendant and the judgment was affirmed here. In that case no consideration whatever moved to the maker of the note. Here the maker admitted the receiving of the consideration but sought to avoid it by charging that the bank was the accommodation payee. To make an issue to be submitted to the jury he relied on charging the bank through C. P. Hord as its agent. To do this it had to appear that Hord had authority to bind the bank to a promise, claimed by defendant but denied by Hord, that defendant would never be called on by the bank to pay the note. There is no evidence of such authority. "The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced." *Security Savings Bank v. Rhodes,* 107 Neb. 223 (Flansburg, J.). In that case judgment for plaintiff was entered on the pleadings. To the same general effect is *Farmers Nat. Bank v. Ohman,* 112 Neb. 491. In that case the court instructed the jury for plaintiff at the close of the evidence. When Hord got the note from defendant he was president of the bank, and, while he owned a considerable portion of the stock, he did not own it all. There is no evidence that he had authority to bind the bank to his promise (if made) to McLaughlin that McLaughlin would never be called upon by the bank to pay the note. As was said in the syllabus in *Farmers Nat. Bank. v. Ohman,* 112 Neb. 491:

"In an action on a promissory note by the payee against the maker, the latter set up as a defense that at the time he made the note he was orally promised by the president and the cashier of the bank that he was not to be liable

thereon. The making of such a promise, if it could be proved, was not, under the facts disclosed, within the apparent scope of these officers' authority, and is not binding on the bank, unless specially authorized, or, with knowledge of the fact, approved by the bank's directors.

"An agreement pleaded as a defense to an action on a promissory note, brought by the payee bank, that at the time of its execution and delivery it was agreed between the payor and the payee that the note was to be used for the sole purpose of enabling the payee bank to satisfy the demands of the national banking authorities then being made upon it, does not constitute a defense; the fraud, if any, being in this agreement, and not in the note, nor in the consideration for it."

The foregoing treats the heart of the case sought to be made by defendant. There are thirty assignments of error. We think those not embraced within our discussion constitute alleged errors of the court in excluding answers to questions and offers of evidence, which if admitted would not change the result, and that these errors, if any, were not really prejudicial to defendant.

The judgment of the district court is

AFFIRMED.

MAURICE E. SULLIVAN, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 21, 1934. No. 28831.

1. **Master and Servant:** FEDERAL EMPLOYERS' LIABILITY ACT. A stockyard platform at a station of a railway engaged in interstate commerce is part of the equipment or works used for railway purposes, within the meaning of the federal employers' liability act.
2. **Courts.** In the interpretation and administration of the federal employers' liability act, the opinions of the federal courts are binding on state courts when applicable to issues under consideration therein.
3. **Master and Servant:** DUTY OF EMPLOYER. It is not the duty

of a common carrier engaged in interstate commerce by means of a railway to maintain station platforms that are absolutely safe for employees.

4. ———: ———. In the construction and maintenance of platforms at railway stations, the measure of an interstate carrier's duty to employees is reasonable care, having regard to circumstances.

5. ———: INJURY TO EMPLOYEE: LIABILITY. Under the federal employers' liability act, there is generally no liability to an employee for damages arising from dangers that are obvious.

6. ———: ———: ———. Evidence that a railway company maintained a wooden stockyard platform with the end of a plank an inch or a little more above the general level of the floor, where an employee tripped at night and fell, *held* insufficient to prove actionable negligence in an action by him against the railway company, his employer, to recover damages for personal injuries under the federal employers' liability act.

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

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

Brome, Thomas & McGuire and *G. H. Seig, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $45,000 for alleged negligence resulting in personal injuries. Defendant is a common carrier operating a railroad. Plaintiff was a brakeman and a member of a train crew running a regular freight train for defendant out of Boone, Iowa, westward into Nebraska. Plaintiff, while engaged in the duties of his employment, walking toward a hydrant for a supply of water for the train crew, with a jug in one hand and a lantern in the other, about 1:30 o'clock in the morning, August 11, 1931, tripped on and fell from a platform with a floor of wooden planks at Boone, Iowa, onto a steel rail of defendant's stock-loading track, and was severely injured.

Employer and employee were engaged in interstate commerce at the time of the accident. The gist of the negligence pleaded in the petition, or the alleged defect due to negligence, was the maintenance of the platform with one end of a plank an inch or two higher than the general level of the floor. The negligence charged was put in issue by formal pleadings.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $35,000. From a judgment therefor defendant appealed.

It was argued by defendant that plaintiff did not make a *prima facie* case and that the district court erred in overruling a motion for a nonsuit. This presents the controlling question.

The action was brought under the federal employers' liability act, making an interstate carrier liable to an employee for an injury, "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." U. S. Comp. St. 1916, sec. 8657, 45 U. S. C. A., ch. 2, sec. 51. The platform was part of the equipment or works used for railway purposes. *Missouri P. R. Co. v. Aeby,* 275 U. S. 426. The platform was located between stockyard chutes and the stock-loading track. The floor was composed of wooden planks laid lengthwise, end to end, parallel with the railway. The planks generally were 16 feet long, 10 inches wide and 3 inches thick. The platform was 8 planks wide and the floor was on a level with the doors of freight cars, or perhaps 4 feet higher than the rail upon which plaintiff fell.

According to plaintiff's version of the facts, as told on the witness-stand, he was a rear brakeman; left the caboose of his train; crossed several switch tracks; went upon the platform; walked toward the water hydrant and, when within a few feet of it, struck a toe on some

obstruction near the center of the platform—something above the level of the floor; lost his balance; took two or three stumbling steps without restoring his equilibrium; fell off the platform and struck his back on a steel rail four or five feet below; never used the platform in the daytime; did not know of the defect; next saw the place in November following the accident; identified the spot by the surroundings; found the elevation of the end of the plank above the general level of the platform to be a "little over an inch," or "better than an inch," or "an inch or better"—estimates without actual measurement; platform used for loading and unloading stock and for a walk.

The wife of plaintiff was a witness who visited the scene of the accident two or three days after it occurred; testified she identified the place where plaintiff fell by fragments of the jug 9 or 10 feet from the hydrant; observed the end of a plank a little "better than an inch" above the other planks; nail in one corner near the raised end but not in the other corner; unnailed corner higher; no other obstruction there; measured the difference in elevation with a finger.

Pictures introduced in evidence by plaintiff indicate a substantial platform for railway purposes with a slight elevation of the end of the plank described.

In connection with the law applicable to the controversy, the testimony outlined and all proper inferences of fact deducible in plaintiff's favor from competent evidence on both sides will be accepted as verity for the purpose of determining whether a question for the jury was presented by the record of the trial.

In the interpretation and administration of the federal employers' liability act, the opinions of the supreme court of the United States are binding on state courts when applicable to the issues under consideration therein. It is not the duty of a common carrier engaged in interstate commerce by means of a railway to maintain station platforms that are absolutely safe for employees. There

is no guaranty of the safety of employees at such places. Construction of a particular type of platform, or maintenance of it in the safest possible condition, is not required. The measure of duty to employees is reasonable care, having regard to circumstances. The obligation of an interstate railway company to a passenger at a station platform is greater than the duty to employees who use the platform in the performance of their duties and thus acquire knowledge equal to that of their employer. These principles, in substance, were recently announced by the supreme court of the United States. *Missouri P. R. Co. v. Aeby,* 275 U. S. 426.

The defect upon which plaintiff relies to show negligence was not latent but obvious. *Campbell v. Chicago, R. I. & P. R. Co.,* 120 Neb. 499. In an action by an employee against his employer, a railway company, under the federal employers' liability act, there is generally no liability for injuries from dangers that are obvious. 20 R. C. L. 64, sec. 57; *Campbell v. Chicago, R. I. & P. R. Co.,* 120 Neb. 499; *Hogan v. Metropolitan Building Co.,* 120 Wash. 82; *Wheelock v. Freiwald,* 66 Fed. (2d) 694; *Northwestern P. R. Co. v. Bobo,* 290 U. S. 499; *Delaware, L. & W. R. Co. v. Koske,* 279 U. S. 7; *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S. 165.

The measure of a railway company's duty to employees being reasonable care, having regard to circumstances, as already stated, is no greater than that of a municipality to pedestrians on sidewalks. It is common knowledge that sidewalks in cities are affected by heat, cold, moisture and wear and that points on the surface vary in elevation from the general level, regardless of the materials used in construction. Differences of two inches or less, if obvious by the exercise of ordinary care, do not necessarily evidence actionable negligence. The fact that a person fell on a step in the entrance to a building to which he had been invited does not of itself raise a presumption that the step was negligently maintained, the defect being observable in the exercise of ordinary care. Variance of

an inch and three-fourths in the level of a step in the public entrance to a building is not of itself evidence of actionable negligence in the maintenance of the step. *Thompson v. Young Men's Christian Ass'n,* 122 Neb. 843. Evidence of a difference of one-eighth of an inch, or a little more, in the elevation of two parts of a cracked step, where a person fell, in the public entrance to an office building, was held insufficient to prove actionable negligence in a suit for damages against the owner of the building. *Wendell v. Roberts,* 125 Neb. 619. Courts of other states have spoken on this subject as indicated by the following excerpts from reported cases:

"An elevation of the edge of a cement block in a sidewalk of 1⅜ inches, held, as a matter of law, not to render the walk unsafe." *Denver v. Burrows,* 76 Colo. 17.

"A grating which projects two inches or less above a sidewalk is not such a defect as to violate the duty of a municipality to keep its streets and walks in a condition of reasonable safety." *Northrup v. City of Pontiac,* 159 Mich. 250. See, also, *Cornell v. City of Ypsilanti,* 212 Mich. 540.

"A slight depression in one block and an elevation in the adjoining block of a cement sidewalk, the difference in level being about one and one-quarter inches, was, as a matter of law, not an actionable defect. *Kleiner v. City of Madison,* 104 Wis. 339, followed." *Van der Blomen v. Milwaukee,* 166 Wis. 168. See, also, *Grass v. Seattle,* 100 Wash. 542.

"A variation of one and one-half inches between the elevation of adjoining ends of flagstones in a street crossing, is not evidence of negligence on the part of the municipality so as to make the latter liable for injuries to a pedestrian who falls at the point of such obstruction." *Newell v. Pittsburgh,* 279 Pa. St. 202.

The cited cases are analogous in principle to the case at bar. The testimony of plaintiff himself shows that he was familiar with his surroundings at the place of the accident and with the dangers in the railroad yards

at Boone. He cleaned and lighted his lantern. With the light from it he crossed many switch tracks where the rails were about six inches higher than the roadbed. He was 44 years of age; had been in the employ of defendant as brakeman or conductor for 16 years; had taken the same route for water at night, with jug and lantern, without injury, perhaps 50 times. While he said the lantern did not throw light directly downward from the flame, there is nothing to indicate it could not have been so used as to throw light on planks in front of him. The senses and powers of perception with which nature endowed him for his own safety and the lantern furnished by his employer were equipments on a dark night for the performance of his duties. His own senses, the raised end of the plank and the proper use of the lantern should have given warning. His knowledge of danger under the circumstances should have been equal to that of his employer.

After two hearings and much deliberation it is the unanimous opinion of the supreme court that plaintiff did not make a case under the federal employers' liability act. In this view of the law and the facts, the trial court erred in submitting to the jury the issue of defendant's negligence. The judgment below is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ALICE LEWIS, APPELLEE, V. JOHN W. NESLUND, APPELLANT: JOHN KINNAN, JR., EXECUTOR, ET AL., APPELLEES.

FILED DECEMBER 21, 1934. No. 29081.

Judicial Sales: SETTING ASIDE. "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." *Hill v. Campbell*, 125 Neb. 585.

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

Craft, Edgerton & Fraizer and *R. E. Bannister,* for appellant.

Frank M. Johnson, contra.

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

ROSE, J.

This is a suit in equity to foreclose a tax lien and the lien of a mortgage on real estate. A decree of foreclosure was entered but not presented for review. The real estate was sold at judicial sale under the decree of foreclosure and the sale was confirmed. The owner of the real estate appealed.

The appeal presents the question of the adequacy of the price for which the encumbered property was sold at the judicial sale. The witnesses differed in their estimates of value, but an examination of the evidence leads to the conclusion that there was no such a discrepancy between the sale price and the evidential value as to require a reversal in the light of the following rule:

"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." *Hill v. Campbell,* 125 Neb. 585.

AFFIRMED.

ADOLPH LENZ, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED DECEMBER 21, 1934. No. 29048.

1. **Courts.** Interpretation by United States supreme court of federal employers' liability act controls in actions in state courts arising under such act.
2. **Master and Servant:** FACILITIES FOR EMPLOYEES. Railway companies have much freedom of choice in providing facilities and places for their employees, and courts will not prescribe the

space to be maintained between tracks nor leave such question to the varying opinions of jurors.

3. ———: NEGLIGENCE. In the absence of evidence of departure from customary practice, a railway company is not negligent in failing to give to track workers warning of an approaching train.

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

Fred P. Marconnit and *Richard S. Horton,* for appellant.

T. W. Bockes, T. F. Hamer, G. C. Holdrege and *C. B. Matthai, contra.*

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

GOOD, J.

This is an action brought under the federal employers' liability act, to recover damages for personal injuries. After plaintiff's evidence was adduced, the trial court, on defendant's motion, dismissed the jury and rendered judgment for defendant. Plaintiff has appealed.

Plaintiff, with others, was employed to repair defendant's railroad tracks a short distance west of Omaha. At that place defendant has a double main line track, with a passing track between the main line tracks. The passing track is about three-fourths of a mile long. When a train moving over the main line passes cars standing on the passing track the distance between the moving train and the standing cars is five feet, three inches. At the time in question defendant had placed on its passing track some four or five boarding and commissary cars for the use of the workmen engaged in repairing its tracks. Ingress to and egress from the commissary cars were by an upright ladder, fastened to the side of the commissary car.

Plaintiff, after having visited one of the commissary cars, descended from the car on the ladder and either stepped in front of or against a passing freight train and received the injuries of which he complains. The

evidence shows that at the point in question the track on which the moving train was coming was straight and parallel to the passing track for a distance of approximately 1,100 feet. The freight train was one of from 75 to 90 cars and was moving at a speed of from 20 to 25 miles an hour. The time was daylight and the oncoming train was visible at least for a distance of 1,100 feet. Plaintiff testified that before leaving the commissary car he "looked around" but saw and heard no train; he knew that from time to time trains were passing the commissary cars; that his eyesight and hearing were good. Plaintiff was 52 years of age and a man of considerable experience and fairly intelligent. He had been at work for the defendant but three days when the accident occurred.

Several acts of negligence are complained of. We think they may be summarized under two headings: (1) Negligence in placing the commissary cars on the passing track in such close proximity to passing trains, without having a flagman to warn approaching trains to proceed slowly and cautiously, and without a lookout to warn the workmen of approaching trains; and in placing commissary cars at a place where the workmen's view of the main line would be obstructed so that they could not see approaching trains; (2) that the crew operating the freight train were negligent in failing to sound a whistle or bell, or give any other warning of the approach of the train; in failing to keep a proper lookout for workmen who might be on or about the commissary cars, and in operating the train at an excessive rate of speed.

Since this action arises under a federal statute, the interpretation given that statute by the supreme court of the United States is controlling. If the decisions of that court preclude a recovery under the facts disclosed by the record, then plaintiff cannot recover, and the judgment must be affirmed.

In *Atlantic Coast Line R. Co. v. Driggers*, 279 U. S. 787, it was held:

"In an action under the federal employers' liability act,

if it appears from the record that, under the applicable principles of law as interpreted by the federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the railroad company was the cause of the death, the judgment must be reversed.

"Upon the facts of this case, *held* that death of a railway switchman who stepped from the foot-board of a moving switch engine and fell or was thrown against the side of another engine drawing a passenger train on an adjacent track, was attributable solely to his own negligence and not to any negligence of the railway company." In that case the distance between parallel railway tracks was slightly less than in the instant case.

In *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S. 165, appears the following statement of facts:

"Plaintiff, while checking cars in a switching yard, was struck by a car shunted down the next track. While the space between the two tracks (in which he was standing) was sufficient to enable him to keep out of the way of moving cars, the danger attending his work would have been lessened if the space had been greater. The accident occurred at night. The cars moved at from four to six miles an hour; they were unlighted and unattended and no one warned plaintiff of their approach. He knew that switching was being done. There was nothing to show that the ordinary practice was departed from. He brought suit under the federal employers' liability act, alleging that his injuries had been caused by the failure to maintain an adequate space between tracks and by the failure to warn him of the approach of the car. *Held:*

"The evidence is not sufficient to warrant a finding that defendant failed in any duty owed plaintiff in respect of the distance between tracks. Carriers, like other employers, have much freedom of choice in providing facilities and places for their employees, and courts will not prescribe the space to be maintained between tracks nor leave such questions to the uncertain and varying opinions of juries.

"In the absence of proof that plaintiff was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give warning by ringing the engine bell or otherwise.

"Except as specified in section 4 of the federal employers' liability act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated, the extraordinary risks and those due to negligence of his employer and fellow employees. On the evidence it is *held* that plaintiff assumed the risk."

This court in *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783, adopted the same view. It was therein held: "In an action against a railroad company for causing the death of a brakeman by backing a car against him in the nighttime, evidence that there was no light on the car, that there was no brakeman thereon, and that it was moved without notice or warning, *held* insufficient, in absence of a custom requiring such notice or warning, to prove actionable negligence, where decedent was an experienced brakeman familiar with the switch-yards and with the methods of switching therein, and was injured while crossing a switch-track in the private switch-yards of his employer on his way home from work; there being nothing to show that the car was not being moved in the usual and ordinary manner."

Under the decisions of the federal courts, we are required to hold that negligence cannot be predicated upon the distance between the passing track and the main line track, and the failure to have a flagman to warn the crew of the approaching train, or to post a lookout to warn the workmen of approaching trains, in the absence of a showing of departure from the usual custom.

The evidence clearly indicates, beyond question, that the cars on the passing track were not so placed as to obstruct plaintiff's view for at least a distance of 1,100 feet in the direction from which the moving train was coming. No negligence in that respect is shown. Like-

wise, under the decisions of the United States supreme court, it was not incumbent upon the members of the train crew to give warning, by whistle or by ringing a bell, to employees of the approaching train, under the circumstances disclosed by the record. The train crew were not negligent in failing to keep a lookout for employees going upon the main line track. According to the record, they could have had no knowledge of plaintiff's intention or of his danger until the instant of the accident. Negligence in that respect is not disclosed.

Finally, it is contended that the train was being operated at an excessive rate of speed. Plaintiff's evidence discloses that the train was moving at the rate of from 20 to 25 miles an hour. It was over the main line track, and there is no evidence to indicate that such a rate of speed was excessive or a departure from the usual custom of moving trains under similar conditions. No actionable negligence in this respect is disclosed.

It may be observed that, had plaintiff listened as he was descending the ladder from the car, it seems incredible that he could not, and would not, have heard an approaching train of 75 to 90 cars moving at the rate of from 20 to 25 miles an hour. It is absolutely true that, had he looked in the direction from which the train was coming, while he was descending the ladder, he would not have failed to see the approaching train, and the danger in going upon or in close proximity to the main line track was obvious. From the entire record, it seems clear that plaintiff's injuries resulted from his own lack of caution and care.

The judgment of the district court is right and is

AFFIRMED.

HERBERT E. RUHL V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1934. No. 29202.

Evidence examined, and *held* ample to support the verdict and sustain the sentence imposed.

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

J. L. Richards and *Edward C. Fisher*, for plaintiff in error.

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

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

EBERLY, J.

Error proceeding from the conviction of the plaintiff in error upon an information charging a violation of section 28-462, Comp. St. 1929. This section provides, in part: "Whenever any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered by any court in this state, shall, without good cause, refuse or neglect to pay * * * the amounts and manner provided by such decree, for the support of such child or children he shall on conviction, be punished by imprisonment in the penitentiary for not more than one year."

The correctness of the proceedings below is challenged, first, because the state has not proved beyond a reasonable doubt that the failure to make the payments was without good cause.

It is not denied that a decree of divorce was entered upon the answer and cross-petition of Blanche M. Ruhl, wife of plaintiff in error, on November 15, 1932, adjudging that she was entitled to an absolute divorce from plaintiff in error "upon the ground of extreme cruelty and nonsupport." Such divorce decree further directed that plaintiff in error pay, for the support of his two

minor children, the sum of $35 forthwith, and $35 on the first day of each month thereafter. None of these instalments thus ordered was ever paid.

It further appears uncontradicted that plaintiff in error is, and was, a healthy, able-bodied man, who was a plumber and enjoyed the reputation of being a good workman in Hebron, Nebraska, where he was residing for some time immediately prior to the entry of the divorce decree. It also appears that some plumbing work was to be had in Hebron practically continuously since he left that town. However, he left Hebron in July or August, 1932, and he admits that at the time of his departure he was able to find part time employment in his trade at this place. From Hebron he went to Oklahoma; from thence to Texas; later he returned to Madison, Nebraska; and ultimately was apprehended on the present charge at Lincoln, Nebraska.

We have carefully read the record, including plaintiff in error's recitals of his doings after leaving Hebron in the summer of 1932. It will be remembered that all the essentials of the offense charged, save one, are conceded in the record. The only element involved which is contested is whether the failure of plaintiff in error to make the payments provided by the divorce decree was "without good cause." Without unduly extending this opinion by a recital of all the evidence pro and con, it may be seen that a careful reading of the record sustains the conclusion that it contains evidence which, if believed by the trial jury, in connection with the surrounding facts, is ample to justify their verdict of guilty "beyond a reasonable doubt" in the present case. *Havlicek v. State,* 101 Neb. 782; *Altis v. State,* 109 Neb. 774.

Instruction No. 5, complained of, we find in accord with the statute defining the offense; we further find that the trial court did not commit error in permitting the cross-examination of plaintiff in error complained of; and we do not find the sentence imposed to be excessive under the facts disclosed by the record.

There being no substantial error in the proceedings of the trial court, its judgment and sentence are deemed correct, and are

AFFIRMED.

NELLY P. CLARKE, APPELLANT, V. PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 21, 1934. No. 29100.

1. **Appeal.** Where the brief fails to state the issues tried in the court below and how they were decided and makes no assignments of error therein as required by rule 13 of this court, the judgment may be affirmed.
2. ———. In the absence of a bill of exceptions or special findings, only the sufficiency of the pleadings to sustain the judgment will be considered.

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

R. H. Mathew, for appellant.

Sidney W. Smith, contra.

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

DAY, J.

This is a suit in equity to cancel a deed. The deed was executed by the plaintiff for a consideration of $1 and an agreement to cancel and deliver to the plaintiff a note secured by a mortgage on the same premises. This was obviously done to avoid a foreclosure suit or other litigation and as a settlement between the parties. The plaintiff seeks to have this deed canceled for that the deal was not completed within a reasonable time and that no consideration was given for the agreement. The trial court entered a judgment in favor of the defendant. The plaintiff appeals.

There are no assignments of error in the brief. Where

the brief fails to state the issues tried in the court below and how they were decided and there are no assignments of error as provided by rule 13 of this court, the judgment of the trial court will be affirmed. *Gorton v. Goodman,* 107 Neb. 671; *Dingle v. Gilbert,* 117 Neb. 237; *Federal Land Bank v. Elsemann,* 121 Neb. 397; *Kucera v. Hansen,* 96 Neb. 316.

There is no bill of exceptions in this case. The rule is well settled that, in the absence of a bill of exceptions or special findings, only the sufficiency of the pleadings to sustain the judgment will be considered. *Reigle v. Cavey,* 107 Neb. 446. In the absence of a bill of exceptions, it is presumed that the issue of fact raised by the pleadings was supported by the evidence and that the issue was correctly determined by the trial court. *Kerr v. Adams County,* 96 Neb. 178; *Miles v. State,* 74 Neb. 684. An examination discloses that the answer stated facts sufficient to constitute a defense. It therefore follows that the record in this case does not challenge our attention to any error requiring reversal.

AFFIRMED.

MASONIC BUILDING CORPORATION, APPELLEE, V. CARL C. CARLSEN ET AL., APPELLANTS.

FILED DECEMBER 21, 1934. No. 28912.

1. Jury: CHALLENGE. In civil actions, where there are several defendants whose interests are not adverse and where there are no separate and distinct defenses as between them, said defendants constitute a single party and are entitled to three peremptory challenges, and no more.
2. Pleading. Where the answers of defendants contain "new matter the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer." Comp. St. 1929, sec. 20-820.

3. **Evidence.** The evidence of a trustee in bankruptcy, having in his care and custody the minutes of the meetings of the directors and stockholders of a bankrupt corporation, testifying to the manner in which said minutes were kept, together with the testimony of the secretary to the president of said corporation, who had seen the minutes of the corporation and its files and who had handled the same and knew they were kept by the corporation's secretary and signed by said secretary, who by the by-laws of the corporation was to keep a true record of all meetings of the stockholders and board of directors, and that said minutes were in the same condition as when written, furnishes sufficient foundation for the admissibility of such records over objection to foundation.
4. ———. Minutes of the meetings of directors and stockholders of a corporation are competent and material evidence, where the corporation, trustee for plaintiff, is charged with a breach of trust and wherein the defendants are charged with having aided, controlled and directed its conduct and charged with not diligently protecting the beneficiary of said trust. Such evidence is admissible for the purpose of showing all the circumstances surrounding the whole transaction, to show who were elected directors of the company, who attended meetings of the directors and what was done with regard to the exposition of the company's affairs, such facts and circumstances tending to show the method by which the trustee transacted its business and who transacted it.
5. **Banks and Banking.** Evidence showing that the trustee corporation placed title to lands in the names of certain of its employees and had such employees execute notes and mortgages, it guaranteeing them against loss, said corporation then taking a reconveyance of title from such employees, assuming and agreeing to pay the mortgage indebtedness, such conduct on the part of the corporation, occurring for a period of two years before the alleged breach of trust in question and two years subsequent thereto, is competent and goes to the question of intent or state of mind which inspired the act, especially when such evidence is limited by an instruction of the trial court as having no bearing upon the original action complained of but is permitted as evidence to show a purpose not consistent with an honest intent.
6. **Trial.** The submission of special interrogatories requested by the defendants is discretionary and the refusal to submit such interrogatories was not an abuse of discretion on the part of the trial judge in this case.

7. **Trusts.** The violation by a trustee of a duty laid upon it by law, whether wilful and fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust.
8. ———. All persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to replace the fund which they have been instrumental in diverting. Whether or not the defendants knowingly participated or aided in committing a breach of trust is a question of fact for the jury to determine under proper instructions and the evidence.
9. **Banks and Banking.** Members of the executive committee of a trustee corporation are held to a higher degree of responsibility than directors. Directors not members of the executive committee have a duty and are bound to use the same degree of care in attending to the trust company's affairs as an ordinarily prudent person would use in his own business, and this care or lack of care is an issue of fact for the jury to determine.
10. ———. Directors of a trust company may delegate their work and employ help and assistance in transacting the business of the company; however, such directors may not delegate their responsibility and hence are not excused from liability for loss suffered by the company because they committed their duties to an executive committee, relying on it to examine the loans and collateral.
11. **Appeal.** Evidence objected to as not proper rebuttal but admitted over such objection, the court later instructing the jury, upon request of the objecting party, as to how the jury should consider such evidence is not error, the instruction having cured the error complained of by the objecting party.
12. **Evidence.** A witness who was president of one corporation and director of another corporation for several years and charged with the duty of investigating, ascertaining and knowing the values of promissory notes and securities and who had made an investigation of the value of the securities of plaintiff in this case is competent to testify to his opinion as to the fair market value of said securities as an expert witness, when properly questioned.
13. **Trial.** In considering an instruction stating averments of the pleadings, effect will be given to the whole, and if it sufficiently contains the substance of the pleadings, it is not erroneous. *Mosslander v. Armstrong*, 90 Neb. 774.
14. **Banks and Banking.** Where the evidence of plaintiff discloses

that at the time of the alleged breach of trust and fraud the trust securities of plaintiff were worthless, and the evidence of defendants discloses that at such time the trust securities were worth the sum of $10,000, the amount of the investment, and the record discloses no evidence of any other values, the true measure of damages is the total of such investment made by plaintiff, if the jury find that the usefulness or value of plaintiff's securities has been seriously affected by such breach of trust and conduct of defendants.

15. **Appeal.** The giving of an instruction probably erroneous, still, as an abstract proposition of law correct, affords defendants no ground for a new trial and is not reversible error, unless the complaining party appears to have been prejudiced thereby.

16. **Judges.** The objection to the qualification of the presiding judge to sit in a case under section 27-315, Comp. St. 1929, failing to show that the court had any pecuniary interest in the case, is insufficient to disqualify such trial judge.

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

Frank A. Peterson and *Perry, Van Pelt & Marti,* for appellants.

Maxwell V. Beghtol, Glen H. Foe and *J. Lee Rankin, contra.*

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

MESSMORE, District Judge.

This is an appeal from the district court for Lancaster county, wherein plaintiff received a verdict and judgment from defendants in the sum of $10,886.62. For the purposes of this opinion the appellants, who were defendants below, will be called defendants, and appellee, who was plaintiff below, will be called plaintiff.

Plaintiff's petition alleges its corporate capacity and that the Lincoln Trust Company was organized as a trust company, transacting its business in Lincoln, Nebraska, and the Lincoln Safe Deposit Company was authorized to own and hold real estate; that the Lincoln Trust Company was conducted and controlled by a board of directors, an

executive committee, a loan committee and various officers, which officers included a president, vice-president and trust officer. The petition further sets forth the duties and functions of the committees and officers of said trust company. Further, that the defendant Carl C. Carlsen was president, director and member of the executive committee and loan committee of said Lincoln Trust Company; that defendant John A. Reichenbach was vice-president, director and member of said committees of said company; that defendant Paul H. Holm was director and member of said committees of said company; that defendant William R. Mellor was trust officer, director and member of said committees of said company.

Said petition alleges further that it was the duty of all the defendants, by virtue of their respective offices in said Lincoln Trust Company, to deal honestly and fairly with persons having relations with said company and with the trusts and property entrusted to the same; to diligently protect the interests of persons who were the beneficiaries of trusts placed in charge of said company as trustee; to abstain from personally profiting or attempting to personally profit from the trusts reposed in said company or to permit others under their direction and control so to do with their knowledge.

Further, that the Lincoln Trust Company and the Lincoln Safe Deposit Company were adjudicated bankrupts on the 9th day of July, 1932, by the United States court for the district of Nebraska, Lincoln division; that on or about January 7, 1928, plaintiff and the Lincoln Trust Company entered into a written agreement providing for reposing in said company by plaintiff of certain trusts; that on the 12th day of December, 1928, said Lincoln Trust Company had in its possession and under its control the sum of $10,000 belonging to plaintiff, together with other amounts resulting from the part performance of said trust agreement; that on said date of December 12, 1928, and shortly prior thereto said company with the fraudulent aid and assistance of the defendants adopted and carried into

execution a fraudulent device for the purpose and with the result of fraudulently converting to the use of said trust company of said trust funds as follows: That at all times subsequent to the early part of 1926 the Lincoln Safe Deposit Company was the owner of certain lands in Holt county, Nebraska, consisting of approximately 640 acres, as more fully described in the petition; that on or about the 5th day of December, 1928, the defendants caused the Lincoln Safe Deposit Company to fraudulently place the legal title to said land in the name of one Harvey R. Given, and thereupon, as a part of the same transaction, said defendants further caused the said Harvey R. Given and Edith N. Given, purporting to be his wife, to execute and deliver to said Lincoln Safe Deposit Company a series of instruments called "real estate first mortgage bonds," purporting to be notes of the said Harvey R. and Edith N. Given, dated December 5, 1928, and due December 5, 1933, and secured by a mortgage on said 640 acres of land in Holt county owned by said Lincoln Safe Deposit Company; that contemporaneous with the execution of said notes and mortgage by the said Givens the defendants caused the said Givens to execute and deliver to the Lincoln Safe Deposit Company a deed to said land, so that by the fraudulent manipulation of said title the same was legally vested in the said Givens only for a sufficient period of time for said parties to execute said notes and mortgage; that said manipulation was for the fraudulent purpose of providing instruments and documents which on their faces would present the appearance of constituting *bona fide* obligations of indebtedness, when, in truth and in fact, the defendants and all of them knew that said instruments were not *bona fide*, constituted no obligation on the part of the Givens to pay money, were not secured as represented in said papers, and were not securities approved by law as trust investments, and were of no value whatever; that notwithstanding said facts the defendants on the 12th day of December, 1928, withdrew from the money of plaintiff the

sum of $10,000 and pretended to invest the same in said Given notes and mortgage; that said conduct on the part of the Lincoln Trust Company was fraudulent and contrary to its duty as trustee of the property and money of plaintiff, and its conduct in that regard was controlled, directed and aided by the defendants and each of them; that plaintiff did not discover the fraudulent dealings of the defendants with its property until about December 1, 1932, and enters its prayer for judgment for the sum of $10,000 and interest.

The answer of defendant John A. Reichenbach admits that the Lincoln Trust Company and the Lincoln Safe Deposit Company were Nebraska corporations and that said companies were adjudicated bankrupts on July 9, 1932, and admits that he was a member of the board of directors, of the executive committee, of the loan committee and an inactive vice-president of the Lincoln Trust Company.

The answer further alleges that the agreement between plaintiff and the Lincoln Trust Company provided for the investment of the endowment fund by the trustee and the acceptance of the trust under the trust agreement with plaintiff, "with the express reservation that no personal liability shall attach to the trustee under this instrument or in the performance hereunder except for its misappropriation of funds herein or its failure to account for the same or to use ordinary care in performing its duties hereunder," and enters a denial of all the allegations of plaintiff's petition not admitted.

Alleges further that said defendant at no time was the managing officer of the Lincoln Trust Company or the Lincoln Safe Deposit Company and at no time had anything to do with the trust funds or the sale of securities; that he at all times mentioned in his answer was a resident of the city of Lincoln, Nebraska; that it was no part of his duties as a member of said loan committee of the Lincoln Trust Company to personally inspect or appraise farm lands; that the managing officers of said company

employed experienced and skilful examiners to appraise farm land for the purpose of making loans thereon, and did employ such an experienced and skilful examiner to examine, appraise and report on the land described in plaintiff's petition, detailing in his answer the kind of examination made by said examiner, upon which he relied, and sets forth the value of the appraisals made on the lands, and that the renewal loan, of which defendant approved, on said land in the sum of $10,000 was less than 40 per cent. of the appraised value of said real estate; that defendant was unaware that any person other than applicant for said loan had any interest in said property; was unaware that said bonds were to be sold to plaintiff or for other trust purposes; that the principal note and coupons, the mortgage, the opinion as to title and all the other legal matters incident to the completion of said loan were entrusted to competent attorneys employed by the managing officers of said Lincoln Trust Company; that said attorneys were learned and skilled in such matters and that defendant's approval of said loan was on the express condition that before said securities were offered for sale such counsel should approve thereof and furnish said trust company an opinion that said bonds had been found and determined by such attorneys to be a first and valid lien upon said real estate; that this defendant at all times used more than ordinary care in performing his duties as a member of the loan committee of said trust company and in attempting to protect investors; that at the time this answering defendant gave his approval to said loan he relied upon the report and appraisal of said examiner, believing that the security was adequate for a loan of $10,000, and in all things acted in good faith and according to his best judgment.

Further alleges that plaintiff did not rely upon the approval of said loan by this defendant or any other member of said loan committee, but that plaintiff selected an experienced committee which knew, or should have known, the value of said property in that vicinity, and

that said committee selected a skilled and experienced examiner and accountant to examine the application, the principal note, the coupons, the mortgage and the abstract and all other papers and records in connection with said loan; that said examiner and accountant were by said trustee given access to all the papers and records in connection with said loan and examined the same at least once every six months and had the power to change the form of said investment or substitute other securities therefor; that at the time said loan was approved said property had a value of $15,000 in excess of the amount of said loan; that the failure of plaintiff (when the panic of October, 1929, depreciated all values) to change the form of said investment and to require other securities to be substituted therefor was not due to any act of this defendant; that plaintiff now has a valid and subsisting first lien on said property which it refuses to release or surrender.

The answer of defendant Paul H. Holm is in substance the same as that of defendant Reichenbach, alleging he was a member of the board of directors, of the executive committee and of the loan committee of the Lincoln Trust Company.

The answer of defendant William R. Mellor is in substance the same as those of defendants Reichenbach and Holm, alleging that he was a member of the board of directors, of the executive and loan committees and at one time was one of the trust officers of the Lincoln Trust Company.

The answer of defendant Carl C. Carlsen is practically the same as those of the other defendants; that during the times mentioned in plaintiff's petition he was president, director and member of the executive and loan committees of the Lincoln Trust Company.

To the separate answers of defendants plaintiff filed its reply, denying each and every allegation in said answers contained except such as are admissions of the allegations of plaintiff's petition. For further reply it denies that

defendants severally used more than ordinary care in performing their duties in respect to the transactions complained of, and alleges that their negligent failure in this regard was as follows: "In that although defendants, and each of them, had actual knowledge on or before the 1st day of July, 1928, that the president of said company was engaged in conduct relative to the business of said Lincoln Trust Company not according to good business principles nor fair business conduct, and although said defendants had been requested by other members of the board of directors of the Lincoln Trust Company not to entrust business transactions to the president of said company, yet, nevertheless, the defendants and each of them negligently permitted said president to continue in a position of trust therein and thereafter failed to use care and diligence in respect to the said officer's conduct. And also said defendants failed to use ordinary care in that although they knew, or, in the exercise of ordinary care, should have known, all the facts and circumstances surrounding the fraudulent transaction resulting in the investment of plaintiff's money in a fraudulent and worthless note, the said defendants, and each of them, negligently failed to exercise their powers to prevent the fraud upon this plaintiff."

When the jury was being selected to try this case the lower court limited the defendants to three peremptory challenges. The defendants insist that each of them had a right to three peremptory challenges in his own defense, but the trial court over objections of defendants on this point held that the answers of the various defendants did not raise adverse claims as between themselves and they were therefore limited to three peremptory challenges, collectively, and were allowed three such challenges, collectively. From a careful reading of the answers filed by each defendant and the similarity of the same as to their defenses, we believe that the trial court was correct in its ruling. *Petsch & McDonald v. Hines,* 110 Neb. 1.

Defendants further contend that a defendant cannot be

required to defend when plaintiff's reply constitutes a new cause of action. They severally filed a motion to strike paragraph 2 of the reply for the reason that it constituted a departure from the cause of action pleaded in the petition, was an attempt to plead a new and different cause of action, an attempt to amend plaintiff's petition, and an attempt to enlarge the cause of action pleaded in the petition, contending that the new cause of action pleaded in the reply was negligence on the part of defendants and was separate and distinct from the cause of action set out in the petition.

It is claimed by defendants that plaintiff can only recover on the cause of action set out in its petition and that it is not the province of the reply to introduce a new cause of action, citing *Hastings School District v. Caldwell, Hamilton & Co.*, 16 Neb. 68, and other cases of the same holding. If the new matter in the reply is not responsive and defensive to the matter pleaded in the answer, it is a departure therefrom and should upon motion or objection be stricken out. *Hallner v. Union Transfer Co.*, 79 Neb. 215. Section 20-820, Comp. St. 1929, states: "Where the answer contains new matter the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer." The motion to strike, however, was never ruled on as far as the record discloses.

Plaintiff claims in its petition that the trustee fraudulently breached the trust, resulting in the conversion of $10,000 to the use of such trustee, and that the four defendants were by virtue of their offices in the company in absolute control of its actions; that it was the duty of defendants to deal fairly and honestly with the trustee and to diligently protect the interests of the beneficiaries of the trusts in charge of the trustee.

The defendants in defense to the petition allege that

their conduct in relation to this trust fund was proper and that they employed competent persons to handle the transaction and used more than ordinary care in performing their duties and in attempting to protect investors.

Replying to the answers of defendants, plaintiff denies the use of ordinary care with respect to the transaction involved and specified the manner in which it claims ordinary care was not used by them in relation thereto.

The answers of defendants contain new matter. They not only deny that they were guilty of fraudulent conduct, that they failed to diligently protect investors, that they controlled, aided and directed the breach of trust, but allege they used good faith and more than ordinary care in performing their duties and in their selection of employees to assist them. To these allegations plaintiff had the right under the statute to allege a defense to the new matter, and that defense was a denial that defendants used more than ordinary care and set out the specific allegations in relation thereto. This did not change the cause of action. The case was still the case it always had been, a case claiming the persons in control of the trust not only fraudulently aided and abetted in the breach of the trust, but failed to diligently protect investors and perform their duties in relation to the trust. The reply did not alter or change the cause of action. *Farmers State Bank v. Butler,* 101 Neb. 635.

The evidence discloses that the articles of incorporation of the Lincoln Safe Deposit & Trust Company were filed in the office of the secretary of state on July 13, 1898, and the articles of incorporation of the Lincoln Trust Company were filed in the same office on July 7, 1911; that the two companies had the same general powers, were in the same lines of business and for the same purposes, but operated more pronouncedly through the Lincoln Trust Company; that the latter company owned the stock of the Lincoln Safe Deposit & Trust Company and the officers of the Lincoln Trust Company served as the officers of the Lincoln Safe Deposit & Trust Company; that the Lincoln

Trust Company did a general business of making loans, a general trust business, rented properties and wrote insurance, and in December, 1928, had from 5,000 to 5,500 active loans with 30,000 investors and a number of employees.

The trust agreement between plaintiff and the Lincoln Trust Company, entered into January 7, 1928, provided for the appointment of such trust company as trustee and for the investment by it of the endowment fund of plaintiff and the disposition of interest. Under section D, paragraph X, of the agreement it is provided: "The trustee shall invest the 'endowment fund' as received, in investments to be made in securities approved by law for trust investments."

One further article of the agreement pertinent to this case is the acceptance of the trust by the trustee and the limitation of the trustee's liability, as stated in paragraph XIV thereof, to wit: "The trustee herein named for itself and its successors hereby accepts the trust and assumes the duties herein created and imposed upon it by this trust agreement but with the express reservation that no personal liability shall attach to the trustee under this instrument or in the performance hereunder except for its misappropriation of funds herein or its failure to account for the same or to use ordinary care in performing its duties hereunder."

The articles of incorporation and by-laws of the Lincoln Trust Company were received in evidence, setting forth the respective duties of the board of directors, of the various committees and officers of such corporation.

The trustee in bankruptcy of the Lincoln Trust Company and of the Lincoln Safe Deposit & Trust Company, appointed August 16, 1932, testified that the corporate records of both companies were kept under the name of the Lincoln Trust Company.

The evidence discloses that in 1923 one Hahn owned the 640 acres of land described in plaintiff's petition and that on the 17th day of March, 1923, he gave two mortgages

on the land to the Lincoln Safe Deposit & Trust Company, one for $12,500 and one for $500. Bonds were issued and sold secured by the $12,500 mortgage, and Mr. Hahn paid the interest until the latter part of February, 1926, at which time payments became delinquent. In March, 1926, the Lincoln Safe Deposit & Trust Company took a deed to the farm from Mr. Hahn, and he in turn leased the farm for a period of one year with an option to repurchase on or before March 1, 1927, for the stipulated sum of $14,097.45, with interest, together with sums paid by said company for taxes on said land, upkeep and repairs. Mr. Hahn was unable to exercise this option on account of business losses and sickness and the company retained title to the land. On April 21, 1928, the funds of plaintiff were invested in the Hahn bonds, as shown by exhibit 11, and its account charged with the value thereof. Said exhibit 11 also discloses the payment of the Hahn bonds and the crediting of plaintiff's account with $12,500 on December 12, 1928.

In the fall of 1928 defendant Carl C. Carlsen, president of the Lincoln Trust Company, became acquainted with one Fred D. Mateer in Lincoln, Nebraska, who proposed to trade to the Lincoln Safe Deposit & Trust Company a $30,000 deed of trust on the Castle Apartments in Kansas City, Missouri, owned by him and one Harvey R. Given, for the Holt county land, theretofore deeded by Hahn to the Lincoln Safe Deposit & Trust Company.

The defendants Reichenbach, Holm and Mellor had several conferences with Mateer in Lincoln, and Reichenbach and Mellor went to Kansas City to inspect the property covered by the trust deed which Mateer proposed to trade to the Lincoln Safe Deposit & Trust Company for the Holt county land. Later a contract was entered into between Mateer and the Lincoln Safe Deposit & Trust Company, which Carlsen executed, purporting to have been signed in Lincoln December 4, 1928. After the contract was executed Mateer returned to Kansas City and the deal was completed by correspondence. Under the

terms of this contract the company agreed to sell Mateer three Nebraska farms, including the Hahn farm, taking in exchange the $30,000 deed of trust heretofore mentioned, which also included the furniture and fixtures in the said Castle Apartments, and the company further agreed to loan Mateer $10,000 on the Hahn farm and $5,000 on another Nebraska farm. According to the contract the deed of trust was to be taken in Carlsen's name, which was done; Carlsen then assigning and delivering it to the company. The $30,000 mortgage or deed of trust, according to the testimony of Given, was later paid, Given having borrowed $125,000 on the Castle Apartments, giving the Lincoln Trust Company a mortgage of $10,000 on another building and the balance in cash. The contract further provided that the title to the Nebraska farms was to be taken in Mateer's name. However, Mateer's wife being absent from the city, Mateer called Carlsen by telephone, explaining the absence of his wife and that the deed from the company should be made to Given, and therefore the deed of the Lincoln Safe Deposit Company was made to Given.

The loan of $10,000 to Given was approved by the loan committee for investment of company funds. Given and his wife executed a mortgage to the Lincoln Safe Deposit Company on or about December 5, 1928, together with 20 bonds in denominations of $500 each. These bonds were eventually purchased with the funds of plaintiff. The Given bonds are the bonds declared by plaintiff to be worthless and constitute the subject-matter of its action. Plaintiff later, in 1932, claimed to have discovered the alleged breach of trust by defendants.

It is the contention of defendants that they had nothing to do with determining investments as trust investments, that loans were acted upon by the loan committee before even being considered as trust fund investments, and that the loan committee had nothing to do with approving trust investments. This was an entirely separate transaction, and at each meeting of the executive committee,

which occurred once a month, a list of all trust investments was made in writing and approved or rejected by that committee. The loan committee kept no minutes and the signatures of the members of the loan committee ordinarily appeared on a pink sheet called the approval sheet. Carlsen, the president, would then take the matter up with the loan committee, whose duty it was to pass on the desirability of the loans; Carlsen being the head of the loan department.

The evidence further discloses that from March, 1928, one Schlytern was in charge of the trust department and had the care, custody and control of trust securities. He testified that Reichenbach, Holm and Mellor had nothing to do with saying when funds should be taken from the loan department and placed in trust investments except when called up when they were present at executive committee meetings, that said three named defendants had nothing to do with any of these transactions. The executive committee usually met once a month and at times once a week to pass upon the proposed investment of trust funds and to see that no investment of such trust funds was approved which exceeded 40 per cent. of the appraised value of the security. The unanimous vote of the executive committee was necessary to authorize the investment of trust funds in any security. Minutes were kept by this committee and show the trust investments approved by it and made a part of such minutes.

Evidence of appraisals of the 640 acres of land in Holt county was given, showing that said land was appraised in 1923 by one Garner as having a value of $36,300, by one Sawyer in 1927 as worth $25,600, by one Schilling in 1927 as worth $17,400 and by one Sturdevant in 1928 as having a value of $25,000 to $26,000. Mr. Sawyer testified that the value of the Given bonds on December 12, 1928, was $10,000.

Mateer was a trader in real estate, had no property to speak of, nor much in the way of liquid assets, had been inclined to overextend himself, and credit transactions

with him should be confined to a secure basis. It appeared that Mr. Given was a man of some property and defendants' evidence credited Mateer with having an equity in an apartment house in Chicago of the value of about $500,000.

Defendants assign as error the admission of the testimony of Frank E. Gillen, a witness for plaintiff. Mr. Gillen testified that he was president of the Provident Building & Loan Association of Lincoln and had been for several years, and that he was a director of the Continental State Bank of Lincoln, and that it was his duty in such business to investigate, ascertain and know the values of promissory notes. That as treasurer of plaintiff corporation, upon receiving the notes involved in this action in July, 1932, he made an investigation to ascertain the value of the same, later turning the notes over to a lawyer for further investigation, examined the files of the trust company and talked to defendants Holm and Mellor about the notes. Upon this foundation he was asked a hypothetical question as to the value of the notes on December 12, 1928, and testified that they were worthless.

Defendants' objection to this testimony is to the effect that this witness had never seen the Holt county farm, had no knowledge of its value, was not acquainted with the signers of the bonds or their financial responsibility, and that there was no evidence to go to the jury upon the measure of damages contended for by plaintiff except the evidence of Mr. Gillen, who was not competent to testify.

We believe that the foundation for the testimony of Mr. Gillen was sufficient, and assuming all the facts to be true as put in the hypothetical question, as an expert, he could testify as to the value of the notes in question and the weight of his testimony was for the jury to determine. Such testimony could be received to determine whether or not the usefulness or value of the bonds had been seriously affected, considering all the facts and circumstances surrounding the transaction.

One of the errors assigned by defendant Reichenbach

is that the minutes of the meetings of the directors and stockholders were improperly received in evidence, under the theory that the proper foundation had not been laid, in that L. A. Ricketts testified that he had been appointed trustee in bankruptcy of the Lincoln Trust Company, and without further identification produced certain loose sheets of paper, which were received in evidence as minutes of the meetings. The record discloses that Mr. Ricketts testified that he was trustee in bankruptcy of both the Lincoln Safe Deposit Company and the Lincoln Trust Company, appointed August 16, 1932, and that he had in his custody the minute book of the Lincoln Trust Company, that the minutes were kept in loose leaf binders and each year's business taken out; that the minutes contained in the larger volume were old minutes, which he identified, where they were kept and designated the years. Upon further objection by defendants Reichenbach, Holm and Mellor to the foundation, plaintiff called as a witness Elinor Elder, employed by the Lincoln Trust Company as secretary to the president for more than 10 years prior to the time of the bankruptcy and as assistant secretary of the Lincoln Trust Company, who testified she had seen the minutes before they were produced in court in the files of the company and to her handling of these papers; that the minutes were kept by Mr. Hadley, the company's secretary, were preserved in the vault of the Lincoln Trust Company, and since bankruptcy had been placed in the custody of the trustee in bankruptcy, Mr. Ricketts; that the minutes when produced were in the same condition as when written, and identified the minutes as having been signed by Mr. Hadley, who, according to the by-laws of the Lincoln Trust Company, was to keep a true record of all meetings of the stockholders and board of directors. Under these facts we believe sufficient foundation was laid for the admission of this evidence.

For further objection defendants claim that said minutes were immaterial, incompetent and prejudicial under the following rule: "In the absence of statute, the rule gener-

ally prevailing is that corporation books are not admissible in matters of a private nature to establish or support a right or claim of the corporation or its members against * * * a stockholder, director, or officer in relation to a matter in which the corporation and the stockholder, director, or officer stand as strangers to each other." 22 C. J. 898. Further, that there is no statutory provision for the admission of the records of a private corporation, the records of a private corporation in Nebraska having no more standing than a private writing.

This suit was one claiming that the Lincoln Trust Company, trustee for plaintiff, had breached its trust because the four defendants aided, controlled and directed its conduct and because they did not diligently protect the beneficiaries of the trust, as was their duty. With this in mind the plaintiff must prove, first, the breach of the trust by the Lincoln Trust Company, and, second, that the breach was controlled and directed by the defendants and occasioned by their lack of diligence in protecting the funds. The books of the company were competent to show all the circumstances surrounding the whole transaction, to show who were elected directors of the company, who attended meetings of directors, what was done at the meetings in regard to exposition of the company's affairs, how often the directors met, who were the members of the various committees, and what action they took relative to the company's business and all the circumstances which would tend to show the method by which this trust company transacted its business and who transacted it. "Such records are received in evidence generally to prove corporate acts of a corporation, such as its list of stockholders, its by-laws, the formal proceedings of its board of directors and its financial condition when its solvency comes in question." 10 R. C. L. 1168, sec. 368.

The four defendants constituted those in control of the executive committee, which, under the by-laws of the company, had all the powers of the board of directors and the particular power to employ agents, and that it em-

ployed Hadley and directed him by the by-laws to keep minutes of what they did. *Commissioner of Banks v. Cosmopolitan Trust Co.*, 253 Mass. 205, 41 A. L. R. 665; 3 Thompson, Corporations (3d ed.) 557, sec. 1966.

Error is claimed by defendants relative to the reception in evidence of what is termed "employees' loans." Defendants contend that such transactions did not disclose any scheme or conspiracy to defraud investors; that the company, by foreclosure or otherwise, had become the owner of certain tracts of land, and, instead of executing notes and mortgages itself, had some of its employees execute them, guaranteeing such employees against loss, the company then taking a reconveyance of the title from such employees, assuming and agreeing to pay the mortgage indebtedness. This testimony showed that for a period of two years before and two years after the transaction at issue such loans were made to employees by the Lincoln Trust Company with the approval of the four defendants. Plaintiff was entitled to have these facts go to the jury as bearing on the question of intent, both of the trust company and of the four defendants. This question was covered in instruction No. 9 given by the court and states the correct rule relative to the admissibility of such evidence as follows:

"You are instructed that you are not to consider other loan transactions in which the defendants participated in determining whether the acts of the Lincoln Trust Company in placing the Given loan in the plaintiff's fund was a breach of trust, and you are not to consider such evidence upon the question as whether the defendants participated in placing the Given loan in the plaintiff's trust fund. The court instructs the jury, however, that fraud in the sale or conveyance of property is a fact that may be proved by showing the existence of other facts and circumstances surrounding or connected with the transaction to show fraudulent intent on the part of the parties to such sale or conveyance or tending to show a purpose not consistent with an honest intent. You are to consider

such other loan transactions only in arriving at the question of whether or not the Lincoln Trust Company by the placing of the Given loan in the plaintiff's trust fund intended to defraud the plaintiff and for the further purpose of determining whether the defendants, if they had knowledge of such other loan transactions, used due diligence to protect the plaintiff from any loss in its trust fund through the investment in the Given loan."

This action is one against the trustee for fraudulent breach of trust, making it necessary to prove intent; therefore, it was proper for evidence of employees' loans to go to the jury. *Shepard v. Hamaker*, 120 Neb. 166; *Sutton v. Kelliher*, 115 Ia. 632; 27 C. J. 807; 12 R. C. L. 669, sec. 175.

"The principle on which such evidence is received to show intent or state of mind is simply the principle which the human mind instinctively applies in ordinary affairs of life." 10 R. C. L. 938, sec. 105.

"When it becomes material to show the motive or intent which inspired an act, or the knowledge under which one has acted, it is relevant for such purpose, under certain limitations, to prove other similar acts which explain such motive or bring home to the party the knowledge sought to be proved." Jones, Evidence (2d ed.) sec. 142.

Defendants contend as error that it was an abuse of discretion because the court did not submit special findings to the jury which were pertinent to the issues. The submission of special interrogatories, when requested, is within the discretion of the court. *Huxoll v. Union P. R. Co.*, 99 Neb. 170. The refusal to submit special interrogatories, requested by defendants, was not an abuse of such discretion.

Defendants contend as error that the evidence fails to support the verdict, and in support of this contention declare that the only part Reichenbach, Holm and Mellor had in the Given loan was to sign the pink sheet approving the loan as a proper investment for funds of the Lincoln Trust Company, indicating that the question of

investing plaintiff's funds in the Given bonds was never presented to nor approved by the executive committee in writing, or otherwise; that the loan committee approved of a loan to Given for investment of company funds, but the latter committee had nothing to do with the investment of trust funds, and no one connected with the company except Schlytern and Hadley knew that the loan had been transferred to the trust department. Elinor Elder, plaintiff's witness, in response to question 671, "Does the loan committee, as a loan committee, have anything to do with determining trust investments, if you know?" answered, "To my knowledge they have nothing to do with determining investments as a trust investment." The witness Schlytern testified that Messrs. Reichenbach, Holm and Mellor had no knowledge that the funds of plaintiff were invested in the Given loan. Witness Harvey R. Given testified that the execution of the bonds in controversy was a *bona fide* transaction; that he was legally bound thereby and financially responsible, the owner of 640 acres of land in Holt county in fee simple; that the mortgage was intended to be and was a valid lien against said land; that his net worth was about $200,000 and that on the 5th day of December, 1928, $10,000 could have been collected from him. Further, that the testimony of Messrs. Reichenbach, Holm and Mellor shows that the question of investing the funds of plaintiff in the Given bonds was never presented to the executive committee; that the only committee which could have approved this or any other loan for trust fund investments was the executive committee; that it required the unanimous vote of all members of such committee to approve a loan. Witness Schlytern also testified that the list which included the Given loan was never reported to the executive committee.

Plaintiff, in order to establish its cause of action, must first produce evidence that the Lincoln Trust Company, as trustee, breached its trust, and, second, it must show by evidence that the defendants were legally responsible for the breach.

3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1071, sets forth the duty of a trustee in investing trust funds in the following language: "It is the trustee's duty to use diligence in investing the trust property so that it may produce as much income as possible, and also to use care and prudence in investing it in such securities as will render its loss highly improbable, even if not virtually impossible. * * * On the other hand, if he has made an investment in improper securities, contrary to the settled rules of equity on the subject, and the principal has been wholly or partially lost through insolvency or depreciation of value, or has failed to produce income, he will be held personally responsible for the loss or deficiency."

3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1079, in defining a breach of trust, states: "It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described—of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith."

The trustee in the instant case had been the owner of the farm in Holt county, known as the Hahn farm, which was encumbered with a mortgage supporting $12,500 worth of notes, for which the trust company was trustee for the holders thereof, and upon which the company paid the interest to the bondholders from its own pocket. When these notes became due March 17, 1928, the trustee paid the notes with plaintiff's money, placing the notes known as the Hahn notes in plaintiff's account on April 21, 1928. The question is whether or not this was a breach of trust. Under the trust agreement the trustee was to make a report to plaintiff as to its investment of plaintiff's money from January 1 to 20 of each year. Before this report was made, the Hahn notes being past due, the

Hahn land was transferred to Harvey R. Given; Given giving a mortgage on the land on December 5, 1928. The trustee replaced the original notes with the new notes made by Given, so that on paper the trustee held valid obligations. This was a question of fact as to the breach of trust to be presented to the jury. The trustee not only had the benefit of the mortgage, but required an assignment of all rents to the trustee and required a deed to be made by Given to it. These facts constitute the evidence upon which plaintiff relies to establish its claim of breach of trust.

The question then arises as to the responsibility of the four defendants herein. The evidence discloses that they were members of the board of directors and of the executive committee of the trust company, trustee, and charged with the powers and duties of their respective offices; that they were members of the loan committee which approved loans; that they employed and discharged the company's employees and owned a large amount of the capital stock of the company. From the record defendants took an active interest in dominating the affairs of the corporation.

Quoting in part from 26 R. C. L. 1321, sec. 182: "Every violation by a trustee of a duty which equity imposes on him, whether wilful and fraudulent or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust."

In *Duckett v. Mechanics Bank*, 86 Md. 400, 39 L. R. A. 84, it was held: "There can be no dispute that as a general principle all persons who knowingly participate or aid in committing a breach of trust are responsible for the money, and may be compelled to replace the fund which they have been instrumental in diverting. * * * There is in such instances no primary or secondary liability as respects the parties guilty of, or participating in, the breach of trust, because all are equally amenable."

The case of *Kavanaugh v. Commonwealth Trust Co.*, 223 N. Y. 103, resulted in the holding that, while members

of executive committees are held to a higher degree of care than directors, still directors not members of executive committees are nevertheless bound to use the same degree of care in attending to the trust company's affairs as an ordinarily prudent man would use in his own business, and that this care or lack of care creates an issue of fact for the jury to determine.

Quoting from 7 C. J. 885: "While directors of a trust company may delegate their work, they may not delegate their responsibility, and hence they are not excused from liability for losses suffered by the company because they committed their duties to an executive committee, relying on it to examine the loans and collateral. Members of an executive committee of a trust company are on their part bound to be on their guard to detect any irregularities or improvident acts on the part of the executive officers, and to scan critically the detailed reports which are made to them by such officers, and their diligence is therefore greater and the rule of their liability more strict than that of a director not a member of that committee."

Defendants claimed by their publicity "a record of sound, conservative management;" that the company's directors "were chosen because of their experience and ability;" that "the executive committee of the board of directors meets monthly, thus keeping in intimate touch with the affairs of the company;" that the officers "are ever watchful of the interests of the company's clientele." Individuals who are permitted by law to create trust companies to handle other peoples' money must use the same fidelity that one uses in his own business to see that the company does not defraud the public and does not divest beneficiaries of their trust funds.

The defense offered by defendants to the foregoing may be summarized as follows: That an officer of a corporation is not liable for an error of judgment or for a failure to perform the duty which the corporation owes third persons. This principle of law is not disputed by plaintiff. In view of the instructions given by the trial court, in

which it instructed as to the law relative to the liability of defendants, we believe that defendants were held not solely because of the Lincoln Trust Company's duty to plaintiff, but because they were the parties who caused the trust company to make the breach. The record presents a case for the jury to decide as between the evidence of plaintiff and the claims of defendants.

Defendants contend that testimony was improperly admitted on rebuttal. Mr. Peterson took the witness-stand and testified that the mortgage was a first lien on the Holt county land. Mr. Ricketts, trustee of the bankrupt company, testified in rebuttal to the amount of taxes paid by the Lincoln Trust Company out of its own money, amounting to $1,214.90, the amount of interest paid by the company on the Given loan amounting to $4,000, and that he, as trustee of the bankrupt company, was claiming $5,000 as prior to all liens. The court instructed the jury as follows: "You are further instructed by the court that the deed of conveyance from Harvey R. Given and Edith N. Given to the Lincoln Safe Deposit Company, which was acknowledged on February 15, 1929, recites that the grantee therein assumes and agrees to pay the $10,000 note and mortgage of which the plaintiff herein is now the holder. You are therefore instructed that no claim can be made by the Lincoln Safe Deposit Company or its owner, the Lincoln Trust Company, for moneys advanced to pay taxes, interest or other expenses as against the plaintiff. Whatever interest the Lincoln Trust Company or Lincoln Safe Deposit Company has in the property in dispute in this action is subject, junior and inferior to the lien of plaintiff." This instruction was given at the request of defendants, and if there was any error in the admissibility of this evidence on rebuttal it was cured by this instruction.

Defendants claim certain errors by the court in its instructions to the jury. They contend that instruction No. 1 does not fairly, properly and adequately state the issues to the jury. In reading this instruction and bearing in

mind that the issues as given to the jury are not to be considered by them as evidence upon which to base their verdict, but to inform them of the contentions of the respective parties to the action, we find that the court in said instruction stated the contentions of the respective parties, although not using the exact language of the pleadings, and by so doing conformed to the best practice. In considering an instruction stating averments of the pleadings, effect will be given to the whole, and if it sufficiently contains the substance of the pleadings, it is not erroneous. *Mosslander v. Armstrong,* 90 Neb. 774.

Defendants contend that instruction No. 25 is erroneous. It is as follows: "You are instructed that if you find from the evidence and the instructions given by the court that the Lincoln Trust Company was guilty of a breach of trust and that the defendants Carlsen, Reichenbach, Mellor and Holm, or any of them, are liable for that breach, you will then direct your attention to the question of damages. If you find from the evidence and the instructions of the court that because of the breach of trust the usefulness or value of the plaintiff's property has been seriously affected, you will find for the plaintiff and against the defendants or any of them and award the plaintiff damages in the sum of Ten Thousand Dollars ($10,000) with interest at seven per cent. from the 5th day of December, 1931."

There were other instructions given on the measure of damages. One for the defendants, instruction No. 24, is as follows: "The defendants claim that at the time of the transactions involved in this case the Hahn land was ample security for the Given bonds in which the plaintiff's funds were invested, and contend that the Given bonds constituted a first lien on the Hahn land and of a fair, reasonable and actual value of $10,000 and that therefore the plaintiff suffered no loss or damage by the investment in question. In this regard, if you find from the evidence and the facts before you that the bonds in question were of a fair and reasonable value of $10,000 when the deal

was made, then and in that case plaintiff would not have been damaged, and your verdict should be in favor of each and all of the defendants herein."

The court further instructed that, upon all questions of value of either the investment, the bonds to secure the same or the value of the land in question, the jury must consider the same as of the time of the making of the investment, December 12, 1928, and limited it to that particular time.

The contention of defendants on the measure of damages is to the effect that the jury had no alternative except either to find for the plaintiff in the sum of $10,000 or to find for the defendants, and that under such an instruction it would be impossible for the jury to return a reasonable verdict, it being their contention that if the bonds at the time they were given to plaintiff were worth less than $10,000, but had some value, then the differences between the two would be the proper measure of damages.

The trial court in instruction No. 25 adopted in part the language used in *McWilliams v. Excelsior Coal Co.*, 298 Fed. 886, relative to the usefulness or value of plaintiff's property being seriously affected, and we believe such instruction properly stated the measure of damages. There was no evidence that the bonds were worth less than $10,000, or any given value, the evidence being that the bonds were either worth the amount of the trust fund of $10,000 or nothing. Therefore, if the jury found that the usefulness or value of plaintiff's property had been seriously affected and further found there was a breach of trust on the part of defendants, then, without evidence to support the value of the bonds in a less amount than $10,000, the measure of damages contended for by defendants could not be considered. This in no way conflicts with the proposition of law as to the duty of a trustee not to invest funds in loans on real estate in excess of 40 per cent. of its appraised value. This question goes to the question of a breach of trust. We believe this contention on the part of defendants is erroneous and

that the rule is well settled that where a trustee wrongfully converts to his own use the trust property, or any part of it, the *cestui que trust* is entitled in equity to a personal decree for the value of the property so converted. Hill, Trustees (3d Am. ed.) *522; Perry, Trusts & Trustees (7th ed.) sec. 847.

The evidence on the part of plaintiff shows that on the date of the original fraudulent transfer the bonds were worthless. The evidence on part of defendants as to the value of the bonds as of said date was to the effect that they were worth $10,000. Instruction No. 24, heretofore set out, is in keeping with the request of defendants for instructions on this subject. The defendants contend the bonds were worth $10,000 and no less. The plaintiff declares them, by virtue of defendants' breach of trust, to be of no value and worthless by the very nature of the transaction. Under the evidence and theory of plaintiff and of the defendants the measure of damages as given in this case is proper. The fact that the rule developed from an equity case is of no consequence; it was the proper rule to apply in a law action.

Defendants allege error in the giving of instruction No. 19, which is as follows: "You are instructed that where a mortgagee takes title to the real estate from the mortgagor the question of a merger of the two estates depends upon the intention of the mortgagee, and if none is expressed, in the absence of circumstances indicating a contrary purpose, it will be presumed that the mortgagee intended to do that which would prove most advantageous to itself." This instruction raises the question of merger of title. While it is probable that the instruction was unnecessary, still, as an abstract proposition of law, it was correct and affords defendants no ground for a new trial. "It is not reversible error to give to the jury an unnecessary instruction, which is a correct statement of a proposition of law, unless the complaining party appears to have been prejudiced thereby." *Johnson v. Ish*, 90 Neb. 173. This instruction did not affect the substantial rights

of the defendants and they were not prejudiced by the giving of it.

We do not feel the objections to other instructions given by the court to be of sufficient importance to discuss, as the instructions, considered as a whole, fairly state the law as shown by the issues and evidence in this case.

Defendant Carlsen contends that the trial judge was disqualified to sit in this case by reason of the fact that he was a member of Masonic Lodge No. 54, which was one of the lodges interested in the plaintiff corporation, and that he paid dues therein, citing section 27-315, Comp. St. 1929, which is as follows: "A judge or justice is disqualified from acting as such in the county, district or supreme court in any case, wherein he is a party or interested," and further citing decisions of this court and courts of other states in support of his contention. The secretary of plaintiff made an affidavit for the record, setting forth that the Masonic lodges of Lincoln desired to build a temple and that plaintiff corporation was organized for that purpose; that Judge Broady was not a stockholder in the corporation; that the funds of the corporation were raised by contributions; that Judge Broady was not a contributor to that fund, and that, should a distribution be made of such funds, Judge Broady would get none of them, he not being a contributor thereto.

Judge Broady, in passing on this angle of the case, which is made a part of the record, stated that he had been a member of Lancaster Masonic Lodge No. 54 for something like 20 years; that he had in no way contributed to the fund of plaintiff in question, was not interested therein, did not personally profit or benefit therefrom, and that the question of his disqualification was not raised until almost at the end of the trial which consumed 11 days, and that his membership in said lodge did not influence him in the slightest degree in any ruling throughout the trial.

We believe the objection as raised is without merit and

that the defendant Carlsen has failed to show in any way that the trial judge was disqualified to hear the case and that the showing made came at a rather inopportune time.

For the reasons heretofore given in this opinion on the various assignments of errors contended for by the defendants, or either of them, we believe the judgment of the lower court should be and is hereby

AFFIRMED.

GOOD, J., dissents.

IN RE ESTATE OF JOHN BENSON.
HANNAH BENSON NELSON, APPELLANT, V. SANFRED BENSON, ADMINISTRATOR, APPELLEE.

FILED DECEMBER 31, 1934. No. 29077.

Executors and Administrators. In a proceeding to settle the estate of a deceased person, proofs in support of claims by his daughter for an unpaid share of the estate and for compensation for her services as a nurse in caring for him, *held* insufficient to make a *prima facie* case in her favor on either claim.

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

Cloyd L. Stewart, for appellant.

D. B. Massie and *August C. Krebs, contra.*

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

ROSE, J.

In a proceeding in the county court of Clay county to settle the estate of John Benson, deceased, his married daughter, Hannah Benson Nelson, presented for allowance two claims, one for $6,000 alleged to be due her as the remainder of a 16,000-dollar share of her father's estate and the other for $1,921.20 for car fare between

Omaha and Saronville and for services performed by her for her father in the capacity of a graduate nurse at $42 a week. The claims were contested by Sanfred Benson, a son of decedent and administrator of the estate. Upon notice and trial, the county court disallowed the claim for $6,000 and allowed the other claim to the extent of $593.60 only and rejected the remainder of it. Claimant appealed to the district court, where a jury was waived. At the close of claimant's evidence, the administrator moved for judgment in his favor on the ground that claimant did not make a *prima facie* case on either claim. The motion was sustained and the petition for the allowance of the claims was dismissed. Claimant appealed to the supreme court.

The decision below is assailed for assigned "error in sustaining a motion to dismiss plaintiff's suit upon her two claims." Claimant argues that she made a *prima facie* case for the allowance of her claims.

John Benson died intestate December 12, 1930, leaving surviving him his widow, five sons and four daughters. The oldest child was 63 years of age and the youngest, Hannah Benson Nelson, claimant, was 46. The home of decedent was in Saronville, Clay county. Claimant resided in Omaha. The petition of claimant states that her father, April 14, 1917, made gifts of land, money and other personal property to all his sons and daughters by orally agreeing to give, and by giving, to each $16,000; that all received that amount except claimant who received $10,000 only with the agreement and understanding that she would receive the remainder due her, or $6,000 upon her father's death; that if any property remained in his estate it would be divided in equal shares among all the heirs. In objections to this claim the administrator denied that his father or the latter's heirs ever agreed to pay claimant $6,000 in cash upon his death, and alleged that he had made gifts or settlements on the basis of $16,000 for each child; that claimant received $10,000 in cash and was to receive the home place at Saronville upon the death of her

parents. Claimant alleged that the oral promise for the gift of the remainder of the $16,000, or $6,000, upon the death of donor, was made April 14, 1917. The father, therefore, had from that date until the date of his death December 12, 1930, to make a will giving effect to the alleged gifts of cash, if made, or to execute in writing a contract evidencing it. He did neither. Assuming, without deciding, that such a gift or promise could be sustained in law, if proved, the evidence is found to be insufficient to sustain the necessary findings of fact to that effect. The preponderance of the evidence indicates that claimant's share, in addition to the $10,000 she received in cash, was the home in Saronville, including 17 acres of land, upon the death of her parents, and not $6,000 in cash. This item was therefore properly disallowed.

Was the claim for compensation of claimant as a nurse and for car fare erroneously disallowed? For two or three years her father at intervals had been in poor health. In caring for him some of his daughters took turns with claimant without compensation. Claimant was not called as a witness. Her husband was her principal witness. Generally, what he had learned about professional services performed by his wife for her father came from her and was largely hearsay. The evidence does not prove that the father of claimant entered into a contract to employ claimant as a nurse or that he promised to pay for her services as such or that any one else in authority did so. Though claimant cared for her father for a time in her home in Omaha and at his home in Saronville at different times, there is nothing to show that she ever asked him for compensation. Her husband did not have personal knowledge generally that his wife actually performed the services for which she claimed compensation. There was no account in writing admitted in evidence. If performance and acceptance of services could be held to imply a promise to pay for them, the evidence as to dates, time devoted to duties and services performed was too indefinite and uncertain to justify a

charge against the estate for any specific amount. The burden of proof was on claimant. She was required to make a *prima facie* case—one in which the adduced evidence, standing alone, warranted the finding of facts to be proved. 49 C. J. 1346. The proofs were insufficient. That part of the claim for car fare falls with the item for compensation. In these views of the evidence and the law, the district court properly dismissed the petition for the allowance of the claims.

AFFIRMED.

CLARENCE J. THURSTON, APPELLANT AND CROSS-APPELLEE, V. TRAVELERS INSURANCE COMPANY ET AL., APPELLEES: EMMA JAYNE HILTON, CROSS-APPELLANT.

FILED DECEMBER 31, 1934. No. 29039.

1. **Attorney and Client: COMPENSATION.** The contract of employment as actually made between attorney and client is controlling, and the attorney is bound thereby even though he may have agreed to act for an inadequate amount, or for no fee at all, unless the agreement is made under a mistake of fact which the law recognizes.
2. ———: ———. "Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for such service while the service is being rendered." *Olson v. Farnsworth*, 97 Neb. 407.
3. **Appeal: ESTOPPEL.** A party who, after appealing from a decree in his favor, voluntarily accepts the benefits or receives the advantage of the decree is thereby precluded from afterwards prosecuting his appeal, even though what is done was in pursuance of an express stipulation of the parties.
4. ———. Record and evidence examined, and *held* to sustain the judgment of the trial court.

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

M. L. Donovan and *Clarence J. Thurston,* for appellant.

Brogan, Ellick & Shoemaker, Robert B. Hamer and *Kennedy, Holland & De Lacy, contra.*

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

EBERLY, J.

This is an action in equity to secure a judicial determination of the amount of attorney's fees alleged to be due plaintiff for his services in the case of Hilton v. Travelers Insurance Company in the district court for Douglas county, and the enforcement of an attorney's lien for the recovery of the same.

Defendant Hilton joined issue by general denial, and also alleged, in substance, that the receipt by plaintiff of the sum of $150 as attorney's fee allowed by the trial court, and the payment by such defendant to plaintiff of an additional sum of $167.90 as a gratuity, constituted payment in full under the terms of the contract of employment. The plaintiff then by reply put in issue the new matter set forth in defendant's answer. Trial was had to the court, and evidence was submitted on behalf of both parties.

On October 10, 1933, the trial court, on consideration of the evidence, entered a finding and judgment determining that a contract of employment as attorney and client existed between the plaintiff and defendant, and that plaintiff had complied with the terms thereof; that, under the provisions of such agreement, plaintiff was entitled to have and receive the sum of $150 (being the attorney's fee allowed by the court) and in addition thereto 20 per cent. of the judgment of $839 entered in said cause (all of which the defendant had theretofore paid); also that plaintiff was entitled to 20 per cent. of the weekly payments on the policy in suit, for total permanent disability of defendant accruing thereon from May 25, 1932, to June 10, 1933, amounting to $225.56 (which at the time of the judgment defendant had not paid); and that plaintiff was entitled to an attorney's lien for the amount so adjudged to be due. Further recovery by plaintiff was denied by the trial court.

On October 16, 1933, plaintiff filed a cost bond on appeal in the sum of $75, which was approved on that day by the clerk of the district court for Douglas county.

On October 19, 1933, the written stipulation of all interested parties was filed in said cause in the district court for Douglas county, providing, in part, as follows: "Now, therefore, it is hereby stipulated and agreed, by and between the parties hereto, that the defendant Emma Jayne Hilton may draw from the clerk of this court 50 per cent. of the money already paid into court by said insurance company and may receive 50 per cent. of all payments which are due and may become due from said insurance company pending this appeal, and that the plaintiff herein may draw down $225.56 and his costs in this court from the clerk of this court and that the balance of the money in the hands of the clerk of this court shall remain in his hands until the determination of the appeal herein, and that the Travelers Insurance Company will pay into court the payments which are due and may become due the defendant Emma Jayne Hilton pending this appeal, 50 per cent. of which shall be paid to defendant Emma Jayne Hilton by the clerk and 50 per cent. of said funds to be held by the clerk of this court until the final determination of the appeal herein and then to be disbursed in accordance with the decision of the supreme court."

Plaintiff now presents an appeal, filing his transcript on appeal in this court on October 25, 1933, and defendant Hilton has cross-appealed.

Appellant challenges the correctness of the conclusions of the trial court, and claims that the evidence, properly considered, fairly shows that a valid oral agreement was entered into by him and defendant Hilton, by the terms of which he was to receive the sum of $150, allowed by the trial court as attorney's fees in the case of Hilton v. Travelers Insurance Company, and 20 per cent. of the judgment entered in that case, and also 20 per cent. of all weekly benefits for permanent total disability to which

defendant Hilton would subsequently become entitled by the terms of the policy in suit.

We have carefully read the record and are unable to accept this contention. It will be remembered that this case is presented on appeal as an action in equity, in which the duty is imposed on this tribunal "to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Comp. St. 1929, sec. 20-1925.

Both parties agree that at the time plaintiff was first employed by the defendant the agreement was, in substance, that in the event a settlement could be secured with the Travelers Insurance Company of a certain claim of defendant Hilton without the institution of a suit no charges of attorney fees whatever would be made by plaintiff. Efforts to arrive at a satisfactory settlement with the Travelers Insurance Company proved fruitless, and the plaintiff and defendant Hilton thereupon instituted an action at law against such insurance company.

The defendant's evidence on the subject of the agreement then made as to attorney fees which plaintiff was to receive is as follows: "Q. Was there anything said over the telephone about any attorney's fees? A. Yes, sir. I asked him about attorney's fees then, and he said, 'Well, Emma Jayne, I don't want you to worry about any attorney's fees.' He said, 'If we win the suit,' he said, 'no doubt we will,' he said, 'they will allow me attorney's fees, and if we lose,' he says, 'I know your circumstances, and I will not charge you anything.' "

This evidence to the effect that the actual agreement by the terms of the contract was that the litigation was to be carried on for the compensation as determined by the

court in the original case is corroborated by plaintiff's admissions as testified to by two witnesses.

Subsequently, and after entry of judgment in the case thus instituted, it appears from the evidence that defendant Hilton agreed to pay, and did pay, plaintiff an additional sum of $167.90, being 20 per cent. of the judgment so actually entered. Defendant says this payment was in the nature of a mere gratuity, and that she never agreed to any further additional payment. The evidence of plaintiff conflicts with these statements. But, in view of the corroboration of defendant's testimony, we feel compelled to accept it as stating the facts as to the terms of the original employment of plaintiff which form the binding contract of employment between these parties.

The contract actually made is controlling. That the compensation it provides is inadequate is not appealing to the conscience of this court. An attorney is bound by his contract the same as any other person, even though he may have agreed to act for an inadequate amount or for no fee at all, unless the agreement is made under a mistake of fact which the law recognizes. 6 C. J. 738; 2 R. C. L. 1047, sec. 129; *Estate of Rapp v. Elgutter,* 77 Neb. 674; *Falloon v. Miles,* 102 Neb. 843; *Lavenson v. Wise,* 131 Cal. 369; *Tong v. Orr,* 44 Ind. App. 681; *Nathan v. Halsell,* 91 Miss. 785; *Reynolds v. Sorosis Fruit Co.,* 133 Cal. 625; *McElroy v. Russell & Avritt,* 15 Ky. Law Rep. 740; *Stone v. Hart,* 23 Ky. Law Rep. 1777; *Walsh v. School District No. 1,* 17 Mont. 413.

Indeed, as to any attempted modification or substitution of contracts of employment by attorneys, after the relation of attorney and client has been created, the general rule appears to be that an agreement for additional compensation, made after such relationship is established, is presumptively invalid, and unless the agreement embraces the performance of services not contemplated before, it will be void for want of consideration. 6 C. J. 737; 2 R. C. L. 1037, sec. 120; *Ridge v. Healy,* 251 Fed. 798; *Moore v. Rochester Weaver Mining Co.,* 42 Nev. 164;

White v. Tolliver, 110 Ala. 300; *Marshall v. Dossett,* 57 Ark. 93; *Shropshire v. Ryan,* 111 Ia. 677; *Egan v. Burnight,* 34 S. Dak. 473; *Stern v. Hyman,* 182 N. Car. 422; *Hubbard v. George,* 81 W. Va. 538.

This court finds from conflicting evidence that, under the original agreement between these parties at the time the suit was originally instituted against the Travelers Insurance Company, the compensation of plaintiff was limited to the sum to be allowed by the trial court in that case. Thus, it follows that no additional compensation may be allowed except within the limitation above noted.

It would seem that this jurisdiction is really committed to a rule more favorable to the defendant than that hereinbefore stated. In *Olson v. Farnsworth,* 97 Neb. 407, the controlling principle was stated in the following language: "Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for such service while the service is being rendered."

No substantial services additional to those in contemplation at the time of the original contract for institution of the suit appear to have been rendered, so there can be no recovery of additional compensation by plaintiff in this case.

True, after the satisfaction of judgment, defendant Hilton paid plaintiff an additional sum of $167.90. Under the circumstances then existing this constituted an honorarium, and was rightly received and retained by plaintiff. But the defendant did not agree to make the further payment of $225.56, which sum was 20 per cent. of the amounts accruing on the policy in suit from the date of the institution of the court action thereon to the date of the settlement of judgment. Indeed, in view of the contract of employment as we have determined it to be, plaintiff, under the Nebraska rule, would not be entitled to "contract for greater compensation" in this case than that contemplated in his original agreement, after judgment

had been entered in the case in which his services were rendered.

It is not to be forgotten that an attorney is not entitled to a percentage of the amount recovered by his client in the absence of an express contract to that effect; the burden of proving which rests on the attorney asserting it. 6 C. J. 741, 758; *Crumlish's Adm'r v. Shenandoah Valley R. Co.*, 40 W. Va. 627.

However, a serious question presented by the record, though not argued in the briefs of the parties, is whether an appeal or cross-appeal is maintainable, so far as the allowance of the sum of $225.56 as made by the trial court is concerned. By the terms of the stipulation filed in the district court the plaintiff has or at least is entitled to "draw down" $225.56 of the moneys in controversy on this appeal. Indeed, both parties, plaintiff as well as defendant, have appropriated the benefits, at least in part, of the judgment entered and appealed from. The time for filing an appeal bond had not yet expired when this stipulation was filed. So far as disclosed by the record, it must be considered as the voluntary act of the parties. This jurisdiction is committed to the rule announced in *Harte v. Castetter*, 38 Neb. 571, viz.: "A party who, after appealing from a decree in his favor, voluntarily accepts the benefits or receives the advantage of the decree is thereby precluded from afterwards prosecuting his appeal." See, also, *Gray v. Smith*, 17 Neb. 682; *Hamilton County v. Bailey*, 12 Neb. 56; *Weston v. Falk*, 66 Neb. 198; *Green v. Hall*, 43 Neb. 275; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385.

The general rule cannot be gainsaid that, pending appeal, an event may occur which renders a decree unnecessary, in which case the appeal will be dismissed. Such a condition may arise by act of the appellant or plaintiff in error himself, or of the appellee or defendant in error, as where, pending appeal, he does or relinquishes the right to do some act in respect to which the appeal is taken. 3 C. J. 360, *et seq.* This appears true even though the pay-

ment of judgment was for the accommodation of appellee, and under an agreement that the acceptance of payment should not affect appellant's right of appeal. *Mutual Benefit Life Ins. Co. v. Simpson,* 163 Ind. 10. See, also, *Denver v. Brown,* 47 Colo. 513; *Board of Com'rs of Clinton County v. Clark,* 43 Ind. App. 499; *In re Black's Estate,* 32 Mont. 51.

It appears that, having in effect voluntarily agreed to the payment of the $225.56 to the plaintiff by the terms of the stipulation executed by defendant, she may not now invoke the jurisdiction of this court on that subject.

It necessarily follows that the judgment of the district court in this proceeding must be deemed correct, and it is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF OMAHA, E. H. LUIKART, RECEIVER, APPELLANT: GERALDINE KEMP, INTERVENER, APPELLEE.

FILED DECEMBER 31, 1934. No. 29052.

1. **Equity.** A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.
2. **Banks and Banking: INSOLVENCY: CLAIMS OF DEPOSITORS.** "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership." Comp. St. 1929, sec. 8-1,102.
3. ———: ———: **CLAIMS OF EMPLOYEES.** Where the employee of a state bank has rendered services on the general credit of his employer, he does not, in the enforcement of his claim for compensation therefor after insolvency and the appointment of a receiver for his debtor, have any other or greater right of preference than any other general creditor.

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

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

Jackson B. Chase and *William H. Thomas, contra.*

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

EBERLY, J.

On August 24, 1931, by a decree made and entered in the district court for Douglas county, the State Bank of Omaha was adjudged insolvent, and it was found necessary that said bank be liquidated. A receiver was appointed, directed to proceed with due diligence to collect the debts owing to the insolvent bank, empowered to sell and dispose of any and all property, both real and personal, belonging to the bank, and, further, authorized and directed to do any and all acts essential and necessary to the speedy closing and winding up of the affairs of the bank. Pursuant to this decree, E. H. Luikart was appointed receiver and he qualified as such, and the regular administration of this trust was entered upon.

On January 13, 1932, a petition of intervention was filed in the cause by Geraldine Kemp, intervener, setting forth that she was employed by the insolvent bank prior to the closing thereof by the state banking department, and remained in the bank's employ until it was so closed, and thereby earned a stipulated salary in the sum of $18.83. Further, that certain other employees of the bank had been employed in a similar manner, rendered similar services, and earned certain amounts as set forth in the petition of intervention; that the claims of these other employees had been duly assigned to intervener herein, and, together with intervener's claim, they aggregated the sum of $458.86, which amount, it was alleged, constituted a preferred claim against the assets of the insolvent bank in the hands of the receiver, and asked that the receiver be ordered to pay said claims in full.

The receiver joined issue, challenging the right to re-

cover as on a preferred claim, though the performance of the services, the amount of compensation due therefor, and the proper assignments thereof to intervener were admitted as alleged in the petition of intervention.

Trial was had to the court and judgment was entered as prayed by intervener as "a preferred claim against the assets of said bank," and the receiver was "ordered and directed to pay said claim in the full amount thereof." The receiver appeals.

In this court appellee bases no claim on the trust character of the sums set forth in her petition of intervention. Her position, as stated in her brief, is:

"It is well settled that after the appointment of a receiver a court of equity may authorize the payment of wages, attorneys' fees and current expenses of liquidation, all on the theory that such expenses are for the interest of mortgage holders, bondholders or depositors, as the case may be. It is also true that work and labor performed within a short time prior to receivership and which is closely and minutely related to work and labor continued after receivership may be properly charged as expenses of receivership."

Thus intervener contends that the applicable rule of law is: "Wages due employees, current operating expenses and current balances arising from indispensable business relations and similar current debts arising within a reasonable time prior to the appointment of a receiver are among the limited class of claims, to which, in its discretion, the court may give priority." In support of this rule the following cases are cited: *Fosdick v. Schall*, 99 U. S. 235; *Wood v. New York, N. E. R. Co.*, 70 Fed. 741; *Central Trust Co. v. East Tennessee V. & G. R. Co.*, 80 Fed. 624; *Bound v. South Carolina R. Co.*, 58 Fed. 473; *Finance Co. v. Charleston, C. & C. R. Co.*, 49 Fed. 693; *Finance Co. v. Charleston, C. & C. R. Co.*, 62 Fed. 205; *Douglass v. Cline*, 12 Bush. (Ky.) 608; *Hale v. Frost*, 99 U. S. 389; *Northern P. R. Co. v. Lamont*, 69 Fed. 23; *Keelyn v. Carolina Mutual Tel. & Tel. Co.*, 90 Fed. 29; *Atlantic Trust Co. v. Woodbridge*

Canal & Irrigation Co., 79 Fed. 39; *Drennen v. Mercantile Trust & Deposit Co.*, 115 Ala. 592, 39 L. R. A. 623; *Lehman Bros. v. Tallassee Mfg. Co.*, 64 Ala. 567; *LeHote v. Boyet*, 85 Miss. 636; *Peoples Nat. Bank v. Virginia Textile Co.*, 104 Va. 34.

A careful examination of these authorities on which appellee relies confirms us in the view that the following would, in a general way, more accurately set forth the true doctrine which they tend to sustain, viz.: "The operating expenses of a public utility corporation, such as a railroad, after it is put in the hands of a receiver and its continued operation directed by order of court, have priority both as to income and corpus over the claims of mortgagees and other lienors, which priority is not based on the element of consent which governs in case of concerns not affected with a public interest, but exists by reason of the fact that the public has an interest in the continued operation of the business, subject to which those having liens or mortgages on such concerns take their security, and on the further fact that the continued operation of a business of this character is necessary to preserve the value of the property in its entirety, and benefits the interest of the lienors by reason of such preservation." 53 C. J. 257.

It will be noted that the cases cited by appellee largely concern railway receiverships. The subjects of litigation in the cases so cited by appellee which do not pertain to railways involve facts so fundamentally similar as to require the application of the doctrine announced by the authorities as applicable to railway receiverships.

The peculiar nature of these subjects of litigation was recognized early in the history of the rule under consideration in *Fosdick v. Schall*, 99 U. S. 235, an early and leading case on this subject, in which Waite, C. J., says, in part (pages 251, 252): "As to the second question, we have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of

issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes are complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation."

Among the peculiar circumstances which are involved in this class of litigation is the appointment of the receiver to continue the business of the insolvent as a going concern, in the continuance of which the public has an interest, and which is essential to maintain and conserve its property values. This involves furnishing to the public, after insolvency, services identical with those afforded prior to receivership. As a necessary incident to the continuance of an uninterrupted business, in this particular class of cases, courts of equity, in the exercise of their discretion, have adjudged to be payable with priority over existing mortgage liens certain claims for services, material, etc., which had been furnished to the insolvent prior to the appointment of the receiver. But the peculiar rule here considered is applicable only when invoked by the peculiar nature of the facts involved in any receivership.

Conceding arguendo that the business of banking is a quasi public business, subject to regulation and control by the state (Comp. St. 1929, sec. 8-114), upon the appointment of its receiver the State Bank of Omaha ceased to be

a going concern, and the receiver thereof was not operating a going business. Its possibility of performing the services intended by its constitution was wholly terminated. The receivership did not contemplate the conservation of its values by its continuance as a going concern. On the contrary, it was the sole duty of the receiver to liquidate and to pay its creditors in the manner provided by law, and that as quickly as possible. Thus, the fundamental reason upon which the rule appellee contends for is based is not presented by the facts which form the basis of the instant case, nor is its application invoked by any deduction which may properly be made therefrom.

"Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." Broom's Legal Maxims (9th ed.) 110.

So, also, in the discussion of equities it is not to be forgotten that one of the accepted maxims of equity is that "Equity follows the law."

In *Mathews v. Mobile Mutual Ins. Co.*, 75 Ala. 85, it was held: "A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy was there pending."

And, again, in *Hazen v. Reed*, 30 Mich. 331, it was held: "However manifest and strong the natural equities in the specific instance may be, the court may not depart from the settled rule of law in order to do what may be deemed substantial justice in the particular case."

Our legislature has ordained that "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership." Comp. St. 1929, sec. 8-1,102.

In construing this statute, in *Guaranty Fund Commission v. Teichmeier,* 119 Neb. 387, it was said: "We are unanimously of the opinion that it is clearly apparent that the legislature intended to give the claims of depositors and holders of exchange priority over all other claims and to fix them as a lien against the assets of the bank."

The foregoing view was reaffirmed in *State v. Thurston State Bank,* 121 Neb. 407, and in that case we also held: "Under section 8-1,102, Comp. St. 1929, priority of unsecured deposits in a state bank is fixed by their status at the time of the actual closing of the bank when the court, under section 8-190, Comp. St. 1929, adjudges it to be insolvent and orders it liquidated."

Indeed, in principle, the doctrine opposed to appellee's contention was clearly announced in *State v. Citizens State Bank,* 117 Neb. 860, wherein, in effect, we held that, where an employee of a state bank has rendered services on the general credit of his employer, he does not, after insolvency, have any other or greater right than any other general creditor.

It is obvious that in the award of preference in the instant case the district court erred, and that the claim was properly classified by the receiver as a nonpreferred claim of a general creditor.

Therefore, the decree of the district court for Douglas county awarding a preference to the intervener is reversed, and the cause is remanded, with directions to enter a decree in conformity with this opinion.

REVERSED.

ELLERY L. DAVIS, APPELLEE, V. AETNA LIFE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 31, 1934. No. 29040.

1. Insurance: CONTRACT: CONSTRUCTION. The natural and obvious meaning of the provisions of an insurance contract controls, rather than a forced or strained construction.

2. ———: ———: ———. The provision in an insurance policy that six months after proof is furnished the company of permanent total disability the company will waive premiums thereafter during disability is not ambiguous and uncertain language subject to judicial construction.
3. ———: ———: ———. The provision that six months after proof is furnished the company of permanent disability the company will pay the life beneficiary the sum of $10 and $10 each month thereafter during disability cannot be construed to determine the company's liability as $10 a month from date of such disability.
4. Appeal. Where a jury is waived in an action at law, the finding of the trial court is entitled to the same consideration upon appeal as the verdict of a jury.
5. ———. Where a jury is waived in a law action, while the finding of the court has the force and effect upon appeal as a verdict of a jury, it will be set aside where there is not sufficient competent evidence in the record to support it.

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

Brown, Fitch & West, for appellant.

Hall, Cline & Williams and *H. W. Baird, 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 to recover under the disability clause of a life insurance contract providing for waiver of premiums and payment of benefits. The plaintiff became totally disabled May 31, 1930, and claims to have notified the company August 1, 1930. On the other hand, the company alleges that it did not receive proof of permanent disability until June 16, 1932, and six months thereafter began paying the benefits under the policy. This controversy therefore is concerned with the liability of the company for benefits from the date of total disability, May 31, 1930, to December 16, 1932, and, in addition, for two annual premiums paid by plaintiff during this period. A jury was waived, and the court entered a judgment for $1,298.51, from which the

defendant files an appeal and the plaintiff a cross-appeal. The provision of the policy giving rise to this action is as follows:

"Six months after proof is received at the home office of the company that the insured has become wholly, continuously and permanently disabled and will for life be unable to perform any work or conduct any business for compensation or profit, or has met with the irrecoverable loss of the entire sight of both eyes, or the total and permanent loss by removal or disease of the use of both hands or of both feet, or of such loss of one hand and one foot, all from causes originating after the delivery of this policy, the company will, if all premiums previously due have been paid, waive the payment of all premiums falling due thereafter during such disability, and if such disability was sustained before the insured attained the age of sixty years, the company will pay to the life beneficiary the sum of ten dollars for each thousand dollars of the sum insured and will pay the same sum on the same day of every month thereafter during the lifetime and during such disability of the insured."

A consideration of the meaning of this clause is essential to a determination of this case. The plaintiff insists that it means that, when proof is furnished the company of permanent total disability, the premiums are waived, and the benefits are to be paid six months thereafter from the date of permanent total disability. With this contention, we are unable to agree. Omitting clauses in the long sentence which have no application or are not in issue in this case, it reads:

"Six months after proof is received at the home office that the insured has become wholly and permanently disabled, the company will waive the payment of all premiums falling due thereafter during such disability and will pay the sum of ten dollars and will pay the same sum on the same day of every month thereafter."

The company's position is that the waiver of premiums begins six months after proof is furnished the home office

of disability. The language is not ambiguous and is therefore not subject to construction. *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. 669. The phraseology of this company's policy is different from any other which has been considered by other courts. There is no evidence in this case as to any different understanding between the parties except as expressed by the contract of insurance. There is no question of reformation of policy involved as in *Rubinson v. North American Accident Ins. Co.*, 124 Neb. 269. "Thereafter" the premiums shall be waived refers to the phrase "six months after proof," rather than "disability." The date after which premiums would be waived is to be six months after proof has been furnished the company of the disability, rather than from the commencement of the disability.

But the meaning of the clause may be clarified by its other provisions. *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18. The company agreed to pay the life beneficiary six months after proof of total permanent disability the sum of $10. Assuming that the insured furnished proof on the first day of disability, then, if we accept plaintiff's contention, the company would be required to pay $60 and not $10. This language definitely negatives the idea that the benefit is to be $10 a month from date of disability. And the policy continues by providing that the company will pay the sum of $10 on the same day of every month thereafter, which fixes the subsequent monthly liability from date of the first payment. The natural and obvious meaning of the provision of an insurance contract controls, rather than a forced or strained construction. The provision in an insurance policy that six months after proof is furnished the company of permanent total disability the company will waive premiums thereafter during disability and pay $10 and $10 each month thereafter during disability is not ambiguous and uncertain language subject to judicial construction. The provision that six months after proof is furnished the company of permanent disability the company will pay the life beneficiary the sum of

$10 and $10 each month thereafter during disability cannot be construed to determine the company's liability as $10 a month from date of such disability. In *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, Howell, J., stated the rule applicable in simple language that a provision in an insurance policy "means what it says." In the instant case, the company contracted to waive premiums and pay monthly benefits six months after it was furnished proof of permanent total disability until such disability ended.

In our conclusion, we are not unmindful that this identical provision has been construed so that it imposes a different liability upon the company in *Wenstrom v. Aetna Life Ins. Co.*, 55 N. Dak. 647, *Aetna Life Ins. Co. v. Phifer*, 160 Ark. 98, and *Aetna Life Ins. Co. v. Palmer*, 159 Ga. 371. In each case, the court construed the contract on the theory that it is ambiguous. We have great respect for these decisions and have considered them carefully. However, we are unable to agree to their primary conclusion that the contract is ambiguous. In this respect the trial court correctly held "That the disability clause of the insurance policy in question should be construed so that the waiver of premiums became effective and the payments of monthly disability accrued six months after proof of disability received by defendant."

But we are unable to agree with the finding of the trial court that the plaintiff gave and defendant received proof of such disability on November 18, 1930. The plaintiff relies upon his communication to the company at that time. In it he stated he could not tell how long he would be unable to perform any work or conduct any business for compensation or profit. At the same time Dr. A. D. Dunn, who had been consulted, in a written statement, said in effect that insured was not totally and permanently disabled, but disabled, at the time. He also stated that the condition was temporary and that such improvement will probably result in enabling him to carry on his usual occupation. Dr. George W. Covey, who was treating the

insured, also furnished the company with a written statement at this time in which he said: "Believe he will be able to resume work." In April, 1931, and April, 1932, the insured and Dr. Covey furnished additional statements to the company as to the physical condition of the insured in about the same tenor. It was not until June 13, 1932, that Dr. Covey wrote the company a letter which was the first time, as far as the record discloses, that he or anybody else informed the company that the insured was permanently and totally disabled. Thereafter, on December 16, 1932, six months after receipt of this letter from Dr. Covey, the company began the payments of benefits thereunder. Where a jury is waived in an action at law, the finding of the trial court is entitled to the same consideration upon appeal as the verdict of a jury, and will not be disturbed unless clearly wrong. *Broadway Bank of Kansas City v. Sager,* 122 Neb. 894; *Boschulte v. Elkhorn River Drainage District,* 102 Neb. 451. But the evidence in the record is insufficient to support the finding of the trial court that the company received proof that insured was permanently and totally disabled November 18, 1930. As heretofore noted, there was not a single statement in the communications to the effect that insured was permanently and totally disabled. The insured as well as the physicians stated positively that the disability was only temporary. The company's liability was determined from the date proof was received. It is not necessary to quibble about the quantum of proof necessary, since there was no evidence of any kind furnished the company that the insured was permanently and totally disabled until June 16, 1932. In its most favorable aspect, it was only notice to the company that insured was temporarily disabled. This did not require the company to compensate him. Where a jury is waived in a law action, while the finding of the court has the force and effect upon appeal as a verdict of a jury, it will be set aside where there is not sufficient competent evidence in the record to support it. *Farmers State Bank v. Butler,* 101 Neb. 635. The evidence in the

record will not support a finding that the company was furnished proof of the permanent total disability of insured until June 16, 1932.

REVERSED AND DISMISSED.

PAUL R. OLIVER, APPELLEE, V. OSCAR W. NELSON, APPELLANT.

FILED DECEMBER 31, 1934. No. 29092.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: ACTION AGAINST THIRD PERSON. Section 48-118, Comp. St. 1929, does not prevent an employee under the workmen's compensation law from bringing an action in his own name against a third person liable for damages for personal injury, but requires that the employer having paid or paying compensation shall be made a party.
2. Negligence: INSTRUCTIONS. In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of the evidence that the negligence of the defendant caused the accident and the damage is sufficient relative to proximate cause, where there is no question of a remote or intervening cause.
3. Trial: INSTRUCTIONS. Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words.
4. Damages. Verdict is not excessive.

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

James D. Conway and *George B. Boland,* for appellant.

B. J. Cunningham and *Stiner & Boslaugh, contra.*

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

DAY, J.

This is an action for personal injuries resulting from an automobile accident. One car driven by defendant and

another driven by plaintiff collided head-on while operated on the highway. The plaintiff recovered a judgment for $5,500 from which the defendant appeals. Such facts as necessary will be stated in the discussion of the issues involved in this court.

It is the contention of the defendant that the plaintiff cannot maintain this action. He alleged in his answer that the plaintiff was involved in the controversial accident "while in the regular course of his employment for the Beechnut Packing Company, a corporation." This contention is founded upon section 48-118, Comp. St. 1929, which is a part of the workmen's compensation law and is:

"Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents should have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation. Provided, however, that nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against said third person in his own name or in the name of the personal representative based upon said liability, but in such an event an employer having paid or paying compensation to the said employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid." The proviso beginning, "Provided, however," was added by amendment in 1929. Laws 1929, ch. 135.

This section has been considered by this court in numerous cases. See *Muncaster v. Graham Ice Cream Co.*, 103 Neb. 379; *Thomas v. Otis Elevator Co.*, 103 Neb. 401; *Murphy Construction Co. v. Serck*, 104 Neb. 398; *Graham v. City of Lincoln*, 106 Neb. 305; *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9.

The section has been held to be for the benefit of the employer, so that he might recover from a third party, who negligently injured his employee, the amount he was required to pay by the compensation statutes. This court properly held that the act prior to the 1929 amendment provided "that the right to bring an action against the third party rests with the employer until such time as the employee can allege and prove that his employer has neglected or refused to institute the action." *O'Donnell v. Baker Ice Machine Co., supra.* However, the amendment of 1929, noted above, provided that the employee could bring the action by making an employer who had paid or was paying compensation a party defendant. The evidence in this case establishes the fact that the employer had not paid and was not paying compensation to the employee. Section 48-118, Comp. St. 1929, does not prevent an employee under the workmen's compensation law from bringing an action in his own name against a third person liable for damages for personal injury, but requires that the employer having paid or paying compensation shall be made a party. *Goeres v. Goeres*, 124 Neb. 720.

There is no allegation in the pleadings that the plaintiff in this case came under the provisions of the Nebraska workmen's compensation act. The evidence suggests that the plaintiff was a resident of Wichita, Kansas, working for a corporation whose principal place of business was New York, reporting to Kansas City, Missouri, and driving in the course of his employment from Hastings, Nebraska, to Concordia, Kansas. The evidence is too indefinite to determine if it were presented by the pleadings whether or not the plaintiff came within the purview of

the compensation law. If he did not, certainly the quoted section relating to subrogation would not be applicable. If the plaintiff came under the compensation law of Kansas, Missouri, or New York, as argued by the appellant, it is doubtful if the subrogation statute would apply, though we expressly refrain from deciding this question, since it is not presented by the pleadings and the evidence. The plaintiff under the pleadings and the evidence in this case is not barred from prosecuting his action by common-law action for damages for personal injuries against a third person because he did not make his employer a party by section 48-118, Comp. St. 1929.

Appellant complains that the court failed to instruct the jury that, before the plaintiff could recover for the negligence of the defendant, such negligence must have been the proximate cause of the injury. The instructions do not use the word proximate, but an examination discloses that an instruction of the trial judge (No. 5) stated to the jury the proof necessary for the plaintiff to recover. In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of the evidence that the negligence of the defendant caused the accident and the damage is sufficient relative to proximate cause where there is no question of a remote or intervening cause.

The instruction herein is an admirable one and tells the jury in simple language that the plaintiff must establish by the greater weight of the evidence that the collision and consequent injury to the plaintiff was caused by the negligence of the defendant. A careful analysis of this instruction reveals that it is a correct statement of the law expressed in language that the jury could understand and incorporates every essential element necessary for a recovery by the plaintiff. There was no question in this case of a remote or intervening cause. It is the meaning that is important and the phraseology is not the primary consideration. *Langdon v. Wintersteen,* 58 Neb. 278. Where the meaning of an instruction is clear and a

correct statement of the law, error cannot be predicated on the selection of words.

Lastly, it is urged that the verdict was excessive. The determination of this question requires an examination of the evidence. Dr. Joseph E. Uridil, surgeon attending the injured, testified that plaintiff suffered a dislocated knee, an X-ray picture of which revealed a comminuted or shattered and broken patella or knee cap. He performed an open operation, aligning the bones, repairing the patella with artificial fastenings. The plaintiff was in the hospital five or six weeks. Dr. Uridil further testified at the time of the trial, a year and a half after the accident, that while the maximum recovery in this kind of an injury usually occurred in a year and a half, the plaintiff's leg, though quite good in appearance aside from the wasting of the muscles of the thigh and leg, has a limitation of flexion or motion of about 33 1/3 per cent. He testified that the injury is permanent and the disability 50 per cent.; also that the injury was disabling and painful. Dr. Charles L. Neutzman corroborated this testimony. Defendant offered no medical testimony on this subject.

The plaintiff testified that after three months he tried to resume work by being driven from place to place and using crutches, but after a trial of nine months was compelled to give up the effort because he could not stand on his leg. The plaintiff was 38 years old, and he was earning $175 a month. The verdict did not seem excessive to the trial judge, for he neither granted a motion for new trial nor required a remittitur. Each case must be determined with a consideration of its own facts, and we find nothing in the record which would justify this court in finding that the verdict is so excessive as to require either a reversal and remand or an order requiring a remittitur.

AFFIRMED.

OTTIE E. TROSPER V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1934. No. 29212.

1. **Information.** "When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient." *McKenzie v. State*, 113 Neb. 576.
2. **Blackmail.** The gist of the offense of blackmail created by the statute is the malicious threatening to do injury to the person of another, or to accuse one of a crime or offense, to compel him to do an act against his will.

ERROR to the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

O. E. Bozarth, C. E. Clark and *C. D. Ritchie*, for plaintiff in error.

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

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

DAY, J.

The plaintiff in error, hereinafter referred to as defendant, prosecutes error proceedings to this court from a conviction for violation of section 28-453, Comp. St. 1929. The statute provides: "Whoever, either verbally or by written or printed communication, either by himself or by an agent, maliciously threatens to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort money or pecuniary advantage whatever, either for his benefit or for the benefit of another, or to compel the person so threatened to do any act against his will, shall be deemed guilty of blackmail and shall be imprisoned in the penitentiary not more than three years nor less than one year, or be fined not less than two hundred dollars nor more than five hundred dollars."

The crime of which the defendant was convicted was

charged as follows: "That Ottie E. Trosper, on or about the 25th day of November, 1933, in Frontier county, Nebraska, then and there being, did, then and there unlawfully and feloniously, directly and verbally by himself, maliciously threaten to do an injury, to wit, cut and castrate and kill one Charles H. Compton, with intent then and there to compel said Charles H. Compton, who was then and there the person so threatened to do an act, to wit, to convey real estate to said Ottie E. Trosper, against the will of said Charles H. Compton."

The defendant contends that the information is fatally defective for that it does not state that the threat was made to the person threatened; and that there is no allegation as to the ownership of the property demanded. *State v. Goldenberg,* 211 Ia. 234, cited to the first proposition, is not decisive because the complaints are not similar. In that case, it was charged that one "did maliciously threaten another with intent to extort money." The information in the instant case charges that defendant threatened Compton to compel Compton to convey real estate to him. We think the defendant's contention is untenable. Other cases cited are concerned with different statutes in other states. The rule in this jurisdiction is: "When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient." *McKenzie v. State,* 113 Neb. 576. See, also, *Sandlovich v. State,* 104 Neb. 169; *Goff v. State,* 89 Neb. 287; *Cordson v. State,* 77 Neb. 416. The information in this case sufficiently charges a crime, the elements of which are defined by the statute. The criticism of the information is highly technical. Nobody was misled by it or misunderstood the charge made against the defendant. The technical rules of the common law are relaxed in this state. *Nichols v. State,* 109 Neb. 335. To hold this information insufficient would be to recede from our advanced position in the *Nichols* case and restore in part at least the old, cumbersome and involved form of information which served no

useful purpose in the administration of justice. We are not willing to do this.

The defendant also insists that the evidence is not sufficient to sustain the verdict. The crime of blackmail as defined by the statute, which is quoted above, required that the state prove beyond a reasonable doubt that defendant Trosper made a malicious threat to do an injury to Compton to compel him to do an act against his will. This challenges our attention to the somewhat sordid details of the evidence. Compton on the day in question called at the Trosper home to leave their mail which he had brought from the mail box some distance away when he got his own mail. Trosper who saw him coming hid in the bedroom of their two-room house. In response to Compton's knock, Mrs. Trosper invited him to "come in." According to Trosper, he came in the house, asked how "she was," and "she said, 'all right.'" And "he asked her how I was, and how Elvin was, and she said, 'all right.' And he said a few words about the wind blowing so hard; and I believe he handed her a paper when he first came in; and then took the paper and said he guessed he would be going."

As Compton was going out the door, Trosper came out of the bedroom and then followed the events which are the basis of this prosecution. There is some dispute as to details, but in general the picture is the same. The defendant accused Compton of making too many stops at his house. The two families had been close neighbors and upon the most intimate terms. Compton denied the accusation, whereupon Trosper hit him several times, until he knocked him down upon the cement floor of the porch. Let the testimony of Trosper continue this narrative:

"Q. What else was said, if anything? A. I said, 'Get up then and come on;' and he got up and we went outside and went down toward the garage, or down where the car was, to a bank shed below this south hill; a cement building on three sides, with a frame roof; and on the west end I had,—when I first built it I made it for a chicken house,

and there were,—on the west part there was a partition of twenty-four feet east, that partitioned off twenty-four feet off the west end, that I expected to use for a chicken house; and on the south side it was partitioned off to the level of the plate, and below that there were canvases, I believe, that I put up there, and some chicken wire and boards up some ways from the bottom, to kind of enclose the south side of it; and I started around to this chicken house when we came down the hill, and he sauntered off toward the car, and I said, 'Come on over here.' * * * Q. Now, what next took place then, Mr. Trosper? A. Well, we went over to the door then of this building, of the west part; the door is in the southeast corner of this twenty-four feet partitioned off from the building, and I opened the door; it was just a little door there that I fixed to hold the chickens in when I fixed it, and he said, 'What do you want me in here for?' and I said, 'I didn't say;' and he backed; and there was a post sitting next to this door and he backed up to that and grabbed hold of that, and I said, 'Come on, we are going in here;' and he said, 'I am not going in there;' and he backed up to this post and grabbed that, and he shoved his right hand in his pocket, and as he shoved his right hand in his pocket, I grabbed his hand with my left one and hit him a few, and then told him to take his hand out, and he did; and he broke loose and ran to his car, and I caught him at his car door, and I said, 'Come on, you son of a bitch, you are going in there;' and when we got to the car I took hold of his elbow; and he grabbed hold of the back of the car, and in the scuffle he took hold of me and I got him down again, and, I don't know, hit him a time or two, and asked him if he was coming, and he said, 'Yes,' and then we walked in there."

After Trosper had Compton in the shed where he could not get away and practically helpless from the severe beating given him, with his face and ears all bloody, more conversation took place. Among other things, defendant told Compton that he would put his brains out with a stick

he had, unless he put a knife in his pocket; that he ought to be "cut" and that if he came to his house any more, "I will cut you." Trosper testified, "I asked what he was going to do about it, and he said he didn't know; he said, 'What do you want?' and I says, 'What are you willing to pay for it?' I said, 'The damage?' and he said, 'Well, what do you want?' and I said, 'There is just one of two things, you can deed me a hundred and twenty acres of land, or I will sue you; one of the two.' " Trosper further testified: "He said, 'How much money will you take?' and I said, 'I do not want your money;' and he says, 'How would a hundred acres of land do?' and I said, 'I didn't say a hundred acres; I said a hundred and twenty, or none;' and then he said, he agreed * * * well, that we would go to town and fix it up; and I asked him if there was any mortgage on it, and he said, 'No;' and I asked him if he could give a clear title, and he said, 'Yes;' and I asked him where the deed was, and he said 'In the First National Bank.' "

Then Trosper took Compton from the shed to the house and proceeded to have him carry out the promise to deed the land to him. We have quoted much of the testimony of Trosper, because it alone seems to us sufficient to support the verdict. The evidence for the state, however, is that the defendant threatened to "cut him" and to kill him, unless he deeded the land. The evidence in the record, even that of defendant himself, forces the conclusion that it was his intent to compel Compton to act, by malicious threats.

However, the defendant contends that, after the shed episode, he accompanied Compton to his home, where he went into the house, from which time he was not under the domination of defendant and did not act against his will thereafter. Of course, when Compton, his wife, and defendant went to Cambridge for the purpose, as defendant thought, to deed the land, they did not do it. It was not essential to sustain the charge that they should do so. If a crime had been committed, it was completed before the parties reached the Compton home.

In *State v. McGee,* 80 Conn. 614, the court held: "The gist of the offense created by the statute is the threatening * * * with the purpose or intent to intimidate, and it is not necessary, to constitute the crime, that the person who is threatened shall in fact be intimidated, provided the threats are such as are calculated to intimidate or put in fear an ordinary firm and prudent man."

In *Commonwealth v. Corcoran,* 252 Mass. 465, the court held: "The gist of the offense described in the statute is the attempt to extort money. * * * If the threat be of the kind referred to in the statute, and is made with the intent thereby to extort money, or with the intent to accomplish any of the other objects mentioned therein, the crime has been committed. The language is explicit and is not subject to any exceptions or qualifications. The legislature did not make the commission of the offense dependent upon the state of mind of the person threatened, and there is no occasion for reading into the statute qualifications not there found."

In *People v. Robinson,* 130 Cal. App. 664, the court held: "It is well settled that the crime here charged depends upon the conduct and intent of the person who makes the threat, and that the effect produced upon the person against whom it is made is immaterial, so that if the effect in evidence warranted the jury in believing that the defendant intended that his threat would produce 'fear' in the mind of Showalter, and if the threat was of such character as might reasonably have that result, it would be wholly immaterial that Showalter was unaffected thereby. *People v. Lavine,* 115 Cal. App. 289."

Following these authorities, we hold that the gist of the offense of blackmail created by the statute is the malicious threatening to do injury to the person of another, or to accuse one of a crime or offense, to compel him to do an act against his will.

The trial court, says the defendant, erred in excluding evidence offered by him of the truth of the charge made that the complaining witness had debauched and carnally

known his wife. In the first place, the defendant did not upon the occasion make any such charge, unless inferentially by language such as heretofore quoted. He does not come within the rule that he was making an honest effort to collect a just debt. The facts do not bring this case within the authorities cited. Moreover, conceding, which is more than generous, that the testimony of defendant could support a finding that such was the fact, the verdict of the jury has decided differently upon a disputed question of fact. If the defendant only made a threat to accuse Compton of misconduct with his wife, the truth of the charge is immaterial.

In *State v. Needham,* 147 Tenn. 50, the court said: "Under the weight of authority it is immaterial whether the person against whom the threat is directed is guilty or innocent of the crime of which he is threatened to be accused." See *McKenzie v. State,* 113 Neb. 576; *Commonwealth v. Bernstine,* 308 Pa. St. 394; *Id.* 103 Pa. Super. Ct. 518; *State v. McDonald,* 192 Wis. 612; *State v. Adams and Belascio,* 7 Boyce (Del.) 335; *State v. Richards,* 97 Wash. 587; *State v. Kramer,* 31 Del. 454; *State v. McGee,* 80 Conn. 614.

Therefore, we conclude that, in a prosecution under the statute (Comp. St. 1929, sec. 28-453) for blackmail, it is immaterial whether the person against whom the malicious threat to accuse of a crime or offense to compel him to do an act against his will is guilty or innocent of the charge.

But the threat to accuse of a crime was not all that was done in this case (if the language used is such an accusation), but it was accompanied by violent physical force and further threats of violence and great bodily injury. The story lacks a certain appeal to reason in that the families of the defendant and Compton had been on friendly relations for years and were frequently together several times a week up to the date of the trouble. The defendant testified that for more than two weeks he had suspected that Compton was calling at his home too much;

but, instead of discouraging the intimacy, the record indicates he encouraged it. On the day in question, the evidence is undisputed that Compton was not guilty even of an indiscretion, unless it was calling at defendant's house on a neighborly errand. The record is that Compton did not make improper advances toward Mrs. Trosper at that time.

Much was said in argument about the conversation with Mrs. Compton when Trosper took Compton home after the altercation. It was tortured into an admission of the truth of the charge by Compton in this manner. It was said that Mrs. Compton asked her husband if it was true, and he said, "No." Then she said, "Look me in the eye," which he did, whereupon she agreed to sign the deed to the land. Again we turn to the testimony of defendant: "She said, 'Charlie, is that so?' and he said, 'No, sir; it is not;' and she said, 'Turn around here, Charlie, and look me in the eye;' and he turned around and she looked him in the eye, and she said, 'Well, I cannot believe that; I cannot believe it; it is nothing but a blackmail.'"

Since the truth of the charge made against Compton was immaterial, it was not error for the trial judge to exclude the offer of testimony of the defendant's wife that she had engaged in sexual intercourse with Compton several times prior to the fateful day. The record discloses that Mrs. Trosper was not only a willing but a ready witness and answered the question relative thereto before an objection could be interposed. It was stricken out by the court.

Several assignments relate to the giving and the refusal to give certain instructions. Some of the objections relate to questions already decided in this opinion. We have carefully examined all complaints to instructions and find no prejudicial reversible error in this regard. The instructions of the court covered the issues, protected the legal rights of the defendant, and correctly submitted the issues. This case was not so difficult as to justify an opinion of this length, but we have given careful and

painstaking consideration to many assignments of error, because able and energetic counsel have presented them so thoroughly and well. The important feature of this case was the evidence, and the jury resolved it against the defendant, which is final, since there is no reversible error apparent in the record.

AFFIRMED.

JOHN C. OSWALD, APPELLANT, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLEE.

FILED DECEMBER 31, 1934. No. 28988.

1. Insurance: CONTRACT: CONSTRUCTION. "A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured." *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841.
2. ———: TOTAL DISABILITY. Total disability, preventing the insured from pursuing a gainful occupation, exists when the injured party is unable to perform the substantial duties of a given occupation.
3. Trial: DIRECTION OF VERDICT. A trial court should not direct the verdict of a jury unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion.

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

G. H. Seig, for appellant.

Brown, Fitch & West, contra.

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

RYAN, District Judge.

This action was brought by the appellant to recover accrued, total, permanent disability indemnity in the sum of $1,000 under a group insurance policy written upon employees of the Union Pacific Railroad Company by the

appellee. The appellant for a number of years prior to January 10, 1931, was employed by the Union Pacific Railroad Company as a switchman. On January 10, 1931, he was retired from the service of the railroad company on account of physical disability consisting of deafness and ulcers of the stomach. He alleges in his petition that he became and was totally disabled and from January 10, 1931, will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations, and that he was then under the age of 70 years. On January 1, 1923, the appellee issued to the plaintiff, as one of the employees of the Union Pacific Railroad Company, its individual certificate No. 25206 under its group insurance policy with said railroad company, whereby the appellant became and was insured in the event of total and permanent disability to the extent and in the sum of $2,500; that the plaintiff made claim upon the defendant and gave notice to the railroad company and submitted proof of his disability. The defendant acknowledged receipt of proof and evidence in support of appellant's claim, but denied liability upon the ground that the appellant's disability is not total and permanent; that the plaintiff's wages for a period of one year amounted to the sum of $2,500; and that the annual instalments now due amount to the sum of $1,000 with interest from January 10, 1931. Appellant also claims a reasonable attorney's fee to be taxed as costs. The Union Pacific Railroad Company was joined as a defendant, but no cause of action is stated as to it and the case is dismissed as to it.

In its answer the defendant admitted the employment of the plaintiff as alleged, the issuance of the certificate and the fact that the same was issued in pursuance of said policy of group insurance, but denied the other allegations of plaintiff's petition. For further answer the defendant set out the total, permanent disability clause relied upon, and in that connection alleged the railroad company had not exercised the option provided in the certificate and

that proof had not been furnished the appellee that appellant had become wholly disabled by reason of bodily injuries or disease and that he will be permanently, continuously and wholly prevented thereby during life from pursuing any and all gainful occupations. The plaintiff filed a reply in which he denied all the allegations of the answer of the appellee except the admissions contained therein, and alleged that the fact that the Union Pacific Railroad Company had not exercised an option to have the insurance benefits paid to the plaintiff by the appellee is immaterial.

At the close of the evidence the court sustained a motion to direct a verdict in behalf of the appellee. Motion for a new trial was duly filed and was overruled. The appellant brings the case here for review.

The evidence showed that the appellant was 43 years of age and a married man; that he had been in the service of the railroad company continuously from January, 1918, to January 10, 1931, except for his service in the army during the years 1918 and 1919. Briefly the evidence disclosed that the plaintiff had suffered a total loss of hearing in the right ear and a 50 per cent. loss in the left ear and that he suffered from chronic ulcers of the stomach. After his dismissal by the railroad company the appellant endeavored to gain a livelihood by engaging in business. He appears to have made two business ventures. The first was with the Safety Signal Manufactury, a concern that manufactured reflectors and other safety signal devices for trucks. The second was with the LaDana Sales Company. Both of these business ventures proved failures and the defendant withdrew very little, if any, greater sum than he had invested in them.

This question was before this court in the case of *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841, opinion by Justice Good. In that case, as in this, it was contended by the defendant that the disability contemplated by the policy is that the plaintiff must be so entirely disabled as not to be able to earn any wages or

income whatever. In disposing of that contention this court said:

"The expressions used in the policy of insurance and other like expressions in other policies have received the attention of many of the courts of this country, and, with few exceptions, they hold that the terms of an insurance policy are not to be construed literally. We think the great weight of authority, as well as that supported by the better reason, requires that a contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured, so that in all proper cases he may receive the indemnity contracted for. *Young v. Travelers Ins. Co.*, 80 Me. 244; *Coad v. Travelers Ins. Co.*, 61 Neb. 563, 569. If the language of the policy were to be literally applied, in order to recover one would have to be either deprived of mentality or be physically helpless to do anything. Such was not the contemplation of the parties. In interpreting similar provisions in other policies, the courts usually take the view that total disability to pursue any occupation exists when the injured party is unable to perform the substantial duties of that occupation. Many authorities are collated in an annotation to the case of *Metropolitan Life Ins. Co. v. Blue* (222 Ala. 665) 79 A. L. R. 852, the annotation appearing at page 857 *et seq.* * * *

"The term 'total disability' is rarely, if ever, given a strictly literal meaning of absolute helplessness or entire physical disability, but rather inability to do substantially, or practically, all material acts for the transaction of insured's business in the customary and usual manner. *Provident Life & Accident Ins. Co. v. Harris*, 234 Ky. 358. Sound reason and the great weight of authority sustain this view. It is unnecessary to encumber this opinion with a citation of the many authorities holding to like effect. We are satisfied from the evidence that the finding of total disability is amply sustained. The evidence further discloses that the spastic paralysis from which plaintiff is

suffering is progressive in its nature, and will continue throughout his life."

The situation in the *Hamblin* case is analogous, as the following facts set forth in the opinion illustrate: "It appears that by occupation plaintiff was a cook, and that, while so engaged in the employ of the Union Pacific Railroad Company, he received a severe injury which did not, at the time, incapacitate him for his work, but that he continued for nearly a year thereafter, when, by reason of the injury received, the railroad company deemed it unsafe for him to continue his work, and he was discharged. * * * After his discharge by the railroad company, plaintiff attempted to pursue his occupation as a cook with other companies, but was unable to do more than a small part of his work, his wife assisting him and doing the greater part of the work. Plaintiff's disability increased to such an extent that he is totally unable to follow his occupation or perform any other substantial amount of physical labor; but he is able to use a telephone and solicit orders for the sale of merchandise, and has thereby been able to earn a trifling sum."

The evidence in relation to the ability of the appellant to earn a livelihood is quite lengthy and it would serve no useful purpose to set it out here. As has been stated, the sum total of it is that the appellant derived very little, if any, more from these business ventures than he invested therein. The rule has been repeatedly laid down by this court that "The trial court should not direct the verdict of a jury unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion." *Bank of Cortland v. Maxey,* 102 Neb. 20. See *Continental Lumber Co. v. Munshaw & Co.,* 77 Neb. 456; *Westover v. Lewis,* 36 Neb. 692.

We conclude, therefore, that this case should have been submitted to the jury for determination of the question as to whether or not the plaintiff was totally disabled from making a livelihood at any gainful occupation, under

the rule laid down in *Hamblin v. Equitable Life Assurance Society, supra.*

The judgment is, accordingly, reversed and the cause remanded for further proceedings.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1935

KEARNEY COUNTY FARMERS MUTUAL INSURANCE COMPANY, APPELLEE, V. H. H. HOWARD, APPELLANT.

FILED JANUARY 11, 1935. No. 29097.

1. **Insurance:** CONTRACT. Where an agent of a mutual tornado insurance company, with authority, accepts from one, qualified to become a member, an application for membership in the company, stating the kind, amount and term of insurance, collects the membership fee, appraises the property and transmits the application and membership fee to the home office, and the secretary enters on the proper records of the company the fact of the receipt of the application and membership fee, designating policy number and the amount, kind and term of insurance, according to the application, and retains the membership fee, a contract of insurance is effected, making the company liable to the applicant in case he sustains a loss, and also making the member liable for proper assessments made.
2. **Appeal.** Failure of plaintiff to prove a fact, not essential to his right of recovery, is no ground for vacating a verdict in his favor, notwithstanding the trial court instructed the jury that plaintiff must prove such nonessential fact as a condition to his recovery.
3. ———. A judgment will not be reversed for harmless error.

APPEAL from the district court for Kearney county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. L. McPheely, for appellant.

King & Bracken, contra.

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

GOOD, J.

This is an action by a mutual insurance company against one of its members, to recover the amount of an assessment upon a policy of tornado insurance. Plaintiff had judgment, and defendant has appealed.

The appeal presents two questions for determination: Is the verdict supported by sufficient evidence? and is it contrary to law in that it is contrary to one of the court's instructions?

It appears that plaintiff is a mutual insurance company transacting two kinds of insurance, namely, fire and windstorm or tornado insurance. By its articles of incorporation plaintiff writes insurance only in Kearney county and confines its membership to farmers, and insurance only on farm buildings, farm products and live stock. The officers consist of a president, secretary and treasurer. The company maintains an office at Minden, the county seat, and apparently the secretary, without other assistance, takes care of the office work. The company also has a corps of agents or appraisers, one located in each township or precinct. These appraisers are authorized to receive applications for insurance and membership in the company, to appraise the property upon which the applicant desires insurance, collect the premium or membership fee and transmit it to the secretary, whose duty it is to enter the transaction upon the books or register of the company in his office. Some time later a policy is ordinarily issued by the president and attested by the secretary. Apparently, the president does not reside at the county seat and only presides at meetings of the board and signs policies of insurance or certificates of membership.

May 7, 1930, defendant made application to the local appraiser for membership in the company, desiring $6,200 of tornado insurance on his farm buildings and contents. The property was appraised, the premium or membership fee was paid by defendant to the appraiser, who trans-

mitted by mail to the secretary the application and membership fee. In the regular course of mail the application would not reach the secretary until the afternoon of the following day. The then secretary of the company departed this life before the trial of this cause, and his evidence is not available. The books of the company, however, in the handwriting of the secretary, show the following entry: "Policy No. 1048. Name of insured: H. H. Howard. Post office: Lowell. Commencement of risk: May 7, 1930. Term: 5 years. Expiration of risk: May 7, 1935. Amount insured: $6,200. Membership fee: $31. Description: Section 17-8-13." Then follow the items insured and the amount of insurance on each item. It appears also that about 7:15 or 7:30 p. m. on May 8, 1930, a disastrous tornado passed over a part of Kearney county, and many of plaintiff's members sustained heavy losses by reason of such tornado. It was for these losses that the assessment was made.

Owing to the death of the secretary it was impossible for the plaintiff to show the precise time when defendant's application was received by the secretary and when he made the entries upon the company's book. It is defendant's contention that no policy or certificate of membership was ever delivered to him and no evidence that his application was ever accepted, and that, in any event, it is not shown that the application was received by the secretary and the entries made prior to the tornado which gave rise to the necessity for an assessment.

Defendant cites and relies upon the following cases: *Lowe v. St. Paul Fire & Marine Ins. Co.*, 80 Neb. 499; *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720; and *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808. In the first two of the cited cases it was held, in effect, that, when a written application is made on a blank form which provides that no liability will attach until the application is accepted and approved at the home office of the company, and the application, together with the premium, is delivered to a soliciting agent of the company,

who has no authority to make a contract on behalf of the company, and a loss occurs before the application has been received at the home office, there is no liability of the company to the applicant. The situation in the cited cases is so different from that in the instant case that the authorities are of no value here. There is no such condition in the application herein. In the application, signed by defendant, there is a recital that the property is located on the northeast quarter of section 17, township 8, range 13, in Kearney county, Nebraska, and a recital that the membership fee is $31.50 and total insurance $6,200, and the application contains the following: "I do hereby declare myself bound under the rules of the Farmers' Mutual Fire and Lightning Insurance Company, of Minden, Kearney county, Nebraska, to share according to the proportion of my insurance in any losses the company may sustain." The last of the cited cases does not sustain defendant's contention.

Defendant denied on the witness-stand that he had ever received a policy of insurance or certificate of membership for windstorm or tornado insurance for which he made application. It is significant that he never made any inquiry of the company why the policy or certificate was not issued to him, and, when two or three weeks later he was notified of the assessment made by the company, he made no protest until this action was instituted. In this action he filed a cross-petition, asking for the return of the membership fee which he had paid, but before the completion of the trial he withdrew his cross-claim.

We are satisfied that, under the facts disclosed, had defendant sustained a loss by tornado he could have recovered against the company on the policy of insurance, whether or not it had been delivered to him. He had paid the fee and made the application; the company had received the application and retained the fee, and had designated the policy number upon its books. If the company would have been liable to defendant in case of a loss, surely there was the mutual obligation of the defend-

ant to share in the loss sustained by the other members. We are satisfied from the record that the risk was assumed by the company, and that it was liable to defendant, and, likewise, the defendant is liable for any assessment properly made. There is no question that the assessment was properly made in this instance, and the evidence is sufficient to warrant the jury in finding that the insurance had been effected and that plaintiff was entitled to recover the assessment made.

The court instructed the jury, in effect, that before plaintiff could recover it must prove by a preponderance of the evidence that it accepted on May 8, 1930, defendant's application for membership and issued on that date a certificate of membership, or policy, in the sum of $6,200, insuring defendant against tornado or windstorm damage. It is apparent that the court erroneously placed a greater burden upon plaintiff than the law required. It was only essential that the proof be such as to satisfy the jury that a contract of insurance had been effected.

To create a contract of insurance it is not essential that a policy be actually issued and delivered to the insured. The giving of the instruction was error harmless to the defendant. Harmless error is no ground for reversal. See section 20-853, Comp. St. 1929, which provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

No error prejudicial to defendant appears. Judgment AFFIRMED.

MARY LOGAN, APPELLANT, V. FARMERS & MERCHANTS BANK OF MILLIGAN, APPELLEE.

FILED JANUARY 11, 1935. No. 29099.

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.

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

E. J. Steinacher and *Guy A. Hamilton*, for appellant.

Sloans, Keenan & Corbitt, contra.

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

GOOD, J.

Three actions in the district court were consolidated and brought to this court by one appeal. The actions are similar and ran the same course in the district court. In all essentials the issues are identical. In the opinion reference will be made to but one cause, but will be applicable to each of the others.

Mary Logan in her petition sought to impress a trust on the assets of the defendant bank for and on account of a cashier's check, issued to her by defendant, and payment of which was refused by defendant when presented. To this petition defendant filed a general demurrer. The trial court held that the petition stated a cause of action in law but not in equity. Plaintiff disclaimed any right to recover at law, entered dismissal of any claim at law and relied wholly upon her petition as stating a cause of action for equitable relief. Thereupon, the demurrer was sustained. Plaintiff refusing to further plead, the action was dismissed. A like course followed in the other two actions.

In her petition Mary Logan alleged that she was a resident of Montana; that December 3, 1932, she paid to defendant $2,000 in cash for a cashier's check of like amount, for the purpose of transferring such money from Milligan, Nebraska, for her use and benefit in her home in

Montana. A copy of the cashier's check is set out in the petition. She alleged that thereafter she returned to her home in Montana, indorsed the cashier's check and forwarded the same by mail to defendant for payment. January 7, 1933, defendant refused payment of the check and returned it to plaintiff. If the bank gave any reason for its refusal to pay the check, such reason is not set forth in the petition. Plaintiff further alleged that she is the owner and holder of the check, and that March 9, 1933, the secretary of the department of trade and commerce of the state of Nebraska, pursuant to the bank moratorium act, by order duly issued placed the defendant bank under restrictions as to its activities and operations, and that defendant so remained under such restrictions when this action was commenced. She further alleged that the cash paid to defendant for the cashier's check increased the assets of the bank by the amount paid, and that the refusal of the bank to pay the cashier's check when presented created a trust in her favor, and that she is entitled to have such trust impressed upon all of the assets of the bank. The petition contained a second cause of action, based on another cashier's check, issued to her at a later date, and which ran the same course as the one in the first cause of action.

Under the circumstances, we are not required to determine whether the petition states a cause of action at law, but to determine whether it states a cause for equitable relief, viz., to have impressed as a trust on the assets of the defendant bank the amount of plaintiff's claim.

In *State v. State Bank of Belvidere,* 122 Neb. 797, it was held: "The purchaser of a bank draft is a purchaser of a bank's credit and a holder of exchange, and, as such, is entitled to share *pro rata* with depositors and other holders of exchange in the assets of a failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, is not entitled to have his claim allowed as a trust fund." That case, of course, was one involving a claim against an insolvent bank in the

hands of a receiver. However, there would be a stronger reason, in the case of insolvency, for holding that such purchaser was entitled to a trust fund, than where the bank was solvent.

In *State v. Farmers & Merchants Bank,* 123 Neb. 358, in an opinion by Rose, J., it was held:

"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.

"Holder of a cashier's check on a bank which went into the hands of a receiver and never paid the check, *held* not entitled, as claimant for a trust fund, to payment in full from bank assets in the hands of the receiver in preference to depositors."

In *State v. First State Bank of Alliance,* 123 Neb. 23, the payee of a draft who was unable to collect because of the insolvency of the bank issuing the draft, was held not to be entitled to have his claim allowed a preference as a trust, but one to share with other holders of exchange and depositors in the assets of the bank.

In *State v. Newman Grove State Bank,* 124 Neb. 667, it was held:

"Items sent to a bank for collection and the proceeds thereof are held in trust for the owner.

"Such trust is executed when owner requests and accepts exchange of the bank.

"Letter transmitting a collection item to bank with instruction, 'When paid, kindly forward us your draft in payment,' is such a request for the exchange of the bank as terminates the trust relation when and if the draft issues."

In that case the owner of the draft sought to have a trust impressed upon the assets of the bank for the amount of his draft. It was held that he was not so entitled. A like holding was made by this court in *State v. South Omaha State Bank,* 126 Neb. 46. In that case the

claimant had contracted to purchase real estate, and because of a defect in title it was necessary to hold the purchase money in abeyance. Claimant purchased from the bank a cashier's check for the purpose of holding the money ready to pay the purchase price of the real estate when title should be satisfactory. This court held that the evidence was insufficient to establish that the cashier's check was a trust fund, and the opinion quoted with approval the holding in *State v. Farmers & Merchants Bank, supra.*

Plaintiff contends that section 62-1812, Comp. St. 1929, being a part of the negotiable instruments act, authorizes the allowance of her claim as a trust fund. That section deals with items sent to and collected by a bank. In *State v. Farmers State Bank,* 125 Neb. 427, this court had under consideration said section. In that case a cashier's check had been sent for payment to the bank which issued it. The bank accepted and canceled the check and issued and sent to the owner a draft instead of money. The draft was dishonored because of the failure of the drawer bank. At the time of the cancelation of the check, the bank had sufficient funds to pay the check. In that case the check had been canceled and collection made. It was there held that said section 62-1812 was applicable. However, in the instant case, the cashier's check was not sent to defendant for collection, but for payment. Payment was refused; there was no collection. We think that the statute is inapplicable.

In our opinion, there are no facts alleged in the petition showing such special circumstances that would create the relation of trustee and beneficiary in the instant case. The facts alleged were insufficient to state a cause of action for the equitable relief demanded. The trial court rightly sustained the demurrer and dismissed the action. This same ruling applies to each of the other two cases consolidated with the *Logan* case.

AFFIRMED.

JENS VITHEN, APPELLEE, V. NELS JENSEN, APPELLANT.

FILED JANUARY 11, 1935. No. 29044.

1. Trial: INSTRUCTIONS. Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.
2. Evidence examined, and *held* to support the verdict and judgment thereon.

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

R. H. Olmsted, for appellant.

Battelle, Travis & Strehlow, contra.

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

EBERLY, J.

It appears in this case that on October 31, 1931, Nels Jensen, appellant, sold and transferred to Andrew Nielsen and Jens Vithen, appellee herein, the Loveland Dairy, as a going business, which included 44 head of cows and one bull, these comprising its dairy herd; and also certain other property used in connection therewith, together with the exclusive right to use the name of the Loveland Dairy in Douglas county. The consideration was $7,500, of which $2,100 was paid in cash and the balance was to be paid at the rate of $150 a month. At the same time the Loveland Dairy farm was leased to Nielsen and Vithen for an additional consideration. Vithen acquired Nielsen's interest in January, 1932. It is obvious from the entire record that the buyers, either expressly or by necessary implication, made known to Jensen their purpose to use the cows in the continuance of the dairy business they purchased, and that the seller expressly represented the cows to be "good cows," and, by implication at least, that they were reasonably fit for the intended use; further, that the deal was closed by the parties on that basis. Comp. St. 1929, sec. 69-415.

It is alleged in plaintiff's petition that shortly before May 13, 1932, he first discovered that, at the time of sale, the 44 head of cows were infected with a disease known as "abortion," which is a contagious disease and prevailed throughout the herd, all of which was known to the defendant at the time of the purchase of the property by plaintiff, and that because of the existence of this disease the cows were valueless as dairy cows; that thereupon plaintiff rescinded said sale and transaction, in writing, and tendered back the property purchased to defendant, who accepted the same but refused to pay back the consideration received therefor.

In his answer, after certain admissions, defendant denied any fraud or the making of false representations, and alleged that certain specified property, aggregating $2,721.80, had not been returned by plaintiff; denied that the dairy herd at the time of the sale was infected with a disease known as "abortion;" alleged that the purchasers personally examined the cattle and knew the condition of the same; and, by way of cross-petition, set forth that a certain chattel mortgage given by the purchasers, Vithen and Nielsen, as security for the payment of the $5,400 note evidencing the purchase price of the property thus sold to plaintiff by defendant, had been foreclosed, and the mortgaged property sold, leaving a deficiency; and prayed judgment for the amount of such deficiency.

By a suitable reply the allegations of defendant's answer and cross-petition were put in issue.

There was a trial to a jury which resulted in a verdict for plaintiff in the sum of $1,255.39. From the order of the trial court overruling his motion for a new trial, defendant appeals.

The evidence introduced by the respective parties was conflicting. The assignments of error as set forth in appellant's brief may be summarized as raising but two questions, viz., first, "The court erred in submitting to the jury instruction 3, sec. 7, in which he instructed the jury that the plaintiff was entitled to such *damages* as the evi-

dence shows he sustained," etc. However, in instruction 7 the trial court employed the following language: "Should you conclude from all the evidence in this case, and under these instructions, that the plaintiff is entitled to recover at all, then you are instructed that his measure of damages is such sum, but such sum only, as will reimburse him for the amounts paid to the defendant for the said cows and other property including the indebtedness of the defendant assumed by the plaintiff and the said Andrew Nielsen, and the amount paid as rent under said lease together with interest on said sums," etc.

In view of the instructions, considered in their entirety, appellant's objection to instruction 3 is without force. *Huxoll v. Union P. R. Co.*, 99 Neb. 170; *Wortman v. Zimmerman*, 119 Neb. 682.

The second error assigned is, in substance, that the verdict is not supported by the evidence.

Noting the fact that none of the "errors relied upon by appellant for reversal" relate to instructions given by the court, save and except as above stated, and reading the evidence in the light of the instructions given and also in view of the verdict of the jury, we find ample evidence, if believed, to establish that the herd in suit was badly infected with the disease of "abortion" at the time of the sale on October 31, 1931, and that defendant is chargeable with knowledge of this fact at that time, and also of the particular purpose for which the animals thus sold were required. It cannot be gainsaid that the condition and value of the herd, due to the presence of this disease, were manifestly seriously impaired; that the disease is incurable and is easily communicable to other animals; that it centers in the genitive organs of cattle and affects their milk, both as to quantity and quality. There is, in fact, a potential danger to public health, in that infected milk will cause undulant or Malta fever, a very great risk. Obviously a diseased herd is wholly unsuitable for dairy purposes.

It will also be noted that the instructions given by the

trial court to the jury, with the exception of the one already discussed, are unchallenged by "errors relied upon by appellant for reversal" as set forth in appellant's brief. The form of the action is one at law, in which the jury are the exclusive triers of the facts. A careful reading of the evidence contained in the record, in the light of the instructions, confirms the view that it contains ample proof, if believed, to support and justify the verdict returned.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

FRITZ J. DIMMEL V. STATE OF NEBRASKA.

FILED JANUARY 11, 1935. No. 29276.

1. **Criminal Law**: PROCEEDINGS IN ERROR: TIME. The supreme court cannot exercise appellate jurisdiction in a criminal case, unless the petition in error is filed within three months after the rendition of final judgment.
2. ———: ———: ———. The legislature may limit the time within which an appeal may be taken, and the trial court may not extend the time by vacating and reentering the same judgment.
3. ———: JUDGMENT: VACATING DURING TERM. The district court has jurisdiction to set aside its own judgment during the term at which it was rendered, if it believes that its former conclusion is erroneous.

ERROR to the district court for Wayne county: CHARLES H. STEWART, JUDGE. *Error proceedings dismissed.*

C. H. Hendrickson and *H. E. Siman,* for plaintiff in error.

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

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

DAY, J.

The plaintiff in error, hereinafter referred to as the defendant, was convicted of criminal libel upon two counts and was sentenced to pay a fine of $75 on each count. The defendant, as owner and publisher of a newspaper at Winside, Nebraska, published certain articles which are the basis of this prosecution.

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

The verdict finding the defendant guilty upon two counts was returned October 19, 1933, and thereafter on October 21, 1933, a motion for new trial was filed. January 9, 1934, the trial court overruled this motion for new trial and sentenced the defendant. On the same day, the defendant filed an affidavit of his intention to prosecute error proceedings. The record is then silent until May 8, 1934, when defendant filed a motion "to set aside the journal entry and ruling on the motion for a new trial herein entered January 9, 1934." On this last date, this motion was sustained by the trial court, and, on the same day, the motion was overruled again, and the identical sentence imposed. Notice of appeal was again filed. The question raised by the record is whether this proceeding in error is prosecuted from the order of January 9, 1934, or May 8, 1934. If from the order of January 9, the petition in error was not filed in time (June 7, 1934) to give this court jurisdiction. The legislature may limit the time within which an appeal may be taken, and the trial court may not extend the time by vacating and reentering

the same judgment. *Morrill County v. Bliss,* 125 Neb. 97. Neither can it be extended by agreement of the parties. *Tootle v. Shirey,* 52 Neb. 674. But, in this case, it is argued that the vacation and reentry was not for the purpose of extending the time for filing the petition in error, but that it was done for the purpose of further argument and consideration of the trial court.

The motion to vacate the sentence and the order overruling the motion for new trial recite that the purpose was "to give further consideration to matters involved herein and to give counsel further time to present oral argument and citation of authorities" relative to these questions. In this respect, the situation is almost identical with that in *Morrill County v. Bliss, supra.* The motion to vacate the judgment in that case was founded upon the fact that the decree had not been properly entered by the court. So that even in the *Morrill County* case there was a substantial legal question presented to the court, although this court found that the decree was vacated and reentered for the purpose of extending the time within which to appeal. In this case, the plaintiff in error filed an affidavit that he intended to appeal and made an application for a stay of execution and did not file the motion to vacate the order of January 9 until May 8. May 8, we were told in oral argument, was the last day of the September term. The trial court, or district court, has jurisdiction to set aside its own judgment during the term at which it was rendered, if it believes that its former conclusion is erroneous. *Winder v. Winder,* 86 Neb. 495; *Netusil v. Novak,* 120 Neb. 751; *Shafer v. Wilsonville Elevator Co.,* 121 Neb. 280.

In the instant case, the court sustained a motion to vacate the final order overruling a motion for new trial before hearing argument on the correctness of the judgment. It was not necessary to vacate the order of January 9 to hear arguments upon the correctness of that order. After hearing argument, the trial court entered the identical order, thereby finding in effect that the order

of January 9 was not erroneous. Regardless of the notion of the trial court at the time, we are forced to the conclusion that the only useful purpose served, if any, by the vacation and reentry of the order overruling the motion for new trial would be to extend the time for filing the petition in error in this court. The court is without power to extend the time for this purpose.

It is observed that this offense was committed more than two years ago; it was tried to a jury who found against defendant; the right of appeal was not exercised within the time prescribed by the legislature, and the defense is entirely technical. The appeal must be dismissed.

ERROR PROCEEDINGS DISMISSED.

ROSE ROATS, APPELLEE, V. HARRY ROATS, APPELLANT.

FILED JANUARY 11, 1935. NO. 29087.

1. Trusts: CONSTRUCTION. The primary rule in the construction of trusts is that the court must, if possible, ascertain the intention of the creator of the trust.
2. ———: ———. The words "care and support" are very broad terms, and may be restricted or enlarged according to the necessities of the beneficiary.
3. ———: TRUSTEES. Courts are always reluctant to interfere with the exercise of a discretion lodged in a trustee.
4. ———: ———. Courts of equity may, however, intervene in behalf of a beneficiary if the evidence discloses that a trustee's denial of the relief sought might be influenced by self-interest.
5. ———: ———. Courts are always ready to correct an abuse of discretion on the part of a trustee which amounts to a violation of his trust.
6. ———: ———. The fact that the beneficiary might call in other funds to meet her necessary care and support does not in any way relieve the trustee from faithfully carrying out the letter as well as the spirit of the terms of the bequest upon which his stewardship is founded.

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

McNeny, Gilham & Sprague, for appellant.

Carrico & Carrico and *James D. Conway, contra.*

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

PAINE, J.

This is an action by a beneficiary, under the wills of her father and her mother, against her brother, who was named trustee in each of said wills, to require the trustee to reimburse her for certain funds she had paid out in her own behalf. Judgment for plaintiff, from which trustee appeals.

Augustus Roats died prior to 1927, devising two tracts of land to his wife for life, and then to his son, Harry, in trust for his daughter, Rose. At her death the remainder should vest in the trustee.

Sarah Roats, the widow, died August 5, 1929, and the third paragraph of her will reads as follows: "I give, devise and bequeath to my executor hereinafter named the sum of $4,000 in trust, however, for the following purposes: I direct that my said executor shall invest said sum of $4,000 and pay the income of said $4,000 to my daughter Rose Roats, and I also empower my said executor to use so much of the principal of said sum of $4,000 as he deems necessary for the care and support of my said daughter, Rose Roats."

The plaintiff, Rose Roats, was born on the home place in Webster county, and lived on this farm until after the death of her mother. Shortly thereafter her brother Harry, being the executor and trustee in his mother's will, insisted that she could not longer live in the old farm home, which belonged to him, but that she should move off the place. At a conference of several members of the family, she testifies that he told her to buy a house in Red Cloud out of her own funds, and he would reimburse her out of her $4,000 trust fund as soon as the estate was settled. She said she acted upon his promise, and bought a home for $1,700, and paid $300 additional, also out of her own private funds, for shingling the roof and making other needed repairs.

Celia A. Smith, a sister of Rose and Harry, in answer to question No. 138, said: "Harry said she should have somewhere to live, so Harry and myself and Rose talked about it and he said to Rose, 'You take your money out of the bank and pay this man Mitchell for the property and I will pay it back to you when the estate is settled.' "

The trustee positively denied that he ever made any such agreement, and refused to pay her the $2,000. He testified that he moved to the state of Michigan in 1919, and has lived there ever since, and gave his residence at the time of the trial as Highland Park, Michigan, but claims that he made a trip to Nebraska every year and looked after the crops from the rented farms.

On cross-examination, his evidence of crop receipts, by years, from the land for which he is trustee for her under his father's will, left much to be desired. He finally made an estimate that he had paid her nearly $1,100 as her share of the crop rents since her mother died. Some or all of such payments were made to her by depositing it to her account in the bank at Red Cloud, upon which account he had the right to draw checks, as, for instance, for taxes. He said he had, in addition, paid her 4 per cent. a year, being $160 a year, upon the trust fund of $4,000.

It was shown by the evidence that Rose was rather sickly, being afflicted with diabetes, and that she requires a doctor at frequent intervals, and sometimes the services of a nurse. Other relatives also assist her at such times, but her brother Harry appears from the evidence to feel no responsibility whatever for her care or support, aside from the payments due her for crops and interest.

He testified he never looked after her at all, and did not think it was necessary to ascertain whether she needed more than the payments which he had made to her. He was asked: "In case Rose uses no more than the income from this property, the principal goes to you?" His answer: "That was the intentions." However, that question is not before us at this time.

In the decree the trial court directed the trustee to pay

her $35 wheat money that was unpaid, and directed him to sell the corn crop of 1932 and pay her the proceeds, but denied the demand of plaintiff that the trustee be removed.

The troublesome question in the case for the trial court and for this court is the question of the purchase of the town house out of these trust funds. The trial court found that it may have been entirely proper for the trustee to refuse to allow Rose to continue to occupy the farm home after her mother's death, and that the question of the purchase of the town property is largely a question of fact. He finds that the plaintiff is corroborated by the testimony of her sister, and finds that there is nothing in the terms of the will which would prevent the trustee from carrying out this agreement, and directs the trustee to reimburse Rose for the expenditure of $2,000.

1. In the oral argument in this court on behalf of the trustee, his attorney closed with this query: "I just want to ask the court one question: Can you buy houses with trust funds left in a will when only the income is to go to the beneficiary?"

The answer can only be given by this court, if it can ascertain the real intention of the mother in creating this trust fund, and such intention must, if possible, be gathered from an analysis of the language she used in her will. True, she did provide that the trustee should pay the interest to the daughter, but, more than that, she empowered the executor, who became the trustee, to use so much of the principal of said sum as he deemed necessary for the care and support of this ailing daughter. When the mother died the daughter could not stay on the farm alone, and she had no other residence at that time in which to live. The trustee asked her to vacate the farm he owned. The burden is upon the plaintiff to prove by the greater weight of the evidence that in this emergency the trustee offered to provide her a new home, and agreed to pay for the same out of these trust funds held for her benefit as soon as the estate was settled. In our opinion, his promise to do this has been established.

2. The words "care and support" are very broad terms, and may be restricted or enlarged according to the necessities of the beneficiary. Under the terms of the mother's will, could not the entire sum of $4,000 under some circumstances have been expended in affording that care and support which was necessary?

3, 4. The trustee refuses to pay this $2,000 for a home, as he promised to do. From early times courts have been reluctant to interfere with the exercise of a discretion lodged in a trustee. But courts of equity are not without power in such a matter. Let us consider two exceptions to the general rule. First, whenever the court finds from the evidence that the trustee's refusal is influenced by self-interest, it always has a valid ground upon which to act.

5. There is another exception which comes to mind, and that is that a denial of support and care of the beneficiary might be such as to amount to a violation of the trust. This would warrant action by a court on the ground of an abuse of discretion on the part of the trustee.

6. It is contended that the plaintiff has other funds which she can call in and use to care for her every need, but admitting this fact does not relieve the trustee from faithfully carrying out the letter as well as the spirit of the terms of the bequest upon which his stewardship is founded. The provision of the mother in her will, setting up this $4,000 cash fund for the benefit of her daughter, did not provide that the trust funds should not be used until the daughter had first exhausted all other funds she might have, if any, but empowered the trustee not to hold and *retain;* but, on the other hand, to *use* so much of the principal as he should deem necessary for her care and support, with no thought of personal advantage to himself. Equity and good conscience whisper that, in case of doubt in construing such a provision in a will, it is better to err in favor of the beneficiary, and against the trustee, than otherwise.

We have reached the conclusion, at the end of this discussion of the case, that the trial judge was warranted by

the weight of the evidence in entering the decree he rendered, and the same is

AFFIRMED.

E. H. LUIKART, RECEIVER OF SOUTH OMAHA STATE BANK, APPELLANT, V. CHRIS KORBMAKER ET AL., APPELLEES.

FILED JANUARY 11, 1935. No. 29102.

1. **Evidence.** The former evidence of a party to an action, against his own interest, upon a material matter, is admissible against him as original evidence.
2. **Fraudulent Conveyances.** Where a father conveys all his property to his daughter in consideration of his future support, such a conveyance is void as to his creditors.

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

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

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

PAINE, J.

This is a creditors' bill, brought by E. H. Luikart, as receiver of the South Omaha State Bank, to set aside a $4,000 note and mortgage given by defendant to his daughter, while the defendant was indebted to the bank on a judgment of $6,345.90 and interest. The trial court found for the defendants, and dismissed plaintiff's petition.

The evidence discloses that the South Omaha State Bank was taken over by E. H. Luikart, receiver, and that on December 29, 1932, a judgment was recovered of $6,345.90 and interest upon two notes given to said bank; that an execution was returned wholly unsatisfied, and that no part of the judgment has ever been paid.

On December 30, 1931, the defendant Chris Korbmaker executed and delivered to his daughter, Jennie Kinsley, a

note for $4,000, with interest at 6 per cent. per annum, payable five years after date, secured by a real estate mortgage upon the north 40 feet of lot 5, block 12, South Omaha. The mortgage was recorded on the same day it was given, and on the day of trial had not been released or discharged of record.

The plaintiff called, as his first witness, Chris Korbmaker, defendant, who testified that he and his daughter, Jennie Kinsley, resided at 3726 South Twenty-fourth street, for which his wife had originally paid $3,800, but that it was worth a good deal more now. His wife died five years ago. He further said he had no other real or personal property but this home. He was thereupon called as a witness in his own behalf, and testified that he had formerly been in the saloon business in Omaha for eight years; that he owed no other debts except to the bank, and that he gave the note and mortgage to his daughter so that if he got sick, as he did each winter with rheumatism, his daughter would take care of him and pay the doctor and hospital bills and furnish him "eats."

The daughter, Jennie Kinsley, testified that her father had lived with her about ten years, and that he gave her the note of $4,000 and mortgage on the home "so I would have some protection; that I would have some way of knowing that I would get the money that I had advanced him, and his board bill," charged to him at $5 a week. She then claimed that he owed her $1,288.88. She never knew her father owed the bank until the sheriff brought the summons to the house. She admitted that on August 19, 1931, her father transferred to her his savings account in the Commercial Savings & Loan Association, in which there was a balance at that time of over $3,000. However, she denied that she knew at that time that South Omaha State Bank had closed less than a week prior to that date. She testified that he owed her board when he transferred the savings association account to her, but he did not give her the account to pay the bill, but "he transferred it because he wanted to." The evidence further shows that

immediately the $3,000 was drawn out by check of the association, and its check turned into cash the same day, and the cash put in an envelope in her safety deposit box, and later she handed the envelope to her father. She said she paid no rent to her father for living in the family home all these years.

The trial court found generally for the defendants, and that the $4,000 note and mortgage were given for a valid consideration, and dismissed plaintiff's petition.

During the trial the plaintiff offered, as part of his case in chief, certain questions and answers given by each of the defendants in proceedings had before Judge Sears in aid of execution. Upon objections, the evidence was not received. Later in the trial, the plaintiff offered certain parts of this evidence as rebuttal evidence, and objections to such offer were sustained by the court. These rulings of the court are assigned as error.

Plaintiff contends that the admissions are primary evidence, and that it is immaterial that the party who made them is present in court and can be called as a witness. The rule in reference to this has been well stated by this court to be: "The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for the admission of such evidence by cross-examination." *Young v. Kinney,* 79 Neb. 421.

We are of the opinion that, in sustaining the objections to the introduction of this evidence, the trial court committed prejudicial error. *Merrill v. Leisenring,* 166 Mich. 219; *Berggren v. Hannan, O'Dell & Van Brunt,* 116 Neb. 18; 22 C. J. 297; 22 C. J. 343, which hold clearly that it is immaterial that the party who made the admission is present in court.

Again, this is a transaction between a father and daughter by which a creditor is wronged. This daughter has the burden of overcoming the presumption against the

good faith of this gift from her father which has the effect of defrauding the depositors of this failed bank. *Lincoln Trust Co. v. Sweeney*, 124 Neb. 686.

It is the law that, where one conveys all of his property to a relative in consideration of future support, such a conveyance is invalid as to his creditors.

The judgment of the district court is hereby reversed, and said court is hereby directed to enter a decree in conformity with this opinion, subjecting the real estate in suit to the payment of the plaintiff's judgment, subject to the right of homestead, if any.

REVERSED.

PAT HUDSON, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED JANUARY 11, 1935. No. 29367.

1. **Master and Servant**: WORKMEN'S COMPENSATION: PROOF. In compensation cases, it is incumbent upon the plaintiff to make his case by a preponderance of the evidence.
2. ———: ———: ———. "Awards of compensation cannot be based upon possibilities or probabilities merely, but must be based on sufficient evidence showing that the workman suffered his disability because of an injury arising out of and in the course of his employment." *Mullen v. City of Hastings*, 125 Neb. 172.
3. ———: WORKMEN'S COMPENSATION LAW: TRIAL DE NOVO. "In a proceeding under the workmen's compensation law, where the evidence is conflicting, the supreme court upon a trial *de novo* may consider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses." *Sherman v. Great Western Sugar Co.*, 127 Neb. 505.
4. **Evidence** examined, and *held* insufficient to prove that plaintiff sustained a compensable injury.

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

Sorensen, Kyle, Newkirk & Rein, for appellant.

Max Kier and *Lloyd E. Chapman, contra.*

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

ELDRED, District Judge.

This is a compensation case. It appears that the appellant, Pat Hudson, at the time of the accident involved herein, was employed by the appellee, city of Lincoln, cleaning a sewer. He claims that while thus employed, on the morning of July 8, 1933, he sustained an injury to his right eye. The sewer cleaning job was being done by winches, cable, blocks and bucket. The terminal winches were set up over the manholes leading from the surface to the sewer. At the bottom of each manhole, and in the sewer, was a block through which the cable was pulled. On July 8, 1933, in the progress of the work, the cable, which was spliced, would not go through one of the blocks at the point of splicing; the block had to be taken apart and set up again ahead of the splice. To do this work Hudson went down into the manhole and, taking hold of the block, found that it was clogged with rags and débris; and while pulling on one of the rags it suddenly came loose and flew into Hudson's face, striking him on the surface of the right eye. There is no substantial conflict in the testimony as to the foregoing facts. It is contended that since said time his right eye has been substantially sightless. The compensation commissioner decided the issues involved in appellant's, Hudson's, favor, and awarded him compensation.

On appeal to the district court for Lancaster county, the court found the issues in favor of the appellee, and that the plaintiff does not now have and never did have any disability from any accident arising out of and in the course of his employment by the city of Lincoln, and dismissed the action. The plaintiff, Pat Hudson, has appealed.

The decisive question for determination is whether the disability of which the plaintiff complains is due to an

accident arising out of and in the course of his employment by the city of Lincoln. This involves a consideration of the evidence bearing upon that question, which was principally given by four witnesses who testified as eye specialists; all of whom appear to be well qualified, both from preliminary study and education, and long experience in their profession.

Pat Hudson, the appellant, testified: The accident happened July 8, 1933, about 9:00 a. m.; he worked the balance of the day; the foreman sent him to Dr. Campbell, who treated his eye and told him, if he got no better, to report back; was required by Dr. Campbell to medicate his right eye every three or four hours; the eye was inflamed and burned continuously for four or five days; after that it cleared up; as he unbandaged it he noticed he could not see out of that eye; just the light was about all; had never experienced any trouble with his right eye prior to the time of the accident. Plaintiff had gone to school, read books and papers, and engaged in marksmanship. Dr. Campbell advised him to consult an eye specialist; he went to his family doctor, Miles Breuer, who sent him to Dr. Earl B. Brooks.

The first specialist to examine the plaintiff's eye after the accident was Dr. Brooks. The plaintiff was taken to him by Dr. Breuer, plaintiff's family physician. Dr. Brooks examined him on July 17, and again on July 21. After the second examination plaintiff did not again return to Dr. Brooks, but went to see the compensation commissioner, who sent him to Dr. Sanderson. July 22, 1933, he was first examined by Dr. Sanderson, who, at the suggestion of the compensation commissioner, kept him under observation and continued with his examinations and treated plaintiff from once a month to as many as four times a month, up to May 9, 1934.

On August 17, 1933, Dr. Hompes first examined the plaintiff, and on August 21, 1933, he was first examined by Dr. Thomas; these examinations being during the time Dr. Sanderson had plaintiff under observation. Drs.

Brooks, Hompes and Thomas all examined plaintiff's eye again on May 14, 1934.

In the opinion of Dr. Sanderson the defective vision of plaintiff's right eye was due to an injury received at the time of the accident involved herein. While the opinions of Drs. Brooks, Hompes and Thomas were all opposed thereto.

Dr. D. D. Sanderson; practiced 23 years; specialized, eye, ear, nose and throat; first examined Pat Hudson on July 22, 1933; the examination was made at the request of the compensation commissioner; obtained from Hudson a history of the accident and went through the usual routine of examining the eye; found that he did not see as well with the right eye as he did with left, and found his field of vision indefinite; rather a little blurry; there was especially one area that he complained of seeing not at all definitely, or being completely absent; his field, as far as distance around was concerned, was practically normal; he could get objects out toward the side; his cornea was comparatively clear; his lens was clear, and his media was practically clear, but the fundus showed a very definite area in the lower area of destruction that was probably congenital, and that accounted for the blurry sensation that he spoke of in the upper field that he could not see. The nerve head was definitely congested; that is, it showed small streaks extending out from the nerve head itself, over the area in the eye where the nerve head comes in and spreads out over the inside of the eye; it extended more toward the central portion of the eye, that we see with; was not definitely swollen; on the surface you would call it irritated. His vision in the eye he complained of at that time was approximately 10/200; that is, he could read at ten feet what he should read at two hundred feet, and with the other eye he could see normally; that is, approximately, at the first examination. At the request of the compensation commissioner the witness kept Hudson under observation. Saw appellant on July 24; at that time his pupils reacted practically normal; his tension at

that time was, according to the instrument used in registering tension—which indicates the pressure of the eyeball—a little higher in the right eye than in the left; sometimes each eye may vary a little; but the right eye was 45, compared with 35 in the left eye. On a number of occasions, during the several months following, witness observed the patient, made different examinations, and different treatments were administered to determine whether the condition was bacteria or traumatic. Throughout this period, witness testifies, the tension of the right eye was considerably greater than that of the left. The vision of the right eye varied somewhat on each examination. In January the fundus remained about the same; still that little fine minute area of congestion around the nerve head, with some very fine areas out at the edge that appeared as if they evidently could continue to a definite atrophy. A chart made of his field of vision, the last time witness saw him, showed a very marked narrowing of his general field of vision. During this time it had changed in the fundus area, and in the area of the nerve head, from a minute inflammatory area to a little more exaggerated and a little more atrophic. At the present time there is a little more atrophy developing. The atrophy is right at the nerve head extending over into the macula area; there is still some inflammatory tissue in that area. The opinion of the witness was that plaintiff's eye was not amblyopic from nonuse. Asked for an opinion as to the cause of the inflammation and atrophy in the macula area of the fundus of the eye, witness stated: "Through the use of protein and vaccine therapy and observation of him over a period of time I was unable to find any evidence of infection causing his difficulty. He did give a definite history of injury, although it appeared at the time as if it was slight; but ever so slight a bump on the anterior part of the eye may cause a rupture in the back part of the eye and sufficient injury to cause all of his difficulty. * * * And therefore since I cannot find anything except a definite history of injury there is no doubt but

what his injury caused it, because it does do it." And stated further his opinion that the atrophy and infection are primarily the result of the injury.

This evidence would seem to disclose but a possibility, or, at most, a probability as to the cause of the conditions of plaintiff's right eye.

Dr. M. F. Arnholt, superintendent of the department of health of the city of Lincoln: In the latter part of July or early August, had a conversation with Dr. D. D. Sanderson relative to an examination he had made of Pat Hudson. "I put the question to Dr. Sanderson, 'Could this present disability or lack of vision be due to an old disability?' and he said, 'It could be.' 'Well,' I said, 'Is it?' and he hesitated somewhat and came back with this answer, 'That the city would save a lot of money if they examined those persons' eyes before they were employed.'"

Dr. Earl B. Brooks, physician specializing in ear, eye, nose and throat: Practiced since 1905; examined Pat Hudson July 17, 1933. "He was brought to my office by Dr. Miles Breuer" (plaintiff's family physician); examined him that day; also on July 21, 1933; and again May 14, 1934. Was given history and made examination; examined the lids, and the tissue of the eye, and of the cornea, that is the clear anterior segment chamber, and iris and media; there was no nystagmus or unusual movements of the eye. The right fundus was clear. The ocular movements were normal. Pupils were round, two to two and a half m. m. in diameter, equal, reacted normally, both direct and consensual, tension was normal. The retinoscopy, right eye sphere plus 5, left eye plus 1.50. Right vision 22/100, left vision 20/15. With the malingering frame at ten feet, right eye, he reads 10/40. He says that he does not see the red. Diagnosis: Amblyopia exanopsia right, with hyperopia. Made a thorough and complete examination; the finger tension was normal; the lids of the right eye showed a slight hyperæmia; lachrymal apparatus, anterior chamber, cornea and sclera were clear, iris brown and mobile, lens and media clear. The ophthalmoscopic ex-

amination, that is, an examination of the interior of the eye, the right fundus was clear. There is an area in the region of the macula that shows a slightly stippled effect, slight pigmentation. The right vision was 20/60, minus three. Saw him again on July 21, and at that time he admitted 22/100 vision only in the right eye; that means that he had slipped apparently from 20/60, minus three, to 22/100; read at 20 feet letters that he should read at 200 feet; apparently that much loss of vision in four days. On that day examined all of the tissues of the eye in a similar manner as on the 17th of July. "I examined particularly carefully the fundus, retina, the inner coats of the eye and anterior, and we found that the two fundi were identical as far as I could make out. * * * There was no injury there. * * * The fundi is the back of the eye that you see as you look into it with an instrument which we call the ophthalmoscope, it has a battery of mirrors which reflects the light into the eye, you get a round appearance, it is the head of the optic nerve, and coming from them the central artery and veins and spreading out like the branches of a tree into the superior nasal and temporal branches, * * * and branching like the branches of a tree. And they appeared normal in both eyes." Used an ophthalmoscope in making the examination. The arteries, veins and nerve head were normal. "We took a Wasserman, which was negative. I intimated to him that it was rather unusual to get that much discrepancy in vision in four days, and that I had misgivings he was not reading with the right eye as good as he could; and after that date he didn't consult me any more until last evening. * * * My conclusion was that his loss of vision was not due to the injury or accident that he had sustained; that he did have an error of refraction which accounted for some loss of vision. The man might honestly have discovered about that time that his vision was not as good in his right eye as in the left, but it did not seem reasonable in four days that that vision had slipped that much with nothing to show for it in the way of physical findings.

* * * Now, do you have an opinion as to what was the cause of this error of refraction? Well, it has been testified to here before, he was born with a faulty shaped eyeball, the anterior posterior axis is undoubtedly short, in fact, a great percentage of people are born with hyperopia; when that discrepancy is too great, as Dr. Hompes pointed out, when the discrepancy between the two eyes is great the brain learns to fix with the eye on the object, but we get a separation of the image with the poor eye, and then from disuse we have blindness and loss of sight that comes from this disuse."

On May 14, 1934, he examined Mr. Hudson again. "We went through an examination of the ocular muscles, the pupillary reactions, the tension, an examination of the lids and lachrymal apparatus, the conjunctiva and the cornea, the sclera, iris, lens and media and found there no evident lesion. Examining the eye with an instrument called the ophthalmoscope he showed curvature of the cornea which would mean some astigmatism on the top of the area of refraction. * * * That might be partially acquired and might be congenital." After the last examination, reached the same conclusion as he had after the examination on July 17 and July 21. "In my opinion the accident didn't cause this defective vision that he claims in his right eye." Examined the eye with all the skill and judgment possessed, both at the beginning and at the time the last examination was made, and did not find the entrance of the optic nerve atrophied or inflamed. Did not find any infection, or any trace of infection. "I looked carefully for evidences of scars or disturbances of the iris, or anything that would indicate hemorrhages in the retina, or patches of atrophy in the retina that might come from an injury or an inflammatory process as a result of infection. * * * I felt that there was a lesion there."

Dr. J. J. Hompes, physician, specializing in eye, ear, nose and throat; practiced since 1908; examined Hudson August 17, 1933; examined him again on May 14, 1934. In giving history Hudson stated he had previously had his

eyes examined in school and had never been told he had anything wrong with them; never had his eyes examined by any one outside of the public school, and had never worn glasses. On examination found his eyes normal in appearance; his eyelids and mucus membrane, and the cornea and the surface of the eye were normal; there were no scars, thickening of the tissue or inflammation in these parts. The extrinsic muscles which control the motion of the eyeball, and vision and pupils were normal, equal in size and acted normally to stimulation. The crystalline lens, the retina and optic nerves of both eyes were normal in appearance. There was no defect in the structure of either the right eye or the left eye to indicate that they had ever been injured. The vision in the right eye was defective, and in the left eye the vision was 3/40, meaning that he saw at three feet an object he should be able to see at forty feet. Diagnosed case of defective vision as due to hypermetropia, meaning farsightedness; that due to the great inequality of vision in the two eyes he has used the better eye, the left eye, to the disadvantage of the right eye. In the language of ophthalmology, the condition of the right eye is known as amblyopia exanopsia. That means a defect in vision from disuse. This condition is one commonly found in cases where there is a great inequality of vision, especially is this condition likely to result where, as in this case, the person has never worn glasses. The fields of vision were normal in both eyes. This is a case, "in my opinion, of defective vision from lack of wearing proper glasses, the defect has existed for a long time, and will remain about the same throughout the rest of his life. He has not sustained any injury to his eye of a permanent nature, nor has it been affected in any way by the accident he claims." Made examination of all parts of the eye; would have detected any inflammation or disease of the optic nerve where it enters the orbit, had there been any. Examined the plaintiff again Saturday evening (May 14). "I went over all this material and examined him in the

same way that I did before, excepting that I did not refract him, and I did not take his fields of vision over again * * * and I found no change, and nothing different than I found on the examination on August 17, 1933. I did one other examination in addition, I examined the surface of his eye and the interior one-third of his eye with a cornea microscope that gave me magnification of 44 diameters and I didn't find anything more than I found in the previous examination. Q. (By the Court) You didn't find any atrophy there? A. That has to do with the interior segment of the eye and cornea and lens and the fluid medias of the eye back about one-third. The optic nerve was examined and the retina and the medias and they were all normal, or were last night at 5 o'clock."

Dr. J. W. Thomas, practiced his profession 24 years, specializing in eye, ear, nose and throat; examined plaintiff's eyes August 21, 1933, and again the night before the trial, May 14, 1934. The first examination was made at the request of the labor commissioner. The history given him was that plaintiff was struck in the eye while working in a sewer ditch for the city, July 8, 1933; some sewer mud was removed from the eye on the date he was hurt. The examination of his eyelids was negative; no inflammation of the eyelids, either inside or out, and no swelling. Motion of the eyeballs was normal; pupils were normal in size and reacted to light and accommodation. The tension, which is the pressure of the eyeball itself, in the right area was 22 millimeters; of the left eye 18 millimeters with Schiotz' tonometer. The examination of the eye grounds of the retina and the head of the optic nerve was negative. There was no pathology. The fields were taken and were normal in both eyes for white. The patient had fusion; that is, he had vision in both eyes and was able to fuse the two eyes on an object. An examination of his vision was made, and the subjective findings, that is, the findings with the patient's statements of vision were of the right eye at twenty feet 22/100, and the left eye 20/15, minus three, and the vision of both eyes 20/20. Under

drops the refraction did not change. Found nothing in the examination that indicated that the plaintiff had any disability of the right eye as a result of the accident. The various details of the eye were normal, except the vision and the refraction; the refraction showed a high area in both eyes, being greater in the right eye. This was not a result of injury; the difficulty of vision is a condition called amblyopia exanopsia, which means loss of vision because of disuse. In the opinion of the witness, "this man, and practically all people who have this condition, were born with it." His opinion being based on his observation and experience. The eye grounds, fundus, were normal; "I might amplify that statement by saying that any rupture of the macula or of the retina in any part of it would be easily obvious, and no such condition could possibly exist in the eye of Mr. Hudson at the time I examined him." There was nothing in the last examination, May 14, 1934, to cause the witness to change the conclusion previously formed. In making the examination, went clear to the back of the eye, the anterior portion, where the big nerves come from; "that is what we speak of as the fundus;" found no inflammation there; found it normal.

Mrs. Matilda Hudson, mother of the plaintiff, testified he attended school until he reached the eighth grade. Read books and papers. He never used glasses. That previous to the accident he had never experienced any trouble with his right eye.

And plaintiff himself testified that he engaged in marksmanship. To what extent, or with what success, is not disclosed. One witness testified he went hunting with the plaintiff two different times. The testimony as to other lines of work or employment in which the plaintiff had been engaged is not such as to indicate whether the vision of one of the plaintiff's eyes may or may not have been defective. The fact that the plaintiff may or may not have experienced any previous difficulty with his right eye does not detract from the conclusion reached by Drs.

Hompes, Thomas and Brooks, the latter witness stating: "The man might honestly have discovered about that time that his vision was not as good in his right eye as in his left."

In compensation cases it is incumbent upon the plaintiff to prove his case by a preponderance of the evidence. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468. Awards in such cases cannot be based upon possibilities or probabilities merely, but the preponderance of the evidence must show that the workman suffered a disability because of an injury arising out of and in the course of his employment. *Mullen v. City of Hastings*, 125 Neb. 172. Further, in a proceeding under the workmen's compensation law, where, as in this case, "the evidence is conflicting, the supreme court upon a trial *de novo* may consider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses." *Sherman v. Great Western Sugar Co.*, 127 Neb. 505.

On trial *de novo* this court finds that the plaintiff has failed to establish, by a preponderance of the evidence, that he sustained a compensable injury as the result of an accident arising out of and in the course of his employment by the defendant, the city of Lincoln.

Error is assigned in the rulings of the trial court on the admissibility of certain evidence offered by appellant. We have examined all of the assignments, and find no prejudicial error in such rulings.

The judgment of the trial court is

AFFIRMED.

HOWARD KENNEDY ET AL., APPELLEES, V. GOLDIE C. POTTS ET AL., APPELLANTS.

FILED JANUARY 16, 1935. No. 29088.

1. **Limitation of Actions.** If action is begun within the time prescribed by the statute of limitations and after the lapse of such time an amended petition in the action is filed, declaring on the

same cause of action, the latter is not subject to the defense of statute of limitations.

2. **Deeds:** CORPORATIONS. A quitclaim deed by a corporation of all its interest in the premises does not convey any interest the corporation may have in the premises as trustee for another.
3. **Trusts:** JOINT TENANCY. Cotrustees take as joint tenants, rather than as tenants in common, upon the death of one of them, the doctrine of survivorship applies, and the whole trust vests in the surviving trustees, unless the trust is purely a personal one, clearly intended to be executed only by the persons named. 65 C. J. 669.

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

Hoagland, Carr & Hoagland, for appellants.

Dysart & Dysart and *Beeler, Crosby & Baskins, contra.*

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

GOOD, J.

This is an action for foreclosure of a tax lien. Plaintiff had decree, and defendants have appealed.

The record discloses the following pertinent facts: In 1923 Peters Trust Company (hereinafter referred to as the trust company) loaned $4,000 to one Spencer upon his promissory note, secured by a mortgage on 160 acres of land. In 1924 the trust company sold and assigned this mortgage to defendant Goldie C. Potts, with an arrangement that the trust company would service the mortgage; that is, look after collection of the interest thereon for Mrs. Potts. Mrs. Potts failed to record the assignment of the mortgage. Taxes on the mortgaged premises for 1925 became delinquent. The trust company on November 1, 1926, purchased the tax sale certificate for the 1925 taxes. November 17, 1926, the trust company sold and transferred the tax sale certificate to the Farm Investment Company (hereinafter referred to as the farm company). The farm company had arranged to issue a series of bonds, secured by tax sale certificates and tax liens. By an in-

denture the farm company appointed the trust company as trustee to hold the tax sale certificates and tax liens as security for the bonds to be so issued. November 17, 1926, the farm company assigned to the trust company, as trustee, a number of tax sale certificates, including the one on the Spencer land. In 1927 Spencer was in default in payment of interest on the mortgage, and Mrs. Potts turned over to the trust company the note and mortgage for foreclosure. Foreclosure action was commenced, but Spencer paid up the interest due and the costs of foreclosure, that action was dismissed, and the note and mortgage were returned to Mrs. Potts. Later Spencer again defaulted in the payment of interest. Mrs. Potts again turned over to the trust company the note and mortgage for foreclosure, and action was commenced.

Prior to the commencement of this action, Mrs. Potts was advised of the fact that the taxes had not been paid by Spencer, and that a considerable amount of taxes remained unpaid; that, if she desired, she could pay these taxes and have them included in the foreclosure action for her benefit. She did not elect to pay the taxes, and the foreclosure action proceeded in the name of the trust company for the benefit of Mrs. Potts.

Prior to the decree in the foreclosure action, the trust company became bankrupt and resigned as trustee for the farm company; whereupon the latter company, by proper court proceedings, secured the appointment of W. S. Weston and Howard Kennedy as substitute trustees, to continue the trust for the farm company and its bondholders. Later a decree was entered in favor of the trust company in the mortgage foreclosure action, and this decree was duly assigned to Mrs. Potts. Assignments were executed by the trust company and by the trustees in bankruptcy. The trust company also executed and delivered to Mrs. Potts a quitclaim deed to the mortgaged premises. After the expiration of the stay taken by Spencer and wife in the mortgage foreclosure action, the property was sold and bought in by Mrs. Potts. The farm

company in the meantime had paid the subsequent taxes on the Spencer land for the years 1926 to 1930, inclusive, and the tax receipts were by it pledged to the trust company as long as it acted as trustee, and later to Weston and Kennedy, successor trustees, as security for its outstanding bonds. Weston and Kennedy, as successor trustees, commenced this action for the foreclosure of the tax lien before five years from the date of the tax sale certificate had elapsed. Before the present case was reached for trial, Weston departed this life, and no successor trustee for him was appointed. Kennedy remained the sole surviving trustee.

In the petition it was alleged that the tax sale certificate was assigned by the farm company to Weston and Kennedy, trustees. Later, and after more than five years from the date of the tax sale certificate, the plaintiffs filed an amended petition in which was set forth the fact that the tax sale certificate had been assigned and delivered to the trust company by the farm company and later was transferred to plaintiffs as successor trustees.

Defendants contend that the action is barred by the statute of limitations, since the amended petition was filed more than five years after the tax sale certificate was issued. The contention is not well founded. In the original petition plaintiffs asserted ownership, as trustees, of the tax sale certificate and the subsequent tax receipts, and sought foreclosure thereof. In the amended petition they did not change the cause of action, but did elaborate by setting out in detail the chain of their title to the certificate and tax receipts.

It is a rule that, where an action is commenced before the cause of action is barred by the statute of limitations, but subsequent to the running of the statute an amended petition is filed, in which the allegations of the petition are amplified, and there is no change in the cause of action, filing of such amended petition does not affect the plaintiff's right of recovery. In the instant case there was no variance between the original petition and the amended

petition. The action is based on the ownership of the tax sale certificate and the subsequent tax receipts and is not based on the manner in which such ownership was acquired.

In *Norfolk Beet-Sugar Co. v. Hight,* 59 Neb. 100, it was held:

"A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects.

"The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action."

Other cases holding to the same effect are *Chicago, R. I. & P. R. Co. v. Young,* 67 Neb. 568; *Witt v. Old Line Bankers Life Ins. Co.,* 92 Neb. 763; *Duffy v. Scheerger,* 91 Neb. 511. See, also, *Cottonwood Lumber Co. v. Walker,* 106 Ark. 102, 45 L. R. A. n. s. 429.

Defendants contend that the trust company, being the original mortgagee, and having purchased the tax sale certificate and thereafter foreclosed the mortgage, could not subsequently foreclose the tax lien. We need not determine whether the trust company could have so foreclosed the tax lien. When the trust company acquired title to the tax sale certificate, it did not own the mortgage. The ownership of that mortgage was then vested in Mrs. Potts, and, while it was so vested in Mrs. Potts, the trust company sold and assigned the tax sale certificate to the farm company. The subsequent foreclosure by the trust company, for the benefit of Mrs. Potts, of the mortgage could not prejudice the rights of the farm company, and it is immaterial that at the time the trust company may have had possession, as trustee for the farm company, of the tax sale certificate. The trust company in its individual right and as trustee is two distinct entities in law. Its possession, as trustee, of the tax sale certificate was not a holding thereof in its own right.

It is also argued that, since the trust company foreclosed

the mortgage, obtained a decree and assigned the decree to Mrs. Potts, and also gave her a quitclaim deed to the mortgaged premises, this extinguished the tax sale certificate. Again, defendants overlook the fact that the trust company could not prejudice the rights of the farm company by its action in quitclaiming any interest it had. The quitclaim deed operated only to transfer any interest in the premises which the trust company owned in its own right, and did not operate to transfer any interest which it held as trustee for another.

Defendants contend that the trust company and the farm company are practically identical and, therefore, any action taken by the one is the action of the other. The record does not sustain defendants' contention. A number of the stockholders in the trust company were also stockholders in the farm company; also, a number of the officers of the trust company were officers of the farm company, but there were many stockholders in the trust company who were not interested in the farm company. Any profits accruing to one company did not inure to the benefit of the other, but inured to the benefit of the respective stockholders of the two corporations.

Defendants contend that, since Weston, one of the successor trustees, had departed this life since the commencement of this action, the cause could not proceed to judgment without being revived either in the name of the personal representative of Weston or a successor trustee, appointed in his stead.

The applicable rule is stated in 65 C. J. 669, in this language: "As cotrustees take as joint tenants rather than as tenants in common, upon the death of one of them the doctrine of survivorship applies and the whole trust vests in the surviving trustees, unless the trust is purely a personal one clearly intended to be executed only by the persons named."

The action did not abate on the death of the trustee. Comp. St. 1929, sec. 20-322. The decree of foreclosure in this cause is for the benefit of the beneficiaries of the trust

and will inure to them, regardless of the fact that there is but one surviving trustee. Nor does the fact that only one trustee survives increase the liabilities or burdens of the defendants. They are not prejudiced by the action.

Defendants complain of many rulings of the court on the admission and rejection of evidence. From the record it appears that much evidence was admitted which should have been excluded. It is a rule that the trial court is presumed to have disregarded any incompetent, irrelevant or immaterial evidence admitted on the trial of an equity cause. The question for determination is whether, upon a trial *de novo*, the findings of the trial court are sustained by a preponderance of the competent evidence. Discarding all of the irrelevant and incompetent evidence from our consideration, the record shows beyond question that the findings and decree of the trial court are sustained by the greater weight of the evidence. No prejudicial error in the exclusion of evidence is disclosed.

We find no error in the record prejudicial to the defendants. Judgment

AFFIRMED.

IN RE ESTATE OF GEORGE HOAGLAND. LESHARA STATE BANK, APPELLEE, V. HAZEL HOAGLAND, EXECUTRIX, APPELLANT.

FILED JANUARY 16, 1935. No. 29074.

1. **Courts: APPEAL BOND: AMENDMENT.** The term "proceeding," as employed in sections 20-852 and 20-853, Comp. St. 1929, includes the "filing of an appeal bond" to obtain a review of a judgment of the county court in a probate proceeding, and the right of amendment of such bond is within the purview of, and governed by, the sections referred to herein.
2. *Peter v. Finzer*, 116 Neb. 380, reaffirmed.
3. **Bills and Notes: EXTENSION.** Under the negotiable instruments law, there is no extension of a bill or note, so as to discharge a person secondarily liable thereon, where another bill or note, either of the maker or a third person, is taken merely as col-

lateral or additional security, and there is no agreement postponing the remedy, although indulgence may in fact be granted.

4. ———: ———. Taking as additional security for a matured note a new note payable on demand is not an "extension" as that term is employed in the negotiable instruments law. In this connection, "on demand after date" is the same as "on demand."

5. Evidence in the record examined, and *held* to sustain the judgment of the district court.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Robins & Yost, for appellant.

J. H. Barry, contra.

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

EBERLY, J.

This is, in substance, an action at law upon a promissory note in the following form:

"$2,750. Leshara, Nebraska, June 12th, 1930.

"On demand, after date, we, or either of us, promise to pay to the order of the Leshara State Bank, Leshara, Nebraska, twenty-seven hundred fifty dollars. For value received, negotiable and payable at the Leshara State Bank, Leshara, Nebraska, with interest," etc. (Signed) "J. R. Magley, Mrs. J. R. Magley, Geo. Hoagland."

George Hoagland died and a claim in usual form, based upon this note, was filed in the matter of deceased's estate in the county court of Saunders county.

To the allowance of this claim the executrix of this estate presented objections, in writing, which, so far as essential to an understanding of the controlling issues, may be summarized as follows: "3. If any liability (of George Hoagland was created by this note), same is as surety and secondary to liability of Joe and Mae Magley. 4. Said note has been extended from time to time without the knowledge or consent of George Hoagland and he was released therefrom by reason thereof."

On a hearing on the claim it was disallowed by the county court. Claimant prosecuted an appeal to the district court for Saunders county where, upon a trial on the merits, judgment was entered for claimant.

The executrix of the George Hoagland estate prosecutes an appeal to this court, and presents two contentions for our consideration, viz.: (1) The district court erred in denying motions of the executrix for dismissal of the appeal because of alleged failure of claimant to seasonably execute and tender a proper appeal bond as required by law; and (2) that George Hoagland and his estate had been, as a matter of law, released by reason of extension of time by the payee of this note to J. R. Magley and Mrs. J. R. Magley.

In support of her first contention appellant insists that section 30-1603, Comp. St. 1929, is applicable and controlling. This section provides: "Every party so appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him."

Appellee contends that the determining statutes are sections 27-540 and 21-1302, Comp. St. 1929.

By section 27-540, it is provided: "In civil actions brought under the provisions of this chapter either party may appeal from the judgment of the county court, in the same manner as provided by law in cases tried and determined by justices of the peace. The amount of the bond or undertaking shall be double the amount of the judgment and costs, and shall be approved by the county judge."

Section 21-1302 provides: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety to be approved by such justice, in a sum not less than fifty dollars in any case, nor less

than double the amount of the judgment and costs, conditioned: First. That the appellant will prosecute his appeal to effect and without unnecessary delay; Second. That if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant."

The legislative history of these sections discloses the following: An act entitled "An act concerning the organization, powers and jurisdiction of probate courts" (passed, and took effect, March 3, 1873) covered the organization, general jurisdiction, exclusive probate jurisdiction, and general powers exercisable in probate jurisdiction, including, "First. To hear and determine claims and set-offs in the matter of estates of deceased persons." Section 4. By section 26 of this act it was provided: "In civil actions brought under the provisions of this chapter, either party may appeal from the judgment of the probate court, or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace. The amount of the bond or undertaking taken shall be double the amount of the judgment and costs, and shall be approved by the probate judge." Gen. St. 1873, p. 263. The terms of this enactment, with certain amendments immaterial so far as the question under consideration is concerned, have been continued in force and effect, and now appear as sections 27-501, 27-502, 27-503, 27-504, and 27-540, Comp. St. 1929.

The reference contained in section 27-540 to "in the same manner as provided by law in cases tried and determined by justices of the peace" refers to section 21-1302. This section was enacted as section 1007 of our Civil Code, adopted in 1866. And by section 17, art. V of the Constitution of 1875, it was provided: "Appeals to the district court from the judgments of county courts shall be allowed in all criminal cases, on application of the defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by law."

However, in 1881, chapter 47 of the laws of that year was adopted, bearing as a title, "An act providing for an appeal from the decision of the county court in certain matters." This purports to be an independent act and contains no repealing clause, and in terms in no manner refers to any laws previously enacted. Section 3 of this act now appears as section 30-1603, Comp. St. 1929, as hereinbefore quoted.

The claim in suit was disallowed by the county court on April 21, 1933, and on April 29, 1933, an appeal bond was filed by plaintiff bank in the county court in this cause conforming in terms to the requirements of section 21-1302, Comp. St. 1929. On the same day the "bond and surety thereon" were approved by the county judge. On May 6, 1933, a transcript of proceedings, certified to by the county judge as of May 2, 1933, was duly filed in the office of the clerk of the district court for Saunders county. On June 2, 1933, the executrix of the Hoagland estate, appearing generally in the district court, presented a motion for an order dismissing the appeal because of failure to have two sureties sign the appeal bond, and because two sureties failed to execute and indorse upon such bond their juistification as required by section 20-2223, Comp. St. 1929.

On June 22, 1933, the district court overruled this motion to dismiss. On June 30, 1933, the executrix filed "objections to claim of Leshara State Bank." On October 4, 1933, the issues were tried to the court "on the pleadings and the evidence, and the cause submitted on briefs."

On October 25, 1933, a motion was presented to the court on behalf of the bank "for permission to amend the appeal bond heretofore filed herein, by adding an additional surety thereon instanter." On the same day a decree was entered by the trial court permitting claimant "to amend the said appeal bond filed herein, by adding the name of an additional surety thereon, and also permitting it to amend the transcript filed herein showing such amendment to such bond." The court also, as part of the

same decree, entered a finding and judgment for claimant, as prayed.

The record also indicates that an additional surety signed the appeal bond on October 25, 1933, and the two sureties, together, on the same day, executed the affidavit of justification in compliance with sections 20-2223, 20-2224, Comp. St. 1929. The bond so amended was subsequently refiled in the county court and transmitted to the district court.

The executrix on October 28, 1933, filed objections in writing to the permission to amend; also filed a motion for a new trial, and a "Motion to Set Aside Judgment and Supplemental Motion to Dismiss Appeal from Disallowance of Leshara State Bank Claim," all of which were overruled by the trial court.

While the district court sustained the bond as originally given, subsequently, on application of appellant, it permitted amendments to the original bond so that as amended it substantially conformed to the requirements of section 30-1603, Comp. St. 1929.

Ultimately, the sole question here is the power of the trial court to permit or approve the amendments as and when actually made.

In *Casey v. Peebles*, 13 Neb. 7, substantially identical with the instant case, the rule is announced: "Where the statute requires two sureties upon a bond for an appeal, and a bond containing but one is duly approved, it is not void, but may be amended. And it will be sufficient, unless objected to on the ground that it is signed by but one surety." See, also, *Bazzo v. Wallace*, 16 Neb. 293; *In re Estate of Hoferer*, 116 Neb. 254.

While appellant impliedly concedes that the amendments here made were within the power of the trial court, she insists that, in view of the facts in the record, the applicable rule is: "Time for amendment is limited to reasonable time after objection is made, and *where not fixed by statute*, rule of court or otherwise, the time is never permitted to extend beyond hearing on the objection to

sufficiency of bond." (Italics ours.) In Nebraska our statute fixes the "time for amendment."

Section 20-852, Comp. St. 1929, provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect. * * * And whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment."

Section 20-853 provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

These two sections (20-852 and 20-853) were considered by this court in *O'Dea v. Washington County*, 3 Neb. 118, and the following language of Mr. Justice Swan in *Irwin v. Bank of Bellefontaine*, 6 Ohio St. 81, was approved as applied thereto, viz.: "Is the filing of an appeal bond a proceeding? The word is generally applicable to any step taken by a suitor to obtain the interposition or action of a court. Steps taken, by which the judgment of a court is vacated, and the cause taken to, and the appearance of the parties effected in another tribunal, is a proceeding, and a very important one, in the progress of a civil action. It is as clearly a proceeding by which the suitor takes steps to prosecute his action, or defense, in an appellate court, as is the suing out of process at the commencement of an action, or the filing of a petition in error with process served. Besides, the term proceeding is used in the section of the Code referred to, to distinguish all other steps taken in an action from those embraced in the word pleading."

In this *O'Dea* case the following rule was announced by this court: "Steps taken by filing an appeal bond to obtain

a review of an award made by appraisers, of damages on account of the laying out of a public highway, is a *proceeding* in an action, and clearly within the statutory meaning of that term; and if such bond be found to be defective it may be amended in the appellate court, by consent of sureties, or a new bond may be filed."

The action of the trial court in permitting and approving the amendments to the appeal bond is approved as being not only within the spirit, but as required by the express wording, of the statute quoted.

Appellant, to establish her claim that the Hoagland estate had been released by reason of extension of time, called as her witness the president and cashier of the Leshara State Bank, who testified that none of the moneys which constituted the original consideration of the note in suit was paid to George Hoagland by the bank; that on three occasions subsequent to the delivery of the note in suit new notes of the same amount were executed by J. R. Magley or J. R. Magley and Mrs. J. R. Magley, his wife, and delivered to the bank "for collateral" to the note here in suit. Two of the notes so executed appear in evidence, and each bears the notation, in pencil, "collateral to old note." Each of these three notes had written on their face the date of execution, and by their terms were payable "on demand after date." It also appears in evidence that the rules of the state banking department required all demand notes to be renewed "within six months." Two pages of the liability ledger of the bank were also introduced in evidence, and opposite two entries thereon (one of which is an entry relating to the note in suit) the word "renewed" appears to have been interlined. This evidence that the renewal notes were taken as collateral to the note in suit is not disputed in the record, and it is also a conceded fact that the note in suit was never canceled nor surrendered by the bank.

On these facts appellant contends that Hoagland is a party secondarily liable on this note, and that section 62-801 of our negotiable instruments law is inapplicable;

that the controlling enactments are sections 62-408, 62-1702, 62-206, and 62-802; that the part of section 62-802 providing "A person secondarily liable on the instrument is discharged: * * * Sixth. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable, or unless the right of recourse against such party is expressly reserved," sustains her defense.

In this connection the correctness of the doctrine of *Peter v. Finzer,* 116 Neb. 380, is challenged because, though in harmony with the determination of the majority of the jurisdictions which have considered the subject involved therein, it is inconsistent with the well-established rules of suretyship. It may be said in passing that the subject involved in that case was the proper construction of our negotiable instruments act, an enactment having for its avowed purpose the obtaining of uniformity in the law of negotiable instruments throughout the nation. In view of the end sought by the legislation under consideration, this court, as now constituted, is unanimous in the view that the so-called "majority rule" should be followed, and therefore the doctrine announced in *Peter v. Finzer, supra,* is reaffirmed.

But the serious question presented by the record is whether the facts established by the evidence invoke the application of the statute on which appellant relies.

It is quite obvious that the terms of the contracts involved in this litigation must be determined by the face of the promissory notes, wholly unmodified, as a matter of law, by any rule of administration which may have been prescribed by the state banking department on the subject of demand notes. Neither can the word "renewed" as interlined on the liability ledger affect the conclusion to be reached.

In discussing a similar point the supreme court of New York, appellate division, in *National Park Bank v. Koehler,* 122 N. Y. Supp. 490, said: "Plainly, the note was not paid.

The bookkeeping entries made by the plaintiff for convenience are of little significance."

From a careful consideration of the authorities we are convinced that, "both under the negotiable instruments law and independent thereof, there is no extension of a bill or note, so as to postpone suit or so as to discharge indorsers, where another bill or note, either of the maker or of a third person, is taken merely as collateral or additional security, and there is no agreement postponing the remedy, although indulgence may in fact be granted; * * * Taking as additional security for a matured note a new note payable on demand is not an extension." 8 C. J. 432.

It also appears to be the true rule that the fact that the new note was payable "on demand after date" in no manner alters the situation. In *Peninsular Savings Bank v. Hosie,* 112 Mich. 351 (after adoption of negotiable instruments act) this principle was announced:

"The acceptance by the holder of a past-due promissory note of a new note for the amount of the old, with interest, payable 'on demand after date,' with interest, is not such an extension of time as will release an indorser of the old note, since the new note is due and suable immediately."

In the opinion of the Michigan court in this *Hosie* case, the following appears (pages 354, 355):

"It is claimed that the giving of the note of April 21, 1893, 'payable on demand after date, with interest,' gave one day's time to the motor company upon the notes sued upon, and, because of the extension of time, released Mr. Jones. The counsel for the estate have made an able argument in support of their contention, and have cited a number of authorities. We understand the rule to be: 'The statute of limitations begins to run from the very day the right of action accrues. Thus, upon a note payable so many days from the date, it begins to run from the day of payment, and not from the day of date; but the day of maturity is excluded in the computation of time.

If payable at sight, the statute runs from sight. If so many days after sight, or after certain events, then from the time named after sight, or after the events have happened. If the instrument be payable on demand, the statute begins to run immediately. "On demand after date" is the same as "on demand." ' 2 Daniel, Negotiable Instruments, sec. 1215.

"In *O'Neil v. Magner,* 81 Cal. 631, it was held that a promissory note made payable on demand after date is an ordinary demand note, payable at once, on which an action can be brought immediately after it is given. To the same effect are *Turner v. Mining Co.,* 74 Wis. 355; *Hitchings v. Edmands,* 132 Mass. 338; *Fenno v. Gay,* 146 Mass. 118. We cannot agree with counsel that the giving of this note was such an extension of time as to discharge Mr. Jones from liability."

It is to be noted that while the quotation from Daniel on Negotiable Instruments above referred to is from the 5th edition, in the 7th edition of the same work, published in 1933, the text, "If the instrument be payable on demand, the statute begins to run immediately. * * * 'On demand after date' is the same as 'on demand' " is retained unmodified. 3 Daniel, Negotiable Instruments (7th ed.) 1426. See, also, *Dies v. Wilson County Bank,* 129 Tenn. 89; *Federal Trust Co. v. Central Trust Co.,* 244 Mass. 204; *Second Nat. Bank v. Graham,* 246 Pa. St. 256; *Williams v. Guaranty State Bank & Trust Co.,* 264 S. W. (Tex. Civ. App.) 194.

It is obvious that, even if appellant be considered as the person secondarily liable on the instrument in suit before us, no defense thereto has been established by the evidence in the record.

The judgment of the district court is, therefore, correct in its final disposition of the case, and it is

AFFIRMED.

LORRAINE L. MCCORD, APPELLEE, V. JAMES G. MCCORD, DEFENDANT, CONSOLIDATED IN DISTRICT COURT WITH HELEN E. MCCORD, APPELLANT, V. JAMES G. MCCORD ET AL., DEFENDANTS.

FILED JANUARY 16, 1935. No. 29090.

1. **Mortgages: LIEN FOR ALIMONY: PRIORITIES.** In an action for divorce, under the statutes of this state, a judgment in favor of the wife for an allowance of "three hundred and seventy-five ($375) dollars per month * * * during the lifetime of the defendant or until the plaintiff remarries" is a lien upon the real estate of the husband for all amounts due or to become due under said decree, and will have priority over the lien of a mortgage on such real estate subsequently executed by said husband.
2. *Lynch v. Rohan*, 116 Neb. 820, reaffirmed.

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

O'Sullivan & Southard, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

EBERLY, J.

This is a controversy between Lorraine L. McCord, appellee, the first wife of James G. McCord, now divorced, and Helen E. McCord, the second wife of James G. McCord, concerning their respective rights to a certain residence property in the city of Omaha, described as lot seventeen (17), block one hundred thirty (130), Dundee Place, as platted and filed, in Omaha, Douglas county, Nebraska. The title to this property, so far as involved in the facts of this litigation, stands in the name of James G. McCord.

The appellee claims a first lien on the property by reason of a decree of divorce and alimony, entered in the district court for Douglas county on June 16, 1929, as

subsequently affirmed and modified by this court in *McCord v. McCord,* 119 Neb. 891.

The appellant, the second wife, claims through a real estate mortgage on the above described property subsequently given by James G. McCord to A. B. Warren, who later agreed to assign said mortgage and note secured thereby as collateral security to a marriage settlement agreement made with appellant by A. B. Warren, acting personally and as guardian for James G. McCord, hereinbefore mentioned.

The original decree granting appellee, Lorraine L. McCord, a divorce from James G. McCord, granted to appellee $2,900 as permanent alimony, and $200 per month during the lifetime of James G. McCord or until Lorraine L. McCord remarried, and was entered in the district court on June 16, 1929. This decree was modified by the supreme court on appeal, by increasing the amount of alimony from $200 per month to $375 per month, in an opinion filed May 29, 1930, in the case of *McCord v. McCord, supra.* The mandate therein was issued July 10, 1930, was filed in the district court for Douglas county, Nebraska, July 11, 1930, and pursuant thereto a supplemental decree was entered in the district court for Douglas county on July 23, 1930. The mortgage under which appellant claims, given by James G. McCord to secure claimed advances made by A. B. Warren, was dated June 23, 1930, and was filed of record in the office of the register of deeds of Douglas county, Nebraska, on July 23, 1930. A. B. Warren, trustee and remainderman under the trust created by the will of the late William H. McCord, under the terms of which James G. McCord was to receive substantially all of the income arising therefrom, was subsequently appointed guardian of this James G. McCord, and was conversant with the fact that the supreme court had increased the monthly alimony payments to be paid to Lorraine L. McCord before the mortgage was received or filed by him. The agreement made by the appellant and Warren, acting personally and as guardian of James

G. McCord, under the terms of which Warren agreed to deposit the mortgage in question as collateral, was entered into February 7, 1933. At the hearing in the district court all the parties were present in person, or by attorney, and all the parties, including James G. McCord by his guardian *ad litem*, stipulated and agreed that, if the trial court found that appellee had a first and prior lien on the property, the trial court should enter a decree directing all parties to assign and convey all their right, title and interest in the property to the appellee.

A trial on the merits resulted in a decree determining that "the plaintiff, Lorraine L. McCord, under and by reason of the original decree of divorce in case Docket 251, Number 16, entered by the district court for Douglas county, Nebraska, on the 16th day of June, 1929, and the supplemental decree in said action entered on the 23d day of July, 1930, pursuant to mandate of the supreme court of the state of Nebraska dated July 10, 1930, is entitled to and has a first lien on the following described real estate, to wit: Lot seventeen (17), block one hundred thirty (130), Dundee Place, as platted and filed, Omaha, Douglas county, Nebraska, to secure alimony payments now due and to become due provided for in said original and supplemental decree."

In accord with the finding thus made, and the terms of the stipulation of the parties, a judgment was duly entered in favor of Lorraine L. McCord and against Helen E. McCord, from which the latter appeals.

The various assignments of error of the appellant may be summed up as challenging the validity of a decree of alimony providing for the payment of "the sum of two thousand nine hundred ($2,900) dollars, as permanent alimony, and two hundred ($200) dollars per month, from the first day of June, 1929, to and including the 28th day of May, 1930, and three hundred and seventy-five ($375) dollars per month thereafter during the lifetime of the defendant or until the plaintiff remarries, the payments at the rate of three hundred and seventy-five ($375) dollars

per month to begin on the 28th day of May, 1930, and to be paid upon the first day of each and every month thereafter."

This contention is based on the theory, first, that the courts of this state have no jurisdiction or power to lawfully provide in decrees of divorce as alimony for monthly payments or instalments to continue during the lifetime of the defendant (judgment debtor) or until the plaintiff (judgment creditor) remarries; and, second, that decrees or orders in this form do not constitute liens upon the real estate of the judgment debtor.

In *Swansen v. Swansen,* 12 Neb. 210, and in *Brotherton v. Brotherton,* 14 Neb. 186, this court announced the rule that under the statutes then in force, a decree declaring alimony a lien upon real estate was erroneous. However, following these decisions, the legislature of 1883 enacted chapter 40 of the session laws of that year, being, "An act to provide additional remedies for enforcement and collection of judgments and orders for alimony or maintenance." This enactment provided:

"Sec. 1. All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process as other judgments.

"Sec. 2. The remedy given by this act shall be held to be cumulative and in no respect to take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders."

This legislature of 1883 also enacted chapter 41 of the session laws of that year, under the title of "An act to amend section twenty-six (26) of chapter twenty-five (25) of the Compiled Statutes of Nebraska, entitled 'Divorce and Alimony,' being section 26 of chapter 16 of the Revised Statutes," which, in effect, added to section 26 of chapter 25 of the Compiled Statutes of Nebraska then in force, and that had been previously construed in *Swansen*

v. Swansen and *Brotherton v. Brotherton, supra,* the provision, "And judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

It will also be noted that the remedy conferred by this legislative enactment was "cumulative." *Nygren v. Nygren,* 42 Neb. 408.

This legislation so enacted has been since continued in force and effect, and now appears as sections 42-319, 42-320, and 42-323, Comp. St. 1929.

So, too, these statutory provisions concerning judgments and orders for alimony and maintenance are identical as to each of the classes thus named. Their effect as "judgment liens" was provided for and established in the same legislative acts, expressing the same legislative purpose by the employment of the same words. Under these circumstances, it is obvious that the qualities conferred by the legislature upon decrees and orders for alimony, and decrees for separate maintenance, must be deemed without distinction. Therefore, it is obvious that a decree for alimony and a decree for maintenance must be treated as equally within the purview of the legislation, and each class of such decrees as having expressly conferred upon it the characteristics of a statutory judgment lien, "in like manner as in other actions."

In the present proceeding, one in the nature of a collateral attack on the decree of divorce and alimony in favor of appellee, the appellant insists that, "in a divorce action where the wife is awarded an absolute divorce and given judgment for a definite sum for permanent alimony, the court has no jurisdiction or power to impose a further obligation on the husband to pay an additional sum of $375 per month 'during the lifetime of the defendant or until the plaintiff's remarriage.' Such latter provision is void."

It will be noted, however, that the statutes authorizing these decrees or judgments in divorce proceedings, in ex-

press terms, contain no such prohibitions. The well-established rule is that they are to be given a liberal construction even in direct proceedings. *Cochran v. Cochran,* 42 Neb. 612. We find nothing restricting the powers of our divorce courts, in a proper case, to enter judgments in this form.

Appellant cites *Cochran v. Cochran, supra,* to sustain her contention. But in this case, so far as it relates to the subject under discussion here, the question was exclusively presented by Mrs. Cochran's appeal, in which her sole ground of complaint was that the alimony awarded was too small. She did not attack the form of the decree or the power of the trial court to employ it, but challenged it for insufficiency of the amount of alimony awarded. Incidentally the judge writing the opinion had in view the circumstances of the case then before him, and the issues therein as made by the parties thereto, when he stated (at page 630): "We do not think alimony should be awarded in instalments during the life of a party *as was done in this case.*" (Italics ours.) This observation was certainly appropriate as applied to the facts then before him, and the actual "issue" then being decided on trial *de novo.* But it cannot be taken from the language thus employed that the court was then determining that it had no power to employ this form of a decree in a proper case. This conclusion is sustained by the fact that the syllabus of this case in no manner reflects such a view.

In *McGechie v. McGechie,* 43 Neb. 523, we again have a case involving a direct proceeding, with the controlling question presented being the excessiveness of allowance, and the appropriateness in view of the facts and circumstances then before the court of the form of the allowance of alimony as an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party or for an indefinite period. The court determined that "we are fully persuaded that the allowance of $10 per month * * * is excessive," and it was ordered stricken from the decree. This fully disposed of the case.

Though, in this *McGechie* case Justice Norval also expresses the view that "alimony should not be awarded a wife in instalments during her life," it will be remembered that the doctrine of a case is to be determined in view of the issues presented by the record, the point or points determined, and the reasons stated for the conclusion reached, restricted in their application to the issue then actually involved. The effect of the judgment entered in the *McGechie* case, when subjected to a strictly collateral attack, was not presented by the record therein, was not then before the court, and thus could not have been decided. The case then before the court was a direct proceeding on appeal for trial *de novo*. *Wilcox v. Saunders,* 4 Neb. 569; *Troup v. Horbach,* 62 Neb. 564.

The scope of the language above quoted, as employed by this truly learned judge, in view of the circumstances of the case, can be extended no further than a determination on trial *de novo* of the appropriateness of the form of the decree appealed from as a proper remedy for the disposition of the case. Thus, the question of judicial power, or jurisdiction, in the technical sense of the term, was not touched upon, referred to, considered, or determined.

In *Hoon v. Hoon,* 82 Neb. 688, also cited by appellant, the true doctrine of the case in no manner supports her contention. This action was brought by a wife against a husband for separate maintenance. While it is true that certain expressions were employed *arguendo* by the writer of the opinion, which are now cited by appellant to sustain her position, yet, a careful consideration thereof results in the conclusion that they pertain wholly to the propriety of the form of the relief granted and in no manner relate to the power of the district court in respect thereto. In truth, these statements neither in terms, nor by necessary implication, negative the existence of the principle on which the decree here in controversy is based, and sustained.

On the contrary, in *McCord v. McCord,* 119 Neb. 891, the decree, which forms the foundation of the present

litigation, was before this court on direct appeal prosecuted by the same James G. McCord. After due consideration, this tribunal modified the monthly award by increasing the same, and the decree, thus modified, was by us, in all things, approved.

In *Lynch v. Rohan,* 116 Neb. 820, in principle, the identical question presented in the instant case was before this court. In that case a subsequent mortgagee of the husband collaterally challenged the sufficiency of a decree, rendered in a proceeding between wife and husband for divorce *a mensa et thoro,* which provided for the payment of $50 per month to the wife for an indefinite period of time for her maintenance, to create, as against such subsequent mortgagee, a valid prior judgment lien for the amounts subsequently to accrue thereon to the wife. It was there determined: "In an action for divorce *a mensa et thoro,* under the statutes of this state, a judgment in favor of the wife for an allowance of $50 a month for her maintenance for an indefinite period is a lien upon the real estate of the husband for all amounts due and to become due under such decree, and will have priority over the lien of a judgment subsequently rendered against the husband." The reasoning contained in this opinion in the *Lynch* case we adopt, and the conclusions stated therein we reaffirm. See, also, *Westmoreland v. Dodd,* 2 Fed. (2d) 212; *Isaacs v. Isaacs,* 117 Va. 730; *Goff v. Goff,* 60 W. Va. 9; 2 Freeman, Judgments (5th ed.) 1962, sec. 932.

It follows that the portion of the decree here attacked providing for the payment of "three hundred and seventy-five ($375) dollars per month thereafter during the lifetime of the defendant or until the plaintiff remarries," is a lien upon the real estate hereinbefore described for all amounts due or to become due under such decree, and will have priority over the lien of appellant's mortgage executed subsequent to the rendition of appellee's decree.

The judgment of the trial court is, therefore,

AFFIRMED.

GUST BILLITER ET AL., APPELLANTS, V. FREDRICA PARRIOTT ET AL., APPELLEES.

FILED JANUARY 16, 1935. No. 29072.

1. **Wills: ELECTION.** The right of election of a surviving spouse to take under the will of deceased or to take by inheritance, descent and distribution is purely statutory, and the manner prescribed of exercising that right is a condition upon which the right rests.
2. ———: ———. A statutory election must substantially comply with the requirements of the statutes to be sufficient.
3. ———: ———. Where the statute conferring the right of election upon a surviving spouse makes certain formal requirements, such as filing in the county court within a specified time a written acknowledged instrument, ordinarily a compliance with such requirements is necessary to constitute an election. Comp. St. 1929, sec. 30-107.
4. **Judgment: COLLATERAL ATTACK.** A judgment cannot be attacked in a collateral proceeding unless affected by some jurisdictional infirmity.
5. **Executors and Administrators: DECREE OF SETTLEMENT: CONCLUSIVENESS.** The county court, in probate matters, is a court of general jurisdiction, and its judgments rendered in the settlement and distribution of estates of deceased persons made upon proper notice are final unless set aside upon appeal.
6. **Descent and Distribution: DECREE OF HEIRSHIP.** The county court in the settlement of an estate has jurisdiction to determine the heirs of the decedent. In doing so, the court does not determine the title to real estate, although the determination may incidentally involve a question of title.
7. **Executors and Administrators: ELECTION: DECREE.** A judgment that surviving spouse has exercised the right of election cannot be collaterally attacked on the ground that the election did not comply with statutory requirement, which requirement could be and in this case was waived.

APPEAL from the district court for Phelps county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Frank A. Anderson, A. W. Storms and *Harry H. Ellis,* Guardian *ad litem,* for appellants.

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

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

DAY, J.

This is a suit for partition and to quiet title to 1,600 acres of land.

This land was the property of Marie M. Yeager who died testate March 15, 1923. She devised a life estate in the land to her husband, W. F. Yeager, and the fee in equal proportions to the six children of herself and husband by different marriages, each having been married before. Two of these children subsequently died intestate leaving heirs. May 1, 1924, W. F. Yeager filed in the probate proceedings of his wife's estate a renunciation of her will and an election to take under the statutes. Thereafter on August 21, 1924, the county court entered a decree of final settlement and determined that by virtue of his renunciation and election he had an undivided one-fourth interest in the fee to this land. On August 14, 1933, W. F. Yeager died testate, devising one-fourth interest in the land in question to the same children equally as Marie M. Yeager had devised it, except that he made it specifically subject to the payment of his debts. The plaintiffs, two of the children described above, brought this suit, first, to partition the land and, secondly, to quiet title against the renunciation and election of W. F. Yeager.

The trial court entered a decree of partition, but found that the renunciation and election of W. F. Yeager was valid and effective and refused to quiet the title. The appellants make several assignments of error which can be reduced to the one general complaint that the court erred in not finding the renunciation and election of W. F. Yeager null and void and in not quieting title against the same.

The statutes provide (Comp. St. 1929, sec. 30-107): "If any real estate be devised by a deceased husband or wife to the surviving husband or wife, * * * he or she shall be entitled to his or her election to take the lands so devised * * * or to take by inheritance, descent and distribution the interest in the estate of the deceased, provided by law."

The time and manner of exercising this right of election is prescribed by section 30-108, Comp. St. 1929. No question is raised except as to the compliance with the following quoted provision: "Said refusal and declaration shall be executed by such surviving husband or wife and acknowledged in the same manner as deeds of conveyance of real estate." Sections 76-201, 76-202, and 76-203, Comp. St. 1929, provide that deeds of real estate executed in this state must be witnessed and acknowledged before a judge or clerk of any court, or a notary.

W. F. Yeager attempted to exercise his right to elect by filing in the county court of Phelps county within the time prescribed a writing in the following terms:

"In the County Court of Phelps County, Nebraska.
"In the Matter of the Estate of Mary M. Yeager, deceased.

"To the Hon. C. J. Backman, County Judge of said County:

"Comes now William F. Yeager, surviving husband of said deceased, and the legatee of a life estate under the last will and testament of said deceased, and hereby gives the court to understand and be informed, that he, the undersigned William F. Yeager, hereby renounces the terms of said will, and hereby elects to take under and by virtue of the statutes of the state of Nebraska.

"W. F. Yeager.

"In the presence of Frank Falk."

It is this writing which caused this litigation. The plaintiffs contend that it is invalid for that it was not acknowledged in the same manner as deeds of conveyance of real estate. Under some circumstances, it might be held valid.

In *Gaster v. Estate of Gaster*, 90 Neb. 529, opinion by Root, J., it was held: "An oral demand by the guardian *ad litem* of an insane widow, made to the county judge, * * * if approved by the county judge, * * * is sufficient to sustain her rights under the law." This case was concerned with personal property, and it is said: "So far as her interest in the real estate may be concerned, the order

of the probate court would not prejudice her rights as against the devisees." This opinion reflects generally the view of courts in excusing an insane surviving spouse from complying strictly with the statute. *Dalsen's Estate,* 310 Pa. St. 190; *Davis v. Mather,* 309 Ill. 284; *In re Baker's Estate,* 81 Vt. 505.

This statute relative to the election of a surviving spouse to take under the will or according to the law of descent and distribution was considered in *Richardson v. Johnson,* 97 Neb. 749, and held: "In making his election, no particular form of words is required, and if it clearly appears from the writing filed by him in the county court that he refuses to take the provisions made for him by the will and elects to take, have and receive the part of the estate which is given him by the laws of the state of Nebraska, this will constitute a sufficient election." In this opinion it is stated: "The refusal and election of the plaintiff complies with every requirement of the statute." It is indicated that the only question presented was the sufficiency of the terms of the writing to constitute an election and rejection. These previous adjudications are not helpful in solving this problem, because they do not involve the question presented here.

However, many other courts have considered this identical question. A recognized authority states the general rule as: "Where the statute conferring the right of election upon a surviving spouse names certain formal requirements, such as the acknowledgment and filing of a declaration in the offices of certain officials within a specified time, a compliance with such requirements is necessary and sufficient to constitute an election." 18 C. J. 860. Another authority states: "A statutory election is insufficient without a compliance with the provisions of the statutes which is substantial, at least." Page, Wills (2d ed.) sec. 1211.

In *Miller v. Stephens,* 158 Ind. 438, it was said in substance that the right of election is purely statutory and the manner prescribed of exercising that right is a condi-

tion upon which the right itself rests. Other cases supporting this view are *Wash v. Wash,* 189 Mo. 352; *Beck's Estate,* 265 Pa. St. 51; *In re Zweig's Will,* 261 N. Y. Supp. 400; *Cook v. Bennett,* 207 Ky. 837. These cases state the prevailing view, with which we are in accord.

But it is argued that the probate court passed its judgment upon the validity of this instrument which is final. The jurisdiction of the county court in probate matters is determined by section 16, art. V of the Constitution, which states: "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. * * * But they shall not have jurisdiction * * * in civil actions in which title to real estate is sought or drawn in question." Section 27-503, Comp. St. 1929, says: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons." Section 30-1303, Comp. St. 1929, provides that, in the final decree, the court shall name the persons and proportions to which each is entitled. *Fischer v. Sklenar,* 101 Neb. 553, held:

"Upon its probate side a county court is a court of general jurisdiction, and its judgment upon matters of probate and of settlement and distribution of the estates of deceased persons made upon due and proper notice is final and cannot be collaterally attacked.

"The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of the decedent. In so doing the court does not determine the title to real estate. The statute of descent passes the title upon the fact so found. The final determination of such fact by the probate court is binding upon all parties interested in the estate, unless it is set aside upon appeal."

See, also, *Lydick v. Chaney,* 64 Neb. 288; *State v. O'Connor,* 102 Neb. 187; *State v. Keller,* 101 Neb. 552; *Miller v. Clausen,* 299 Fed. 723.

In the instant case, the county court in its final decree found: "That the rights and interests of the said William

Frederick Yeager were wholly released from the operation of said will and subjected to the provisions of the statutes of the state of Nebraska by reason of the latter's written renunciation of the will filed herein as above mentioned." And, "That the above described real estate, by reason of the renunciation of the will by the surviving husband as above mentioned, passes to said surviving husband, William Frederick Yeager, for and during his natural life, as provided for by the laws of the state of Nebraska, and in addition to the life estate of said surviving husband in and to all of said real estate, he as such surviving husband is the owner in fee of an equal undivided one-fourth part of all the above described real estate." This presents an issue difficult of determination. It is argued by appellants that the probate court was clearly within its jurisdiction, while the appellees insist that it attempted to partition real estate. It would seem that the decree of the probate court in the estate of Marie M. Yeager made a necessary finding as to the election of W. F. Yeager, to distribute the estate and determine the heirs. The election and renunciation of the will did not pass the title to real estate. Its effect upon the title to real estate was only incidental. Title passed to the devisees from the testate by the will and to W. F. Yeager upon his renunciation of the provisions of the will by the law of descent and distribution. W. F. Yeager had a choice to take under the will or the law of descent and distribution of his wife's estate. He could not take both ways. He attempted to exercise that right by filing within the prescribed time an instrument complete in every detail except that it was not acknowledged. The exercise of this right would make a difference to the other devisees under the will. They had proper notice of the proceedings in the probate court.

August 21, 1924, the probate court determined that W. F. Yeager had elected to take under the intestate laws and a decree of final settlement was entered. No appeal was taken from this decree. It is now attacked collaterally in this suit. For nine years, all parties acquiesced in it and

acted upon it. At the time this decree was entered in the county court, no objection was made by the appellants. It has been held that the interested parties could waive an irregularity. In *McCutcheon's Estate,* 283 Pa. St. 157, it was held that the statute of Pennsylvania relating to an election "provides for an election in writing to be duly acknowledged and recorded, and a copy served on the representative of the decedent. Ordinarily, these requirements must be complied with (*Beck's Estate,* 265 Pa. St. 51), but there may be a waiver of irregularities by those interested."

The action of the parties was a waiver which became an inherent part of the judgment. To avoid misunderstanding, it is stated that waiver was not pleaded as a defense in this case. But the waiver relates to the time of the entry of the judgment of the county court. A judgment cannot be attacked in a collateral proceeding unless affected by some jurisdictional infirmity. *Gwynne v. Goldware,* 102 Neb. 260.

The plaintiffs were not entitled to a decree quieting the title to real estate against the election and renunciation of W. F. Yeager.

AFFIRMED.

BANK OF CEDAR BLUFFS, APPELLEE, V. E. J. BECK, APPELLANT.

FILED JANUARY 16, 1935. No. 29103.

1. **Bills and Notes:** ALTERATIONS. After a note has been signed and delivered by the maker, if the time of the maturity is altered by the holder without the consent of the maker, this constitutes a material alteration, which releases the maker.
2. ———: ———. After a note is signed, if a memorandum or notation is placed upon its margin for the convenience of the bank taking the same, which notation does not affect the rights or liabilities of the maker, it is not a material alteration.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

William Niklaus and *J. E. Mockett,* for appellant.

Hendricks & Kokjer and *F. C. Radke, contra.*

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

PAINE, J.

This was a law action on a promissory note. The defense was alteration. Verdict for plaintiff, on which a judgment was entered.

There were three causes of action set out in the petition on three promissory notes. There was no issue on the first two. As to the third, the petition set out a copy of a demand note for $1,820, dated May 15, 1931, bearing interest at 8 per cent. It was alleged that nothing had been paid thereon except the interest to March 31, 1932.

In the amended answer the defendant admits the execution and delivery of an instrument similar to said note, but alleges that the same has been materially altered by writing over the signature of the defendant the words "Due 11.15.31," without the knowledge or consent of the defendant.

The note, exhibit A, reads as follows:

"Cedar Bluffs, Nebr., May 15, 1931. No. 44897
Due 11.15.31

"On demand after date, we or either of us, jointly and severally, promise to pay to the Bank of Cedar Bluffs, Cedar Bluffs, Nebr. or order Eighteen Hundred Twenty & no dollars, $1,820.00 for value received, payable at the Bank of Cedar Bluffs, Cedar Bluffs, Nebraska, with interest payable annually at the rate of 8 per cent. per annum from date and ten per cent. per annum after maturity. The makers, sureties, indorsers and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that time of payment may be extended without notice thereof. Every signer and indorser of this note guarantees its payment and waives demand, notice

and protest and each and every maker or indorser hereby charges his own personal and separate estate with the payment of this note.

"Secured by———————— E. J. Beck

"Post Office—Fremont R. 4."

The note, exhibit A, shows, and the evidence indicates, that it was drawn up by filling in a number of blanks in violet ink, and the date put in with a rubber-stamp dater.

N. O. Walther testified that he was cashier of the plaintiff bank, and that, after the note was signed by the maker, one of the employees put it in the typewriter and wrote in the due date, for the reason that the rules of the banking department of Nebraska required that a demand note come due in six months.

It appears from an examination of the note itself that there has been filled in on the typewriter, "44897," being the number of the note in the bank's discount register. In front of the line just under this appears the printed word "Due," and in that line appear the figures "11.15.31," filled in by the typewriter. The printing in of these figures on the typewriter, after the note was signed by the defendant, is alleged in the answer to have materially altered this note, the note being simply payable on demand, and the alteration changing it to a note payable in six months.

An instruction was offered by the defendant reading as follows: "You are instructed that it is admitted by the plaintiff that the typewritten figures appearing on exhibit A after the printed word 'Due' were placed on said exhibit by the plaintiff after the note in question was executed and without the knowledge or consent of the defendant. You are instructed that such is a material alteration and destroys the validity of the note, your verdict should be for the defendant on the third cause of action."

The court refused this instruction, which ruling is one of the errors alleged.

1. Defendant relies upon the first part of section 62-806, Comp. St. 1929, reading as follows: "Where a nego-

tiable instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers;" and also upon our statute defining material alteration, as follows: "Any alteration which changes: First. The date; Second. The sum payable, * * * or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." Comp. St. 1929, sec. 62-807.

There is no dispute in the evidence that, when the clerk entered this note upon the discount register, he inserted it in the typewriter and added the proper number, and then a date showing that it would mature six months from date, and the defendant cites us to the case of *Brown v. Straw*, 6 Neb. 536, in which a note was dated September 13, 1874, when it was signed, and changed by the holder to September 11, 1874, without the consent of the maker, which was the true and actual date on which the note had been signed, but by error of both parties it had been dated the 13th. Judge Maxwell held that the note had been altered in a material part, and the maker was discharged. It may, therefore, be conceded that if the time of maturity or the date of a note is altered, whether the time of payment is curtailed or extended, it is a material alteration, and releases the maker.

A material change in a note is one that causes it to speak a language different in legal effect from that in which it originally spoke. It has been held that an alteration of a note is material if the change enlarges or lessens the liability of the maker thereof without his consent. *Palomaki v. Laurell*, 86 Or. 491; Brannan, Negotiable Instruments Law (5th ed.) sec. 125; *Gray v. Williams*, 91 Vt. 111; *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96.

2. In the case at bar, the insertion of a maturity date, which was required by the banking department rules, did not affect in any way the terms of the note. It was, in fact, simply a memorandum to advise the bank by what date a renewal demand note should be taken. This mar-

ginal notation was in no sense an alteration of the legal obligation of the maker, for it did not in any way affect the rights or liabilities of the parties or either of them.

A case very similar to the one at bar is *Whittier v. First Nat. Bank*, 73 Colo. 153, in which case a note, made payable on demand, was marked due "2/29/19." The bank's cashier recollected afterward that the year 1919 was not a leap year, and changed the figures to "3/1/19." It was held that this change on the part of the cashier after the note was signed did not vitiate the note, as it would have been construed in accordance with the change that the cashier made. Other cases supporting this view are: *Fisk & Co. v. McNeal*, 23 Neb. 726; *Clem v. Chapman*, 262 S. W. (Tex. Civ. App.) 168; *Bland v. Fidelity Trust Co.*, 71 Fla. 499; *Fisherdick v. Hutton*, 44 Neb. 122; *Danforth v. Sterman*, 165 Ia. 323; *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534; *Bank of Lauderdale v. Cole*, 111 Miss. 39; *Gray v. Williams*, 91 Vt. 111; *Donnybrook State Bank v. Corbett*, 37 N. Dak. 87; *Reed v. Watson*, 262 S. W. (Tex. Civ. App.) 178.

It is clear that, had the date added in the marginal notation been entirely omitted, plaintiff's recovery could have been no more or no less.

We have carefully examined the record, and, finding no prejudicial error therein, the judgment is hereby

AFFIRMED.

EDGAR T. FISHER, APPELLANT, V. SCHUYLER G. KELLOGG, APPELLEE.

FILED JANUARY 16, 1935. NO. 29050.

1. **Homestead.** Under section 40-101, Comp. St. 1929, the ownership or interest in land necessary to support a homestead right is an estate or interest which gives a present right of occupancy or possession.
2. ———. An estate in remainder, whether vested or contingent, will not support a claim of homestead exemption until the termination of the prior estate.

3. ———: REMAINDER: SALE ON EXECUTION. Under the facts set out in the opinion, *held*, that the plaintiff had no right of homestead in his estate in remainder in the land involved in this action, and that the judgment obtained against him was a lien thereon, and by the sale thereof, subject to the life estate therein, on an execution issued on said judgment the defendant, as purchaser at such sale, under the sheriff's deed, acquired a valid title.
4. EXECUTION: SALE: CONFIRMATION: COLLATERAL ATTACK. A sale of real estate under an execution, where notice is published for less than 30 days before the sale, will be set aside on motion before confirmation. Where the sale is confirmed without objections thereto, the order of confirmation settles and adjudicates the sufficiency of the publication, and thereafter, in the absence of fraud, such order is not subject to collateral attack.

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

Littrell & Patz, for appellant.

Carl D. Ganz, contra.

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

HASTINGS, District Judge.

This action was brought by Edgar T. Fisher, plaintiff and appellant, to have a sheriff's deed to Schuyler G. Kellogg, defendant and appellee, the purchaser at an execution sale of the undivided one-half interest of plaintiff, subject to a life estate therein, in 160 acres of land in Cass county, canceled and the title quieted in him. On the trial the district court found the issues for the defendant and dismissed the action.

Plaintiff bases his right to relief upon two grounds: (1) That the land involved was his homestead and the sale thereof, under execution, void; and (2) that the sale was void, notice thereof not having been published for 30 days before the sale, as required by statute.

The record shows that James A. Fisher, father of the plaintiff, died testate January 13, 1916, in Cass county,

Nebraska, and at the time of his death was the owner in fee simple of the land involved herein. He left, as his sole surviving heirs, his widow, Louisa Fisher, and two adult sons, the plaintiff and Egbert A. Fisher; and by his will, duly admitted to probate, devised a life estate therein to his widow, and, subject thereto, an undivided one-half interest to each of his sons. Plaintiff's father and mother, at the time of the father's death, were living upon the land in question. The mother, about a year thereafter, moved from the premises, and the plaintiff, who was married, moved, with his family, thereon, under a verbal lease from his mother from year to year for a share rental. The plaintiff resided thereon up to March, 1932, when he voluntarily removed therefrom, and thereafter his mother leased the premises to another, who went into possession as her tenant.

On April 7, 1930, Clarence G. Bliss, as receiver of the Farmers State Bank of Greenwood, recovered a judgment against the plaintiff in the district court for Cass county for the sum of $3,245.27. Execution was issued and a levy made by the sheriff of said county on plaintiff's undivided one-half interest in said land, subject to the life estate of his mother. On July 19, 1930, said undivided one-half interest, subject to the life estate of his mother, was sold to the defendant, Kellogg, for $3,075. The sale was confirmed without objections being filed, and the sheriff ordered to execute a deed to the purchaser. Pursuant to said order, on July 31, 1930, the sheriff executed and delivered to the defendant, Kellogg, the deed sought to be canceled.

The land consists of two eighty-acre tracts lying about a mile apart, separated by land owned by others. The dwelling-house in which plaintiff resided and its appurtenances are on one of the eighty-acre tracts. It is not alleged in the petition nor was any evidence offered showing the value of the interest of the plaintiff separately in either of said tracts, or as a whole. It appears, however, from the amount for which the land sold at the

execution sale, that plaintiff's interest therein had a value of at least $1,000 more than the $2,000 exemption allowed by statute. At the time the land was levied upon, the plaintiff made no claim of homestead exemption. About a year after the land was sold, plaintiff filed a petition in voluntary bankruptcy, and in his schedule filed therein stated that he owned no real estate, and had the personal property owned by him set off as exempt. On September 8, 1931, a discharge was entered.

Under these facts the principal question presented is whether the plaintiff acquired a homestead right by reason of his vested estate in remainder. The precise question presented has never been passed upon by this court.

Section 40-101, Comp. St. 1929, relating to homestead exemptions, provides:

"A homestead not exceeding in value two thousand dollars, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided."

In defining the ownership or interest in land necessary to support a homestead right, under the provisions of the statute, we held, in the case of *Giles v. Miller,* 36 Neb. 346:

"Neither the above provision, nor any other section of the homestead law, specifies or defines the character of the ownership or interest in lands which is necessary to support the homestead right. We know that the purpose of the legislature in enacting the statute under consideration was to protect the debtor and his family in a home from a forced sale on execution or attachment. Keeping this object in view, and applying the liberal rule of construc-

tion which always obtains in the interpretation of exemption laws, *we are constrained to hold that an estate or interest in lands which gives the right of occupancy or possession is sufficient* (italics ours), if coupled with requisite occupancy, to entitle the person to the benefits of the provisions * * * above quoted."

It is not necessary that the ownership be of an estate in fee simple, but any interest, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein.

Following this rule we have held that an undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest, and his family, as a home, is sufficient to support a homestead exemption. *Giles v. Miller, supra; First Nat. Bank of Tekamah v. McClanahan,* 83 Neb. 706; *Doman v. Fenton,* 96 Neb. 94; *Connor v. McDonald,* 120 Neb. 503.

The rule established by the great weight of authority is that an estate in remainder, whether vested or contingent, will not support a claim of homestead.

"For the reason, however, that land held in remainder dependent on a life estate of another is not susceptible of that immediate occupancy which is contemplated by law in order to constitute a homestead, the rule is that an estate in remainder cannot constitute a homestead." 13 R. C. L. 570, sec. 33. See, also, 29 C. J. 846.

In 89 A. L. R. 523, at the beginning of an exhaustive note upon this subject, it is said by the annotater: "With but few exceptions it has been held that a claim of homestead may not attach to either vested or contingent future estates or interests in land. For the reason that land held in remainder is not susceptible of that immediate occupancy which is contemplated by law in order to support a claim of homestead, a homestead may not be claimed therein by the remainderman; and the same rule applies where the remainderman occupies the premises during the life of the life tenant by the latter's permission." The numer-

ous cases cited and reviewed in this note confirm this statement of the rule.

In support of the claim of a homestead right, counsel for plaintiff cites us to the case of *Grattan v. Trego,* 225 Fed. 705, which states the opposite view. The writer of the opinion in that case frankly concedes that the great weight of authority is against the rule announced therein. Opposed, as that case is, to the great weight of authority, we decline to follow it. The leasehold interest in the land was not of such a character as to cause a merger of the two estates. Plaintiff's possession and occupancy was in no way based upon his estate in remainder, but was referable, entirely, to his yearly lease. Whether his occupancy under the lease gave him such an interest as would exempt his leasehold estate we do not feel called upon to decide. His leasehold estate was not levied upon or sold under the execution. After the sale he continued in possession under his lease until he voluntarily terminated the same. His undivided estate in remainder was sold subject to the life estate. His right of occupancy of the land, under his lease, as a home for himself and family was in no wise disturbed by the sale of the remainder. We conclude therefore that the plaintiff had no homestead right in the estate in remainder.

Counsel for the plaintiff contends that the sale was void because the notice thereof was not published for 30 days before the sale. The facts, as disclosed by the record, show the notice of sale was published in a legal newspaper for five weeks, commencing with the issue of June 19, 1930, and ending with the issue of July 17, 1930. The sale was held two days later, on July 19, 1930. Section 20-1529, Comp. St. 1929, providing for the time that a notice shall be published on sales on execution, so far as pertinent, provides:

"Lands and tenements, taken in execution, shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the sale. * * * All sales made without such advertisement

shall be set aside on motion, by the court to which the execution is returnable."

No motion was made to set the sale aside before the confirmation of the sale. Under a like state of facts, we held, in *Wyant v. Tuthill,* 17 Neb. 495:

"A sale of real estate under an order of sale, where the notice is not published at least thirty days before the sale, will be set aside on motion; but if the sale is confirmed without objection, in the absence of fraud the purchaser will acquire a good title."

Under the published notice the sale was not void but voidable, and subject to be set aside on motion made before confirmation. The order of confirmation settled and adjudicated the sufficiency of the publication of the notice of sale and is not thereafter, in the absence of fraud, subject to collateral attack.

For the reasons pointed out, the judgment is

AFFIRMED.

GEORGE E. HALL, STATE TREASURER, PLAINTIFF, V. UNITED STATES NATIONAL BANK OF OMAHA ET AL., DEFENDANTS.

FILED JANUARY 17, 1935. No. 29480.

Original action by George E. Hall, as state treasurer, against the United States National Bank and others, to obtain a declaratory judgment, to determine his rights and status under his official bond. *Order in accordance with opinion.*

Peterson & Devoe, for plaintiff.

Morsman & Maxwell, Finlayson, Burke & McKie and *Wells, Martin, Lane & Offutt,* for defendants.

William H. Wright, Attorney General, and *Daniel Stubbs, amici curiæ.*

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

PER CURIAM.

In obedience to a motion or resolution, adopted by the house of representatives on January 11, 1935, the plaintiff, claiming to be state treasurer, brings this action to obtain a declaratory judgment, to determine his rights, status and other legal relations under his official bond as treasurer for the term which expired January 2, 1935.

Plaintiff was elected, qualified and served as state treasurer during 1933 and 1934 and was reelected in 1934 for a second term, but has failed, through no fault of his, to give an official bond for his second term. Defendants are depository banks for the state's public funds, and, pursuant to an opinion of the attorney general, have refused to pay checks drawn on them, respectively, by the state treasurer, upon the ground that doubt exists as to his official status and whether he is either a *de facto* or *de jure* officer at this time, since he has not given a bond for his second term. Each of the defendants demurred generally and specially to the plaintiff's petition, the special demurrer challenging the sufficiency of the petition on the ground of defects of parties defendant, and claiming that the state of Nebraska and the surety on plaintiff's official bond are necessary parties to a proper determination of the questions presented.

It is the unanimous opinion of the court that, so far as the rights of the state to enforce any obligation of the surety on the official bond are concerned, it would not be bound by any judgment entered in this cause, since it is not a party to the action. Likewise, the surety on plaintiff's official bond would not be bound by anything this court might hold affecting the liability of the surety on plaintiff's bond, since such surety is not a party to the action.

We are of the opinion that the state and the surety on plaintiff's official bond should be made parties to this action to give this court jurisdiction to determine the questions presented. The demurrers of the several defendants are each sustained, with leave to plaintiff, if he

so elects, to file an amended petition, making the state and surety on plaintiff's official bond parties to this proceeding.

It may be necessary for the legislature, or one branch thereof, to give its consent that the state be sued before it can be made a party.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, APPELLANT, V. GEORGE TOWNSEND ET AL.: JAY C. MOORE, APPELLEE.

FILED JANUARY 25, 1935. No. 29334.

Mortgages. Facts examined: Sale set aside and directions for new sale given.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed, with directions.*

Cranny & Moore and *Raymond B. Morrissey*, for appellant.

Jay C. Moore, Peterson & Devoe and *F. C. Radke, contra.*

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

PER CURIAM.

This is an appeal from an order confirming a judicial sale.

Plaintiff foreclosed a first mortgage upon two different tracts of land. All parties having liens and otherwise interested were made parties. The decree gave plaintiff a lien for $12,776.35 upon the two tracts, the first of which consisted of 80 acres, the second of 93.45 acres. The decree gave Jay C. Moore a second lien upon the larger tract. It also decreed several judgment liens to other defendants, but it is unnecessary to recite them here.

The decree directed that the sheriff sell as upon execu-

tion and that he "first offer for sale" the 80-acre tract, separately from the larger tract. The decree did not specifically state that, after the first tract was offered, then the sheriff should offer the larger tract, and then in turn should offer all the land as a whole. The sheriff offered the 80-acre tract, then the other, but there were no bidders. Thereupon plaintiff bid $13,750 for both tracts. The sheriff refused to accept the bid. He interpreted the decree to mean that he should not offer the land for sale as an entire tract and announced that he would make a return to the order of sale showing no bids. Thereafter nominal bids were made on the 80-acre tract until it reached $1,800. The sheriff then stated he would not offer the larger tract until the other was sold. Under the erroneous ruling and interpretation of the sheriff, and without personal knowledge of the character of the smaller tract, the plaintiff's bidder made a bid of $6,000 on that tract, and Jay C. Moore bid $9,300 on the second tract, on which he had a lien. There is evidence tending to show that the smaller tract is worth about $4,000, and that plaintiff stands to lose $2,000 of its principal by reason of the circumstances.

While the decree did not specifically order the land to be offered as a unit after the tracts had been offered separately, the evidence indicates that, when the trial court made up his minutes for the decree, this omission was noticed by plaintiff's attorney, and the court was requested to insert the provision and announced that his minutes and record would be changed to comply with the request. At the time for confirmation a motion by plaintiff asked that a *nunc pro tunc* order be made to cover this point in the decree. In the order confirming the sale this motion for the order *nunc pro tunc* was refused "for the reason that the decree as now entered is in effect the same as requested and for the further reason that the entry of the requested change would not affect the rights of any of the parties." This last reason probably goes to the question of estoppel of plaintiff by reason

of its bid. For the purpose of another sale, we think the decree should make this so plain that the sheriff will know it is his duty to entertain a bid of plaintiff on the whole tract of land. The order *nunc pro tunc* should be made.

Plaintiff's attorney interpreted the decree and order of sale as did the court, but the sheriff interpreted the order of sale to require him, not only to offer for sale, but actually to sell the smaller tract before he sold the other. This is shown in the bill of exceptions by affidavit of J. D. Cranny, attorney for plaintiff. The sheriff made affidavit, which is also in the bill of exceptions, and he does not deny this positive statement of fact. We think the fundamentals of a fair sale did not obtain, that plaintiff was taken by surprise, was in effect coerced by the sheriff, and so made an improvident bid on the 80-acre tract, from which it should be relieved.

The judgment of the district court is reversed, with instructions to provide for a sale of the two tracts of land so that plaintiff may make a lump sum bid upon all the land without being required to make a bid upon either tract separately. This is to be understood as not interfering with the offering for sale of the tracts separately, but it is not to compel plaintiff so to bid.

REVERSED.

DELIA TUCKER BEATTY, APPELLANT, V. WALLACE D. BEATTY, APPELLEE.

FILED JANUARY 25, 1935. No. 29091.

Divorce: ATTORNEY'S FEES. In a suit wherein a wife is granted a divorce and alimony, the trial court may allow her also adequate fees for the services of her attorneys in procuring such relief. Comp. St. 1929, sec. 42-308.

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

Mothersead & York, for appellant.

Raymond & Raymond, contra.

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

ROSE, J.

This is a suit in equity by Delia Tucker Beatty, plaintiff, against her husband, Wallace D. Beatty, defendant, for a divorce on the ground of extreme cruelty, for adjustment of their property rights and for alimony. Defendant denied the charge of extreme cruelty. Upon a trial of the cause, the district court granted plaintiff a divorce from her husband, quieted in her the title to a tourist camp in which both had been interested, allowed her alimony in the sum of $2,500, and required defendant to pay her attorneys' fee of $50.

Plaintiff appealed, but she does not attack the divorce. She assails that part of the decree relating to property rights and alimony as failing to allow her sufficient relief under the evidence, and challenges the attorneys' fees as inadequate.

Upon a trial *de novo*, the unanimous finding is that plaintiff, on the merits of her case, is not entitled under the evidence to any relief in addition to that granted by the decree of the district court. There was, however, error in limiting the attorneys' fees for services in the district court to $50. Owing to necessary services of counsel in procuring the adjustment of complicated property rights and the difficult task of proving the value of real and personal property owned by defendant or in which he had an interest, the fees for the services of attorneys for plaintiff in the district court should have been $100 in addition to the allowance below. As modified to that extent the judgment is affirmed at the costs of defendant.

AFFIRMED AS MODIFIED.

RUTH REES MCQUISTON, APPELLANT, V. W. H. GRIFFITH, COUNTY CLERK, APPELLEE.

FILED JANUARY 25, 1935. No. 29458.

1. **Statutes:** CONSTRUCTION. Courts, in construing statutory provisions, will endeavor to ascertain the intent of the legislature and give effect thereto.
2. ———: ———. "All statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689.
3. ———: LEGISLATIVE CONSTRUCTION. Where a statute has long been construed by administrative officials charged with its execution, and where the legislature has several times been in session without amending or changing such statute, it amounts to a legislative construction thereof, and such construction will not be disregarded by the courts unless it is clearly erroneous.

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

Hastings & Hastings, for appellant.

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

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

GOOD, J.

Plaintiff, county superintendent of Perkins county, brought this action to enjoin the county clerk of that county from issuing a certificate of election to one S. B. Hanley, the successful candidate for the office of county superintendent at the election held November 6, 1934.

The basis of the action is the claim of plaintiff that, under the statute creating the office of county superintendent, the election for that office, held November 6, 1934, was invalid and that the proper time for holding the election of a county superintendent was in the year 1932 and every four years thereafter.

The answer admits the facts pleaded in the petition, but further pleads that section 79-1501, Comp. St. 1929, was

enacted in 1881, and in 1923 was amended so that the pertinent part of said section reads as follows: "There shall be a county superintendent in each organized county whose term of service shall be four years and who shall be elected at the same time and in the same manner as other county officers on the nonpolitical ballot" (Laws 1923, ch. 49); that at all times since the law was amended it has been interpreted by the officers, charged with conducting elections, as requiring county superintendents to be elected on a nonpolitical ballot, and that said section was not intended to fix or change the time for holding elections of county superintendents; that at all times since said section was amended in 1923, it has been construed by the proper officials of all the counties in the state to require an election to be held in 1926 and every four years thereafter; that such construction is the proper one, and that the said Hanley was duly and legally elected to the office of county superintendent at the general election in 1934. The court, upon motion, rendered judgment upon the pleadings for the defendant. Plaintiff has appealed.

The determination of the questions presented by this appeal hinges on a proper construction of legislative provisions relating to the election and term of office of the county superintendent.

It is a cardinal rule of statutory construction that courts will endeavor to ascertain the intent of the legislature and give effect thereto. *State v. Omaha & C. B. Street R. Co.*, 96 Neb. 725; *State v. School District*, 99 Neb. 338; *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734. Another rule well established is that "All statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689. See *Dawson County v. Clark*, 58 Neb. 756; *State v. Swanson*, 127 Neb. 715.

In 1879 the legislature enacted a law, fixing the time of election and term of office of county superintendents.

This act has been amended a number of times and now appears as section 32-209, Comp. St. 1929. That section, as amended, in so far as it relates to the office of county superintendent, provides: "In each county there shall be elected * * * in the year 1926 and every fourth year thereafter * * * one county superintendent of public instruction, for the term of four years."

In 1881 the legislature enacted chapter 78, Laws 1881, appearing at page 331. This was a comprehensive act to establish a system of public instruction in the state. Section 1, subd. VII, ch. 78, Laws 1881, reads: "There shall be a county superintendent in each organized county, whose term of service shall be two years, and who shall be elected at the same time and in the same manner as other county officers." This statute remained unchanged until 1923, when it was amended to make the term of the county superintendent four years, and there were added the words, "on the nonpolitical ballot." Laws 1923, ch. 49. This statute now appears as section 79-1501, Comp. St. 1929. The title to the amendatory act reads: "An act to amend section 6463, Compiled Statutes of Nebraska for 1922, relating to schools, providing that county superintendents shall be elected by the electors for a term of four years and to repeal said original section."

In 1913 the legislature enacted a law providing for the election of judges of the supreme and district courts and county judges on the nonpartisan ballot. In 1917 this statute was amended so as to provide for the election of state superintendent of public instruction, county superintendents and regents of the state university on the nonpartisan ballot. Laws 1917, ch. 37. That act, as amended, now appears as section 32-1201, Comp. St. 1929.

It appears that prior to the enactment of chapter 49, Laws 1923, there was an apparent conflict between section 79-1501, Comp. St. 1929, as it then existed, and section 32-1201, Comp. St. 1929, the one provision requiring the election of county superintendents in the same manner as other county officers on the political ballot, while section

32-1201 provided for election on the nonpolitical, or nonpartisan, ballot. Evidently, the purpose of the legislature, in enacting chapter 49, Laws 1923, was to harmonize these provisions by adding the words, "on the nonpolitical ballot," and it was certainly not the purpose of the legislature to change the time of election of county superintendents.

It will be observed that since 1923, in each of the 93 counties of the state, a county superintendent has been elected in the years 1926, 1930, and 1934, and this with the full knowledge of the legislature, which has several times been in session. It thus appears that there has been a construction given to chapter 49, Laws 1923, now appearing as section 79-1501, Comp. St. 1929, as not changing or affecting the time when a county superintendent should be elected, by the administrative officers of the state and acquiesced in by the legislature, since it has not seen fit to qualify the subject or amend the law, notwithstanding it had full knowledge of the construction that has been placed upon the statute by administrative officials.

It is a rule that where a statute has long been construed by those charged with its execution, and where the legislature has been in session several times, and having knowledge that such construction has been placed upon the statute, it amounts to a legislative construction thereof, and such construction will not be disregarded by the courts, unless it is clear that such construction is erroneous. It is only by implication and by reference to another section that chapter 49, Laws 1923, now section 79-1501, Comp. St. 1929, could possibly be construed to fix the time when county superintendents should be elected. Moreover, it appears that the words used in said section, "shall be elected at the same time and in the same manner as other county officers," could not have been intended to refer to the county judge, because that was the only county officer elected on the nonpolitical ballot. Evidently, the reference was to county officers generally.

We are constrained to hold that the legislative intent

was simply an attempt to harmonize the provisions of section 79-1501 and section 32-1201, Comp. St. 1929, and that the proper time for the election of county superintendents was in the year 1934.

The judgment of the district court is right and is

AFFIRMED.

VILLAGE OF OVERTON, APPELLANT, V. WILLIAM NAGEL ET AL., APPELLEES.

FILED JANUARY 25, 1935. No. 29127.

Municipal Corporations: VILLAGE TREASURER: DEPOSIT OF VILLAGE FUNDS. "Under section 17-515, Comp. St. 1929, a village treasurer is not authorized to deposit village funds in any bank which has not been designated by the board of trustees as a depository." *State v. Bank of Otoe*, 125 Neb. 383.

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

W. A. Stewart, Jr., T. M. Hewitt and *M. O. Bates*, for appellant.

Cook & Cook and *Crofoot, Fraser, Connolly & Stryker, contra.*

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

DAY, J.

This was an action by a village against a former treasurer and his bondsman for money lost by reason of the failure of a bank in which it was deposited. The treasurer of the village was assistant cashier and a director of the bank. The trial court submitted the cause to a jury, under instructions which do not state the law applicable to the facts, and the jury returned a verdict in favor of the defendants. The village appeals.

The appellees argue that the statute (Comp. St. 1929, sec. 17-515) required the treasurer to deposit the money

in the bank under the facts presented herein. This bank was the only one in the village. The trial court accepted their view and gave the following instruction:

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

This instruction was clearly erroneous. It does not take into account the whole law on the subject. The same argument was made before this court in *State v. Bank of Otoe,* 125 Neb. 383. The facts in that case are almost if not identical with those in the case at bar. The interpretation of the statute is discussed at length there and will not be repeated here. A bank of approved or responsible standing as contemplated by the statute is one approved by the village board.

It seems to be necessary to quote the syllabus from *State v. Bank of Otoe,* 125 Neb. 383: "Under section 17-515, Comp. St. 1929, a village treasurer is not authorized to deposit village funds in any bank which has not been designated by the board of trustees as a depository."

The trial court submitted this cause to the jury on the question of negligence of treasurer in making the deposit in the bank of which he was an officer and which was insolvent at the time. Evidence was introduced by the defendants that the state department permitted the bank to remain open. The plaintiff is entitled to recover here for that the deposit was unauthorized. It was negligence under the evidence for the treasurer who was assistant cashier and bookkeeper to deposit the money in the bank. It was not necessary for the plaintiff to prove negligence. It was sufficient that the deposit was unauthorized. But, in view of the foregoing erroneous instruction, the jury could not return a proper verdict. There is no question of fact to submit to a jury. Instead of submitting the case

to the jury, the trial court should have directed a verdict in favor of the village against the treasurer for the full amount lost and against the bonding company to the extent of its bond. The judgment is reversed and remanded, with directions to the trial court to enter a judgment, without further delay, for the amount prayed for in the petition, with interest from the date of his resignation (November 27, 1929) as treasurer, against William Nagel and against the American Employers Insurance Company to the extent of its bond.

REVERSED.

J. P. JENSEN, APPELLEE, V. GURLEY GRAIN COMPANY: OLD LINE INSURANCE COMPANY, INTERVENER, APPELLANT.

FILED JANUARY 25, 1935. No. 29131.

1. Mortgages: GROWING CROPS. "Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty." *Aldrich v. Bank of Ohiowa*, 64 Neb. 276.
2. ———: ———. In such a case, the mortgagor is not entitled to continue in posesssion because of growing crops but may reenter temporarily for the sole purpose of harvesting the crop.

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

Albert S. Johnston, for appellant.

Radcliffe & Wehmiller, *Paul L. Martin* and *H. C. Henderson*, *contra.*

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

DAY, J.

Jensen brought this action against the Gurley Grain Company to recover the value of some wheat which had been delivered to the grain company by Christensen. Jensen claimed the proceeds of the sale of the wheat by virtue of a chattel mortgage given by Christensen, the

owner of the land, on the growing crop which was planted during the pendency of an action of foreclosure. The Old Line Insurance Company was the purchaser at the subsequent judicial sale and intervened. The grain company filed an interpleader and paid the money to the clerk of the district court. The contest proceeded between Jensen, the mortgagee, and the Old Line Insurance Company, the purchaser at the judicial sale. The trial court found in favor of the mortgagee Jensen. The insurance company appeals.

"We may regard it as settled in this state that annual crops growing on the land do not pass to the purchaser at judicial sale. *Aldrich v. Bank of Ohiowa*, 64 Neb. 276; *Foss v. Marr*, 40 Neb. 559; *Monday v. O'Neil*, 44 Neb. 724." *In re Estate of Andersen*, 83 Neb. 8. See *Cooper v. Kennedy*, 86 Neb. 119. If the reason of the rule has vanished, it is a matter for legislative rather than judicial action. In the meantime, the rule obtains that the owner of the land sold at judicial sale is entitled, not to the use of the land, but to a temporary reentry for the sole purpose of harvesting his crop.

The appellant relies upon *Carlson v. Nelson*, 125 Neb. 5, but an examination of that case reveals that it has no application here. There it was urged that the judicial sale should not be confirmed for that there was a growing crop by reason of which the mortgagor was entitled to possession for another year. The mortgagor in that case was not entitled to the relief sought. In such a case, the mortgagor is not entitled to continue in possession because of growing crops but may reenter temporarily for the sole purpose of harvesting the crop. "The title to the annual crops growing on the lands does not pass to the purchaser on judicial sale, for the reason that the law regards them as personal property." *Aldrich v. Bank of Ohiowa, supra.*

The mortgagee of personal property has, of course, the same right as the mortgagor to the growing crop. The trial court found that the mortgage was a *bona fide* transaction, and that finding is supported by the evidence.

AFFIRMED.

PLATTSMOUTH STATE BANK, APPELLANT, V. V. C. REDDING, APPELLEE.

FILED JANUARY 25, 1935. No. 29030.

1. **Bills and Notes:** INDORSEMENT: ASSIGNMENT. The indorsement of a negotiable instrument payable to order must be written upon the instrument itself, or upon a paper firmly attached thereto as an allongé, but an assignment thereof may be written upon a separate sheet.
2. ———: ASSIGNMENT. Where a negotiable instrument payable to order is transferred only by delivery and assignment, the transferee has the rights of an assignee of a chose in action.
3. ———: ———: HOLDER IN DUE COURSE. Such transferee has, in addition, the right to have the indorsement of the payee, but such transferee only becomes a holder in due course at the moment when such indorsement is actually made.
4. ———: ———: ———. Such transferee holding a negotiable instrument, payable to order but not indorsed, is not a holder in due course, because he is not a payee or indorsee; nor is he a bearer, because the instrument is not payable to bearer.
5. ———: ———: DEFENSES. Such a transferee is not protected against any defenses which might be shown against the payee.
6. ———: ———: ———. Payment of a negotiable instrument payable to order to the payee named therein, without notice of assignment, is a valid defense to an action by a transferee.

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

Wright & Wright, for appellant.

Mothersead & York, contra.

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

PAINE, J.

In an action on a promissory note, the trial court instructed a verdict for the defendant. Plaintiff appeals.

Plaintiff bank in its amended petition alleges that the defendant on October 5, 1928, gave his note for $2,500 to the State Bank of Minatare; that said note bore 10 per cent. interest from date, and its maturity was December 5, 1928; that on October 6, 1928, the State Bank of Mina-

tare, in due course of business and for a valuable consideration, assigned and delivered the note to the plaintiff, who has ever since been the owner and holder thereof. The answer admitted the execution and delivery of the note, denied the other allegations set out, and further alleged that the defendant had paid the note in full.

The case was tried to a jury, and after the evidence was concluded each party moved for an instructed verdict. After argument by counsel, the court found that the plaintiff was not a holder in due course, but a mere assignee, and that the defendant paid the note to the payee thereof, without notice of any assignment or transfer of the note, and that said payment constituted a full payment and discharge of the note and a release of the defendant.

The evidence in the case discloses that the note, exhibit No. 1, was made upon the regular note form of the State Bank of Minatare, and no indorsement of any kind appears upon the back thereof. The evidence further shows that during the summer of 1928, the exact date not being disclosed in the evidence, Mr. L. F. Johnson, the president of the State Bank of Minatare, and Mr. L. L. Conklin, a director of said bank, went to Plattsmouth, Nebraska, to borrow money of the plaintiff bank. The president of the plaintiff bank was the father of the cashier of the State Bank of Minatare. After some negotiation, the president of plaintiff bank made a loan to these two men upon a note signed by them individually, basing the loan, he said, upon the property statement of L. L. Conklin. Some months thereafter, and on October 6, 1928, the cashier of the State Bank of Minatare sent plaintiff bank 52 notes, totaling $20,000, the note sued upon being included, and in the letter, exhibit 4, accompanying them, said: "We enclose herewith notes aggregating $20,000 under guarantee of Mr. Johnson and Mr. Conklin which we would like to have you handle for us until beet pay day when they will positively be paid," etc.

It appears that there was a balance due upon the note given by Johnson and Conklin in the summer of 1928, and

that, after taking up the note of these individuals, there was forwarded by the draft of plaintiff to the Omaha National Bank the balance, in the sum of $14,546.09, which amount of the proceeds of the 52 notes was there placed to the credit of the State Bank of Minatare. In the note given by these men in the summer of 1928, no collateral of any kind was listed in the note itself. However, on June 20, 1929, a new note was given to the plaintiff for $3,917, signed by the same L. F. Johnson and L. L. Conklin, and in said note there was listed, as collateral thereto, the note in suit of $2,500, signed by defendant, which was then long past due, and another note of $1,417. The president of plaintiff bank testifies that this was a renewal note, and upon receipt of this note a former note given by Johnson and Conklin was returned to them. The note upon which the plaintiff brings suit thus appears to have been a note owned by the State Bank of Minatare, and, without any indorsement whatever by that bank, to have been held by the plaintiff bank as collateral to a note of two individuals who were directors of the State Bank of Minatare.

The testimony of the defendant is that he went into the State Bank of Minatare on the evening of January 18, 1929, and was waited upon by L. F. Johnson, the president thereof. He first deposited a draft from the Stock Yards National Bank for $6,148.92, the slip being dated January 19. Defendant then said he wanted to pay off this $2,500 note, and asked Mr. Johnson to figure up the interest. The president reached in the note pouch and took out a paper and figured interest, and said that the total amount due was $2,558.34. The defendant then asked the president to write out a check for it, which he did, neglecting to insert the date, and passed it through the window, and the defendant signed his name and shoved it back, and then asked for his note. The defendant testified: "Right at the time I gave him the check I asked him for the note and he said 'this ain't it, it is just a copy of it.' * * * He told me that he had sent it out and that he would get it."

The bank statement shows that defendant Redding had a balance in his account on January 31, 1929, of $7,966.58, but the bank had not cashed his check, although he had sufficient funds at all times to meet it, but the bank simply held it among the cash items until the bank failed and was taken over by the department of trade and commerce February 23, 1929, since which time the defendant has never filed any claim with the receiver for that part of his deposit covered by the check of $2,558.34 which he gave in full settlement of the note in suit.

The evidence shows that not until after the president had possession of his check did the defendant know that the payee bank did not have his note in its note pouch, ready to deliver to him the moment he paid it off.

In examining the Compiled Statutes of Nebraska, 1929, we find that section 62-301 provides generally that, if a negotiable instrument is payable to order, it is negotiated by the indorsement of the holder completed by delivery.

"A negotiable instrument payable to the order of a person can be transferred, so as to preserve the negotiable character of the instrument, only by the indorsement of the holder completed by delivery. The indorsement must be in writing on the instrument itself, or upon a paper attached thereto." *Jackson State Bank v. Laurel Nat. Bank,* 111 Neb. 744; Ann. 56 A. L. R. 921.

By "a paper attached thereto" is not meant an assignment which may be written as a separate instrument, but only such a paper as an allongé, which was defined under the old law merchant as a strip of paper tacked, that is, stapled, or firmly pasted, onto the instrument so as to become a part of it. That is to say, that when the back of a promissory note is filled with indorsements, then another sheet of similar size may be attached thereto for the sole purpose of furnishing room for further necessary indorsements.

In *Gookin v. Richardson,* 11 Ala. 889, 46 Am. Dec. 232, decided in January, 1847, it was held: "According to the principles of mercantile law, a bill or promissory note

payable to a certain person or his order, could only be transferred by indorsement. * * * A mere assignment of such paper without an indorsement, will invest the holder with the same rights only, as he would acquire upon an assignment of a bill not negotiable; and if the *beneficial* interest be transferred, but there has been no indorsement, the action must be brought in the name of the payee."

However, in Nebraska, section 20-302, Comp. St. 1929, specifically provides that such an action may be brought by the assignee in his own name; but, aside from that one point, this early holding of the Alabama court is strictly in point. See *Brown v. Janes,* 130 N. Y. Supp. 333.

"Where a negotiable note is transferred by delivery and assignment, the holder is nothing more than an assignee of a chose in action, and * * * takes the instrument subject to any defenses existing in favor of the makers and against the assignor before notice to the makers of the assignment." *Hecker v. Boylan,* 101 N. W. 755 (126 Ia. 162). See *Smith v. Nelson Land & Cattle Co.,* 212 Fed. 56.

Where a negotiable instrument, payable to order, is transferred only by delivery and assignment, the transferee, being the one who has by such means become possessed of the instrument, has the rights therein of a chose in action. It is subject to equities against the assignor arising in favor of the maker before he has notice of the assignment.

It has often been held that the transferee is entitled to an unqualified indorsement unless the parties have agreed to the contrary. *Lawrence v. Citizens State Bank,* 113 Kan. 724; *Queensboro Nat. Bank v. Kelly,* 48 Fed. (2d) 574, 87 A. L. R. 1172.

The Nebraska law upon the effect of a transfer without indorsement is found in section 62-320, Comp. St. 1929, which reads: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer

had therein and the transferee acquires, in addition the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

This is the exact language of section 49 of the original negotiable instruments law as recommended by the National Conference of State Boards of Commissioners for promoting uniformity of legislation in the United States, and it was first adopted into our Nebraska law as section 49, art. 3, ch. 83, Laws 1905, and has never been amended.

An exhaustive discussion of this section will be found in Brannan, Negotiable Instruments Law (5th ed.) sec. 49, which is authority for saying that the transferee, without indorsement of a note payable to order, cannot be a holder in due course, as he is neither a "holder" because not a payee or indorsee, not a bearer because the instrument is not payable to bearer.

While we have not discussed it, there is a serious question whether there was a valid transfer to the plaintiff bank of the note in suit, which was the property of the State Bank of Minatare. Could there have been a valid and legal transfer of an unindorsed bank note to secure the individual indebtedness of two of the bank's officers?

"A note which is payable to order, and which has not been indorsed, and has come into the hands of a third person by assignment merely, is subject to any defenses which could have been interposed against the original payee." *Emerson-Brantingham Co. v. Brennan,* 35 N. Dak. 94. "A negotiable promissory note may be transferred by a separate distinct assignment thereof, but in such case the transferee will not be protected as against infirmities or defenses which might be shown as against the assignor." *Gaylord v. Nebraska Savings & Exchange Bank,* 54 Neb. 104. Section 62-408, Comp. St. 1929, provides that a negotiable instrument "in the hands of any holder other than a holder in due course * * * is subject to the same defenses as if it were nonnegotiable."

Thus, in the case at bar we have a note belonging to the State Bank of Minatare put up as collateral to the note of L. F. Johnson and L. L. Conklin, without any indorsement whatever thereon. It is clear that the plaintiff could not under these circumstances be a holder in due course.

While this court held in *Davis v. Polak,* 126 Neb. 640, "Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment," yet in the case at bar the plaintiff is but the holder of an unindorsed note, and as such has no greater rights therein than a mere assignee. The plaintiff bank, therefore, held this note subject to all the original equities between the parties arising before notice of assignment was brought to the maker.

Other authorities sustaining our holding are: *Bank of Bromfield v. McKinley,* 53 Colo. 279; 3 R. C. L. 987, sec. 196; *Gookin v. Richardson,* 11 Ala. 889; Comp. St. 1929, sec. 62-408; *Peterson v. Swanson,* 176 Minn. 246; *Marling v. FitzGerald,* 138 Wis. 93.

The plaintiff calls to our attention our decision in *First Nat. Bank of Cripple Creek v. Redding,* 121 Neb. 642, in which case we held that the giving of an undated check by this same defendant, made out at the same time as the check in the case at bar, that is, immediately after depositing his draft for $6,148.92, was not a payment which released Mr. Redding from a note held by the Cripple Creek bank, and they insist that the two cases are identical, and that the judgment of the trial court in the case at bar should be reversed because of this former decision. There appears to be this vital difference between these two cases, namely, that before the State Bank of Minatare sold and delivered the note before maturity to the First National Bank of Cripple Creek, it indorsed the note, "Without recourse, State Bank of Minatare, By L. F. Johnson Pt.," thus making the Cripple Creek bank an indorsee and holder in due course for value before maturity,

while in the case at bar no indorsement of any kind was placed upon the note.

It can be said that the plaintiff bank can only assert such rights as the State Bank of Minatare can assert; and the defendant paid it off in full, with interest, to that bank.

The maker of a negotiable note which has been transferred without indorsement may pay the same to the original payee where he does so without actual notice of the assignment of the note. Such a payment before notice discharges the obligation.

In *Conroy v. Garries*, 126 Neb. 730, we held: "The fact that the party to whom payment is made * * * did not have the same in his possession is not conclusive upon the question of his authority to collect, but is a circumstance to be considered upon that question." Cases supporting this view are: *Hatfield v. Jakway*, 102 Neb. 831; *Garnett v. Meyers*, 65 Neb. 287; *Bliss v. Falke*, 125 Neb. 400.

In *Dodd v. Brott*, 1 Minn. 270, 66 Am. Dec. 541, that court in 1856 said: "The simple question arises whether a debtor who pays a debt in good faith to his creditor can be made liable to pay it a second time to his creditor's assignee? If such a rule of law existed, I should not, for a moment, feel bound to follow it. It is repugnant to common sense and every principal of justice."

Where an instrument was transferred to the plaintiff after maturity, for value and without indorsement, it was held that subsequent payment to the transferer discharged the instrument. *Citizens Bank & Trust Co. v. Chase*, 151 Va. 65.

"The maker of a note and mortgage not negotiable, who has no notice of a transfer of the papers, may satisfy the same by payment to the payee named therein." *Garnett v. Meyers*, 65 Neb. 287. "Payment of a promissory note to the payee by the maker, without notice of a transfer of the note after maturity, is a valid defense to an action by the indorsee." *Haywood & Son v. Seeber*, 16 N. W. 727 (61 Ia. 574). See *Consterdine v. Moore*, 65 Neb. 296; *Swan v. Craig*, 73 Neb. 182.

While opinions may be found to the contrary, yet we believe that the clear weight of authority sustains the judgment of the district court, which is hereby

AFFIRMED.

ROSE, J., dissenting.

I do not concur in the affirmance of the nonsuit below. In my view of the record and the law, defendant did not prove any defense to the case made by plaintiff. It seems to me there should have been a judgment against defendant for the full amount of plaintiff's claim.

The instrument on which plaintiff brought suit is a negotiable promissory note for $2,500 dated October 5, 1928, and payable December 5, 1928. It was executed by defendant, the debtor and maker, and delivered to the State Bank of Minatare, the creditor and payee. In banking transactions the Plattsmouth State Bank, plaintiff, for value paid to and received by the State Bank of Minatare, the original payee, became the owner and holder of the note without indorsement October 8, 1928, and never surrendered possession or parted with title. Defendant knew, or was chargeable with notice, that the note was transferable by delivery before due and he gave currency to it as such in a commercial transaction. He owed to plaintiff, the owner and holder, the debt evidenced by the note. His purported defense is that he paid his obligation to the State Bank of Minatare, the original payee, without notice of the assignment or transfer. On the undisputed facts he should be held amenable to the law which declares:

"Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment." *Davis v. Polak*, 126 Neb. 640.

Defendant's obligation on the note was to the owner and holder of it and not to the State Bank of Minatare which had already received value therefor from its assignee, plaintiff.

Defendant did not by his own testimony or otherwise

show any legal right or authority to pay to the State Bank of Minatare the debt evidenced by the note. That bank was not the owner or holder or an agent authorized to receive payment. It was closed on account of insolvency February 23, 1929. Chargeable with notice that the note was transferable by delivery before due, and without reason to assume it was still held by the State Bank of Minatare, defendant's explanation of his purported payment without notice of the assignment may be summarized as follows: January 18, 1929, he deposited in the State Bank of Minatare a draft for $6,148.92; gave that bank his undated personal check at night for $2,558.34, January 18 or 19, 1929, to pay the 2,500-dollar note with interest; asked for the note when tendering the check, or immediately thereafter, and was told it had been "sent out."

The evidence does not tend to show that the State Bank of Minatare charged the banking account or the deposit of defendant with the amount of the check before he knew the note was not in possession of the original payee and could not be surrendered. He knew he was entitled to the note when making payment, because he asked for it. In any event he could have protected both himself and plaintiff by simply demanding the return of his check, or, in the event of a refusal, by an order in writing to stop payment of the check. This required only ordinary business sense. The only proper inference is that defendant put his trust in the State Bank of Minatare and made it his agent to pay his debt and to procure for him the return of the note.

Plaintiff did not perpetrate on defendant any fraud in the transactions connected with the note, or trust the State Bank of Minatare to collect the debt due, or authorize such collection, or create by negligence or other means a method of misleading or wronging defendant. I have an abiding conviction that the record presents a typical case for the application of the following doctrine:

"Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third

person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566. Followed in *Johnson v. Kindig*, 127 Neb. 360. See, also, *Rehmeyer v. Lysinger*, 109 Neb. 805; *First Nat. Bank v. First Nat. Bank*, 111 Neb. 441; *Deleski v. Peters Trust Co.*, 115 Neb. 547; *Nebraska State Bank v. May*, 117 Neb. 262.

Entertaining these views, I respectfully dissent, fearing that the rules of law announced by the majority, when applied to the undisputed facts in the case at bar, may become disturbing factors in commercial and banking law.

RAPER, District Judge, concurs in this dissent.

ANNA LEISY, APPELLEE, V. FARMERS MUTUAL HOME INSURANCE COMPANY, APPELLANT: FEDERAL LAND BANK ET AL., APPELLEES.

FILED JANUARY 25, 1935. No. 29129.

1. Insurance: FORFEITURE. A forfeiture of a policy of fire insurance on the ground of a depletion by the insured of the property described in the policy, in the absence of a provision in the policy to the contrary, cannot be invoked as a defense unless the depletion was such as to change the identity of the property insured.
2. ———: VALUED POLICY LAW. "Under the valued policy law (Compiled Statutes, 1889, ch. 43, sec. 43), the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance, and in case of total loss, that sum is the measure of recovery." *Lancashire Ins. Co. v. Bush*, 60 Neb. 116.

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

A. R. Oleson, for appellant.

Zacek & Nicholson and *J. M. Gurnett, contra.*

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

CARTER, J.

This is an action at law upon a policy of fire insurance issued by the Farmers Mutual Home Insurance Company of Hooper, Nebraska, to Henry Leisy, now deceased, in the amount of $2,500, covering a corncrib and elevator. The defendant insurance company defended on the ground that the insured during his lifetime had depleted the property to such an extent as to void the policy. The trial court directed a verdict for the plaintiff at the close of defendant's evidence and, from the overruling of a motion for a new trial, the defendant brings this appeal.

The evidence shows that the property insured consisted of an elevator 54 by 24 and a corncrib and granary 166 by 46 in size; that the center of the building designated as a corncrib and granary was used for the storing and feeding of hay and on each side of which was a cattle shed. On the outside of the cattle shed were grain bins and cribs extending the full length of the building, the outside walls of which formed the side walls of the building. The evidence further shows that various persons at the direction of the insured removed boards from the floor and walls of the grain bins during the life of the policy, but that none was removed from the building proper. The evidence also discloses that the grain bins were not in condition for use and had not been for a considerable period of time prior to the issuance of the policy. The balance of the evidence covers the general condition of the insured property brought about by natural depreciation and has no bearing on the result of this litigation.

On March 28, 1930, the insured property herein described was totally destroyed by fire. Under section 44-344, Comp. St. 1929, commonly called the valued policy law, the plaintiff is entitled to recover the full $2,500 unless Henry Leisy in his lifetime depleted the building to such an extent as to cause a forfeiture of the policy. There is nothing in the policy of insurance providing for

a forfeiture on the grounds alleged in defendant's answer. There can be no question but that there was some depletion of the floors and inside walls of the grain bins, but not such as would void a policy of insurance containing no provision for so doing. The insurance in question was written on the elevator and corncrib as a whole and not upon the integral parts thereof. The buildings insured still maintained their original identity at the time of the fire. In the absence of an express provision in the policy to the contrary, such a depletion of the buildings as is shown by the evidence in this case will not result in a forfeiture of which the defendant can take advantage. Forfeitures are not favored by the law and will be enforced only when the strict letter of the contract requires it or when it would be an unconscionable act to not enforce it. Under the evidence in this case, we are convinced that the trial court was right in directing a verdict for the plaintiff for the full amount of the policy.

The appellant also complains of the trial court's action in striking from its answer the following: "And it (the insured building) was of such small value that the executor of this estate offered to sell it for less than three hundred dollars because of its then present condition just prior to the fire which destroyed it. But the prospective purchaser to whom this offer was made did not consider that it was worth the amount of money that the executor was asking for it." Clearly the trial court was right in striking said allegations, they being wholly immaterial to the issue, and evidence in support thereof could not be properly admitted.

The appellant further complains of the action of the trial court in not admitting in evidence a purported New York standard form fire insurance policy. The offer apparently was made on the theory that section 44-601, Comp. St. 1929, made the provisions of a New York standard form a part of every fire insurance policy issued in this state. If this were true, the appellant could not lay the foundation for its admission by an insurance agent as

was here attempted. The laws of another state cannot be proved in this manner. As a matter of fact, the statute provides that fire insurance shall be written on forms prescribed by the department of trade and commerce as nearly as practicable in the form known as the New York standard form. This being true, the department of trade and commerce is authorized by law to prescribe the form of fire policy and the policy so prescribed can be proved by the records of that office. The trial court was right in sustaining objections to the admission of the purported New York standard form policy.

"Under the valued policy law (Compiled Statutes, 1889, ch. 43, sec. 43), the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance, and in case of total loss, that sum is the measure of recovery." *Lancashire Ins. Co. v. Bush*, 60 Neb. 116. See, also, *Fadanelli v. National Security Fire Ins. Co.*, 113 Neb. 830. There being no forfeiture of the contract, and the amount of recovery having been fixed by statute, there was nothing that required submission to a jury.

The judgment of the trial court was in all respects correct and is hereby

AFFIRMED.

HORACE L. HELFRICH, APPELLANT, V. IRVING F. BAXTER ET AL., APPELLEES.

FILED JANUARY 25, 1935. NO. 29137.

1. **Mortgages:** ASSUMPTION OF MORTGAGE DEBT. A grantee in a deed made of property previously mortgaged, subject to the mortgage, does not become personally liable for the mortgage debt, in the absence of an agreement on the part of such grantee to assume the payment of the mortgage.
2. ———: ———. Where the grantee in a deed retains the amount of an existing mortgage on the property out of the purchase price, in the absence of an agreement to pay the mortgage, it does not render him personally liable for the mortgage debt.

3. ———: ———. An alleged agreement to pay an existing mortgage, as part of the consideration for the conveyance of mortgaged premises, is not established by recitations in the deed of conveyance that said mortgage is part of the consideration or purchase price.
4. ———: DEFICIENCY JUDGMENT. "To entitle the holder of a mortgage to a deficiency judgment against a purchaser of the premises mortgaged, the proofs must be such as would enable such mortgagee to maintain against such purchaser an action for the amount secured by said mortgage." *Green v. Hall*, 45 Neb. 89.
5. ———: ———. Section 20-2141, Comp. St. 1929, as amended by chapter 41, Laws 1933, taking away the power of the court to enter deficiency judgments in equity actions, is not applicable to a suit pending at the time it went into effect by virtue of the general saving clause act, section 49-301, Comp. St. 1929.
6. Contracts: CONSIDERATION. A valuable consideration sufficient to sustain a contract need not be pecuniary in the sense that it may be determined in dollars and cents, but this quality may be found in the accomplishment, actual or secured by the promisor, of some object or purpose which appeals to him of such importance that he is willing to pay a pecuniary value for it. *In re Estate of Griswold*, 113 Neb. 256, followed.
7. ———: ———. Evidence examined and *held* that the contract set out in the evidence is supported by a sufficient consideration.

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

Gaines, McGilton, McLaughlin & Gaines, for appellant.

Crofoot, Fraser, Connolly & Stryker, Fradenburg, Stalmaster, Beber & Klutznick and *Montgomery, Hall & Young, contra.*

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

CARTER, J.

This was an action brought by the appellant to foreclose a real estate mortgage and secure a deficiency judgment from the appellees herein. On July 22, 1919, one Blanche J. Elwood executed a note for $14,000 and secured the same by a mortgage on the real estate involved in this

action. On September 25, 1919, one Irving F. Baxter purchased the mortgaged property, taking the title to himself as trustee for himself and others, including the appellees herein. The appellant, Helfrich, purchased the note and mortgage on December 6, 1923, and on July 22, 1924, Helfrich and Baxter entered into an agreement extending the loan for five years. On January 5, 1928, Helfrich and the appellees and others entered into a contract regarding the mortgaged property which will be described more fully later on in this opinion. On August 3, 1932, Helfrich filed his petition to foreclose the mortgage with a prayer for a deficiency judgment against all of the defendants. A decree of foreclosure was entered July 3, 1933, finding the amount due on the note and mortgage to be $14,142.98, and a further amount of $838 due for redeeming the property from tax sale. The property was sold to Helfrich on August 29, 1933, for $2,000, subject to accumulated taxes amounting to $6,288.53, leaving a balance due the appellant, Helfrich, after exhausting his security, of approximately $13,000. From an order dismissing appellant's application for a personal judgment against Samuel W. Reynolds, Abe Herzberg, Jr., and Clifford W. Calkins, appellees herein, the appellant, Helfrich, appeals.

Appellant's first contention is that he is entitled to a deficiency judgment for all the balance due. The record discloses that Baxter and his associates, the appellees herein, purchased the property involved here for the sum of $51,150. It was encumbered at that time by mortgages totaling $30,000, which were deducted from the purchase price. Appellant contends that these facts constitute an assumption of the mortgage indebtedness.

Appellant relies on the case of *Rockwell v. Blair Savings Bank,* 31 Neb. 128, from which we quote as follows: "The property was conveyed by a deed of general warranty which makes no mention of any encumbrance. Austin Rockwell and Isaac Tebury were the only persons who gave testimony as to the terms of the agreement for the

sale of the lot. The testimony of these witnesses agrees that the purchase price was $2,500; that Tebury only paid the Rockwells $300; that he never agreed to pay the balance of the considerations to them, and gave no obligation for the remainder of the contract price. Tebury knew of the existence of the mortgage for $2,200 held by the bank when the sale was made, and after obtaining the deed he paid three instalments of interest on the lien. Austin Rockwell also testified that Tebury agreed to pay the amount due the bank on the mortgage. This testimony is not overcome by the evidence of Tebury. While he swears on his direct examination that nothing was said about his paying the mortgage, yet on cross-examination he says he has no recollection of anything being said about his taking care of the mortgage debt. He was also asked on cross-examination 'How did you pay the other $2,200?' His answer was: 'A mortgage holds it.' He makes no claim in his testimony that he only bought the Rockwells' equity of redemption, but admits that he was to pay $2,500 for the property; that he only paid $300 of the same, and that the mortgage holds the balance. The testimony establishes beyond any question that Tebury retained part of the purchase price to pay the $2,200 encumbrance. He thereby made the mortgage debt his own and is therefore personally liable with the Rockwells for the amount of the deficiency remaining after the foreclosure of the mortgaged premises."

A part of the case above quoted indicates that the liability for a deficiency was based on an agreement to pay the mortgage. This is in line with the subsequent holdings of this court. That part of the opinion that indicates a liability for deficiency where a mortgage is deducted from the purchase price is not in harmony with the decisions of this court. By deducting the amount of the mortgage and paying the balance in cash, the purchaser does not assume and agree to pay the debt. Recitations in a deed of conveyance that said deed is subject to a mortgage or that said mortgage is a part of the considera-

tion or purchase price do not create an assumption agreement. It is our opinion, and we so hold, that to entitle the holder of a mortgage to a deficiency judgment against a purchaser of the premises mortgaged, the proofs must be such as would enable such mortgagee to maintain an action against such purchaser for the amount secured by said mortgagee. *Green v. Hall,* 45 Neb. 89. We therefore hold that appellant is not entitled to a deficiency judgment for the full amount remaining unpaid, for the reason that he does not come within the rule above announced. That part of the opinion in *Rockwell v. Blair Savings Bank,* hereinbefore cited, which infers that the deduction of liens from the purchase price of real estate, or the purchase of realty subject to mortgage, amounts to an assumption of the debt, in the absence of an agreement to the contrary, is hereby disapproved.

Appellant contends that the extension agreement of July 22, 1924, entered into by Baxter as trustee for appellees, amounts to an assumption of the debt by the appellees. To this we cannot concur as there is no agreement to assume the debt contained in the extension contract.

The appellant contends that appellees are liable for a personal judgment because of the written agreement entered into on January 5, 1928, which was signed by Helfrich and each of the appellees herein, the material part of which is as follows: "That said parties of the second part jointly and severally further agree to pay or cause to be paid, to the extent of the value of said premises, including the proceeds from the sale thereof and the income derived therefrom, to said H. L. Helfrich the interest as it falls due according to the terms of the said fourteen thousand dollar mortgage note, also the principal of said mortgage note at its maturity, as fixed by said extension agreement, and we further agree to pay to said H. L. Helfrich all other expenses and costs incurred or to be incurred by him in connection with this contract and in connection with the purchase and holding of said certifi-

cate of purchase, including said sale, until said sale is finally confirmed and the deed of the county treasurer executed and delivered to said party of the first part, or his assigns."

The appellees contend, however, that there is no consideration for the agreement and that it is therefore void. We are of the opinion that there is a sufficient consideration to sustain it. The contract provides:

"That P. J. Tebbens may purchase said real estate at said sheriff's sale, and receive the certificate of purchase therefor, which certificate of purchase said H. L. Helfrich agrees to have assigned to him by said P. J. Tebbens within five (5) days after said sale, on condition, however, that the parties of the second part provide and furnish to said P. J. Tebbens a sufficient amount of money to cover his bid for said property at said sale, which amount of money the parties of the second part agree to so furnish at said time.

"Party of the first part further agrees to hold said certificate of purchase as security for said fourteen thousand dollars indebtedness represented by said fourteen thousand dollar note, for the period of eighteen (18) months from the date of said certificate of sale, and in the event any other person or concern, within the time provided by statute, makes a premium bid or bids on said property, over and above the amount for which said property is sold at said sheriff's sale, that said party of the first part will thereafter and within the time required by law, increase said premium bid or bids to an amount sufficient to protect said security under said certificate of purchase, and will thereafter take such action as the law requires to secure the confirmation of said sale and to secure a deed from the county treasurer of Douglas county, Nebraska, of said real estate, pursuant to said sale and confirmation."

It will be noted that Helfrich agrees, not only to purchase the certificate of purchase, but he also agrees to hold the same for 18 months, protect against premium

bids, and get a confirmation at the bidder's price. Appellees receive an actual financial benefit by this transaction as they can redeem only by paying all the taxes and interest.

The contract further provides: "Said party of the first part further agrees to assign and deliver said certificate of purchase over to said parties of the second part at any time after he receives the same and prior to the time he receives the county treasurer's deed for said real estate, upon payment by the parties of the second part or any of them of the amount then due said party of the first part on said indebtedness, and expenses, and further agrees to promptly execute and deliver to the parties of the second part his deed to said real estate after he acquires title to said real estate through said certificate of purchase, on condition that the parties of the second part or either of them then pay him the amount of money then due him on said indebtedness, and expenses."

It will be observed that appellant agrees to assign all the benefits of his purchase to appellees either before or after the deed is issued by the county treasurer. It would appear from these portions of the contract that appellees have received a consideration for their promises made in the contract. Their property was about to be lost through a tax foreclosure and, under the arrangement made, appellant agreed to protect them from a tax sale at the bidder's price instead of the redemption price that would have been required in order to redeem. The appellant has agreed to perform certain acts that benefited the appellees that he was under no obligation to perform. The fact that the appellant was benefited by the transaction is not material. If the appellees received any benefit, the consideration is sufficient. This court has held: "The requirement of a legal consideration to the validity of a contract arises out of the necessity or propriety of protecting the promisor against fraud and overreaching; but the law's solicitude does not extend to the point of requiring the consideration to be of a specific character or amount, and

leaves these questions, in the absence of fraud or mistake, to the determination of the parties. We are, therefore, not concerned with the particular thing, nor its value, which the promisor has considered a sufficient inducement for his promise. All that we are required to do is to ascertain that the subject-matter of the consideration is such as to warrant an inference of value to the promisor, or that he considered it of value; and it need not be pecuniary in the sense that it may be said to be worth so many dollars, but this quality may be found in the accomplishment, actual or secured by the promisor of some object or purpose which appeals to him of such importance that he is willing to pay a pecuniary value for it." *In re Estate of Griswold,* 113 Neb. 256. Under this rule, it is a valid contract supported by a sufficient consideration. The trial court therefore erred in refusing a personal judgment computable under the terms of the contract.

The appellees further contend that a deficiency judgment cannot be obtained in this case because of section 20-2141, Comp. St. 1929, as amended by chapter 41, Laws 1933, providing as follows: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof." This statute was passed with an emergency clause and was approved on August 26, 1933. The petition in the case at bar was filed on August 3, 1932, so that it was pending when the statute became effective. While the above statute does not contain a saving clause, such repeal did not affect the matters herein, as section 49-301, Comp. St. 1929, provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing act." The trial court therefore has the power in this case to grant the deficiency judgment.

The order of the district court sustaining the motion

of the appellees for a dismissal of appellant's application for a deficiency judgment is therefore reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED.

HARRY E. BOWMAN, RECEIVER, APPELLANT, V. FREDERICK O. COBB: PHELPS COUNTY, APPELLEE.

FILED JANUARY 25, 1935. No. 29027.

1. **Judgment:** PLEADING. Under our system of Code pleading and practice, issues to be tried must be formed by pleadings, and a judgment rendered thereon must respond to the issues raised by the pleadings.
2. ———. Where the judgment of a court responds to the issues raised by the pleadings, and full and complete relief is awarded thereon, no duty rests upon the court to render judgment upon an issue litigated not within the pleadings, and a failure or refusal to do so is not error.
3. ———. Where, as in this case, the judgment of the trial court granted full and complete equitable relief under the issues raised by the pleadings, this court will not try *de novo* an issue litigated and not within the pleadings on which the trial court has refused to enter judgment.

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

Stiner & Boslaugh and *Edmund P. Nuss*, for appellant.

Dora O. Nelson, contra.

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

HASTINGS, District Judge.

This action was commenced by the plaintiff and appellant, Harry E. Bowman, as receiver of the Clarke-Buchanan Company, to foreclose a mortgage on 518.64 acres of land in Phelps county. The mortgagors, Frederick O. Cobb, Sylvia Cobb, a tenant upon the premises, the

county of Phelps, defendant and appellee, with others, were made parties defendant.

The petition is not incorporated in the transcript. It is conceded by the parties to this appeal that the petition of the plaintiff was for the foreclosure of the mortgage against all of the land covered by the mortgage, and that this was the only relief prayed for. It is further conceded that all of the defendants failed to answer or otherwise plead to plaintiff's petition. A decree of foreclosure was entered in which plaintiff was decreed to have a first lien upon all of the premises involved to secure the sum of $21,705 found due plaintiff, and, unless said sum with interest was paid within 20 days from the date of the decree, that an order of sale issue directing the sheriff to sell the mortgaged premises. The decree further provided that all questions and issues between the plaintiff and defendant county in reference to said premises should be reserved for hearing, submission and determination upon confirmation of the sale, without prejudice to the rights of either the plaintiff or said defendant.

The sheriff, pursuant to said decree, advertised and sold all of the premises described in the mortgage and decree to the plaintiff for the sum of $20,000, leaving a deficiency of $2,006.65. The defendant county filed objections to the confirmation of the sale. The grounds of said objections, in substance, were: That a public highway was laid out and established across the mortgaged premises containing approximately six acres of the land covered by plaintiff's mortgage, and that on or about the 8th day of June, 1926, certain condemnation proceedings against said land were instituted by the county of Phelps to condemn for public road purposes the said six acres of land, and that as the direct result of said condemnation proceedings a public road was established over said land; that on appeal to the district court for Phelps county the statute under which said condemnation proceedings were brought was declared unconstitutional and the matter of damages between the county of Phelps and said mortgagor, Frederick O. Cobb,

was settled by paying him a stipulated sum of money, and in consideration thereof said mortgagor and his wife signed and delivered a deed to the county of Phelps for the land used for a public highway, which deed was recorded in the office of the county clerk of Phelps county, Nebraska, on the 6th day of April, 1927. The county prayed for an order excepting said strip of ground from the confirmation of the sale.

The record shows that the land was not lawfully condemned for highway purposes, and that plaintiff was not a party to said attempted condemnation proceedings, nor did it receive any notice thereof. It further appears that plaintiff was not dealt with nor consulted in the settlement made between the defendant county and the mortgagor and title holder, Cobb, and did not receive any part of the consideration paid mortgagor for the conveyance. The deed was not given until approximately two years after plaintiff's mortgage was given and recorded. The evidence does not disclose the amount paid to the defendant, Cobb, in settlement of damages occasioned by the location of the road across the mortgaged premises. The consideration named in the deed was $3,500.

At the hearing had on the objections to confirmation, it was insisted by counsel for the plaintiff, plaintiff not having received compensation for the land taken and used by the county for highway purposes, the only question involved was whether the holder of the mortgage was entitled to have the sale confirmed on all the land covered by the mortgage, and that ultimately plaintiff would be entitled to compensation.

After counsel for both plaintiff and defendant county had made statements in regard to their respective claims, the trial court stated: "Well, as I get it, there is practically no dispute between you as to the facts. I could, perhaps, take the statements of both of you as they have been made here as a stipulation of the facts so far as they go. Is there any objection on the part of either of you as to that?" To which the attorney for the plaintiff

replied, "No; I don't think there is any dispute at all as to the facts." The court then asked counsel if there was anything further in the way of evidence that either cared to submit, and counsel for plaintiff indicated that he desired to introduce some evidence. Both parties then introduced evidence on the question of damages occasioned by the location of the highway.

The court, at the conclusion of the evidence on this question, on March 1, 1933, entered an order confirming the sale as to all of the land except that on which the highway was located, and found, as to such tract and the taking thereof, that plaintiff, as lienholder, was entitled to compensation. The matter of fixing the amount and assessment of compensation for the land taken was taken under advisement.

Thereafter, on the 19th day of July, 1933, the court entered an order overruling the objections of defendant county to the confirmation of the sale, and confirmed the sale as to all of the land described in the mortgage and decree, including the tract used for highway purposes, and provided in said order that the confirmation of said sale should be without prejudice to any right claimed by said county for the use of any part of said premises for road purposes, and without prejudice to any right of the plaintiff with reference to any part of the land claimed by the county for road purposes, or any right of the plaintiff for compensation for any part of the land so used by the county, and such matters or any of them should not be adjudicated or determined by the court in this case. From this order plaintiff appeals.

It is urged that the court erred in not fixing the amount of plaintiff's damages for the taking of the land for highway purposes and in entering judgment against the defendant county therefor, and in remitting the parties to another action or actions instead of determining the whole controversy and adjusting all of the rights of the parties.

It is conceded by counsel for the plaintiff that plaintiff's claim for damages was not an issue presented by the

petition for foreclosure of the mortgage, and that the decree of foreclosure granted full equitable relief under the issues as presented by the petition. But he contends that the record shows a stipulation between the plaintiff and the county to litigate the question of plaintiff's right to recover damages for the location of the highway over and across a part of the mortgaged premises. The record shows no such stipulation. All the record shows is that the county, by not objecting to plaintiff's offer of evidence on the question of damages and in offering evidence in its own behalf upon that question, may have acquiesced in litigating that issue. The attempt here was to litigate, without pleadings, a cause of action not accruing until confirmation of the sale, and not related to the merits of any issue presented by plaintiff's petition. We have repeatedly held that, under our system of pleading and practice under the Code, issues to be tried must be formed by pleadings and a judgment rendered thereon must respond to the issues raised by the pleadings. *Clarke v. Kelsey,* 41 Neb. 766; *Hobbie v. Zaepffel,* 17 Neb. 536; *School District v. Randall,* 5 Neb. 408; *Traver v. Shaefle,* 33 Neb. 531.

Counsel for the plaintiff contends, however, that, "where all the parties interested in an action consent to a certain decree or to the determination of a certain question, the court has the right to determine such question and make such decree, even though it may not be within the pleadings." The case of *Clark v. Charles,* 55 Neb. 202, is the only case cited in support of this proposition. In that case we held:

"When a decree is entered conforming to the agreement and consent made in open court of all the parties to the action, the court having jurisdiction to enter such decree, then no party to the decree, nor one claiming under such party, can be heard to question it except for fraud or mistake, even though the pleadings would not support the decree had the action been contested."

It is manifest that the case cited is not an authority

upon the question involved. Here no judgment was rendered upon the issue attempted to be litigated, nor was it agreed between the parties that a judgment should be rendered in favor of the plaintiff and against the defendant county for any amount. The case does not decide that it is the duty of the court to determine an issue litigated which is not within the pleadings. In *Clarke v. Kelsey, supra,* it was said by Judge Norval:

"The only safe rule is to require litigants to try their cases upon the issues presented by the pleadings."

The record in this case furnishes a good illustration of the wisdom of adhering to that rule. When an issue is tried which is not within the pleadings, no duty rests upon the trial court to render judgment thereon and a refusal or failure to do so is not error. To hold that a trial court is required to render judgment upon an issue litigated, not within the issues, would be to give sanction to a practice not contemplated by our Code nor in accord with our previous decisions. If plaintiff desired to have tried and determined his right to damages and the amount thereof, he should have obtained leave from the court to file a supplemental petition raising that issue. Not having done so, he cannot predicate error upon the refusal of the trial court to determine an issue not within the pleadings.

It is urged by counsel for the plaintiff that we should try *de novo* the issue of his right to damages and the amount thereof, and direct that judgment be entered for the amount which we find to be his damage. The trial court having determined all the issues within the pleadings in favor of the plaintiff, and there being no judgment of the trial court upon the merits of said issue, that issue is not here for a trial *de novo,* no matter how desirable it might be to dispose of it so as to avoid further litigation. The judgment is therefore

AFFIRMED.

UPDIKE INVESTMENT COMPANY, APPELLANT, V. EMPLOYERS LIABILITY ASSURANCE CORPORATION, APPELLEE.

FILED JANUARY 30, 1935. No. 28968.

Declaratory Judgments. An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

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

Brogan, Ellick & Shoemaker and *James J. Fitzgerald, Jr.*, for appellant.

Kennedy, Holland & De Lacy, contra.

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

PER CURIAM.

In this action the plaintiff seeks a declaration of its rights under an insurance contract. The pleadings and evidence disclose that the defendant issued to the plaintiff a policy of insurance designated as a "Universal Standard Workmen's Compensation Policy," by which the defendant agreed to defend in the name and on behalf of plaintiff any suits or other proceedings brought against the plaintiff to recover any loss designated as a risk by the policy. One Eunice Roth brought an action against the plaintiff to recover an alleged damage of $50,000. The petition of Eunice Roth alleged that during the life of said policy and while she was an employee of the plaintiff and engaged in her employment she suffered personal injuries. These injuries are such that they are not compensable under the workmen's compensation act, and are alleged to have been caused by the negligence of her employer, who is the plaintiff herein. The plaintiff in this action requested the

defendant herein to defend such action, and the defendant herein refused and claimed that loss on account of the facts alleged in the petition of said Eunice Roth was not a risk covered by the policy. The issues in the action by Eunice Roth have not been tried.

The trial in this cause resulted in a declaration to the effect that the defendant herein was not obliged by its said contract of insurance to defend the action brought by Eunice Roth and would not be obligated to reimburse plaintiff herein for any sum that might later be recovered therein. The plaintiff appeals.

One of the questions presented is that of whether or not a justiciable issue is presented without Eunice Roth being a party to this action. By a paragraph of the policy designated therein as "one (a)" the defendant insures the plaintiff against loss under the provisions of the workmen's compensation act, and by the provisions of a paragraph designated as paragraph "one (b)" the defendant herein agrees to indemnify the plaintiff herein "against loss by reason of the liability imposed upon it by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada." By other provisions of the policy, as well as by the provisions of the workmen's compensation act, the defendant is made jointly liable with the plaintiff to any employee of plaintiff entitled to compensation under such act for injuries arising while the policy is in force. By the provisions of paragraph "one (b)" an action may be brought by the injured employee against the defendant herein upon the policy in case of the return of an execution unsatisfied against the plaintiff herein. Clearly, any declaration of rights made by the court in this action would not be *res adjudicata* as against Eunice Roth, she not being a party to this action.

One of the most fruitful fields in which courts may function to the benefit of society under the provisions of

the declaratory judgments act (Comp. St. 1929, sec. 20-21,140 *et seq.*) is that of the construction of written instruments. A declaration of rights has often properly been made in actions based on facts similar to facts in this case. *American Motorists Ins. Co. v. Central Garage*, 86 N. H. 362; *Post v. Metropolitan Casualty Ins. Co.*, 227 App. Div. 156, 237 N. Y. Supp. 64. A declaratory judgment, however, is designed to terminate the controversy so far as it relates to the parties and facts that gave rise thereto, and the court should, under most circumstances, dismiss an action for a declaration of rights without prejudice to either party, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration, had they been parties, have not been impleaded. Actions for a declaration of rights will better serve the needs of the public, and the court far less often find that its declaration did not end a controversy, if this rule is followed. *Dobson v. Ocean Accident & Guarantee Corporation*, 124 Neb. 652. While we approve of the use of this form of action under facts similar to those shown by the pleadings, the court hold that Eunice Roth should be a party to this action before a declaration of rights is made.

For reasons given, the judgment of the district court is reversed and the cause remanded, with directions to dismiss the cause without prejudice in case Eunice Roth is not made a party to the action within a time to be fixed by the district court. Costs in this court taxed to plaintiff.

REVERSED.

DAY, J., concurs in result.

IN RE ESTATE OF ALFRED OTWAY WIRSIG. MABEL C. WIRSIG, APPELLEE, V. LILLIAN WIRSIG, APPELLANT.

FILED JANUARY 30, 1935. No. 29135.

Wills: PAROL EVIDENCE. Where a testator, in a clause of his will devising real and personal property, omits the beneficiary either by name or by any other reference, and nowhere in the will is

there any means of discovering the identity of the intended beneficiary, parol or extrinsic evidence cannot be received to determine that fact.

APPEAL from the district court for Loup county: EDWIN P. CLEMENTS, JUDGE. *Reversed, with directions.*

Davis & Vogeltanz, for appellant.

Charles C. Larsen and *John W. Delehant, contra.*

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

GOSS, C. J.

Lillian Wirsig, mother of deceased, has appealed from a judgment of the district court construing a will in favor of Mabel C. Wirsig, wife of deceased, and ordering the estate distributed as so construed. The county court had construed the will otherwise and the wife had appealed to the district court.

The paragraph of the will so construed reads as follows:

"First: I hereby devise and bequeath all of my personal property and all of my real property of any nature or kind whatsoever and wheresoever found, with the exception of twenty dollars in cash ($20.00)."

In the second and third paragraphs the testator bequeathed "to my beloved mother" (without otherwise naming her) and "to my beloved sister Alpha L. Troxel," respectively, ten dollars each.

Everett Satterfield was permitted to testify that he drew the will for testator on October 4, 1932, the day it was executed. The witness was directed by the testator to draw the will devising and bequeathing all testator's property, save the two ten dollar bequests, to Mabel C. Wirsig, wife of testator, and under those instructions the witness drew the will in evidence. He was one of the subscribing witnesses. Timely objection was made to the competency of the scrivener to testify to the conversation with and directions of the testator, but the trial court

overruled the objections with the observation that he would reserve decision of that point until the close of the case.

In the final journal entry the court overruled the objections of Lillian Wirsig to this testimony, though stating: "This contention seems to be in accordance with the general rule for the introduction of evidence in such cases. We think it doubtful whether the rule should be applied in this case. Here the omission was entirely the oversight of the scrivener and so appears from the language of the will itself. The evidence does not seek to contradict or vary the terms of the will. It does not attempt to prove what the understanding of the scrivener was as to the intention of the testator. It merely details what instructions were given by the testator and that the failure to carry out the instruction to insert the name of the wife, as devisee, was solely the mistake and omission of the scrivener. * * * Conceding, however, that the evidence of the scrivener was incompetent and should not be considered, the court is of the opinion that the language of the will itself, when read in the light of the surrounding circumstances and with reference to the situation of the parties, is sufficient to justify the conclusion that it was the testator's intention to leave the residue of the estate to his wife, Mabel C. Wirsig."

The "surrounding circumstances" referred to by the trial court are that the testator had no other near relatives than his mother, his sisters, and his wife with whom he was living, and that he "undertook to dispose of his whole estate." The trial court's journal entry cites on this point the case only of *Herter v. Herter*, 97 Neb. 260, and quotes only the second point in the syllabus thereof: "The object and purpose of a court in construing a will is to carry out and enforce the intention of the testator, as shown by the language of the will, and considering the circumstances under which it was made." There the will was evidently written by the testator and was very informal. It was so construed as to permit two grandchildren who had been

mentioned in the will to participate, with others named, in the distribution of two tracts of land, from which the decree had excluded them. The will specifically bequeathed all the personal estate to the widow and two living children of the testator. As to the two tracts of land the will (which was written in the second person) made this reference only: "The eighty acre farm in section twelf (Grand Pr.) you get in comp, and make the best of it. The rent you will pay to Mother as long as she lives, or as long as she wants it. The farm in Hitchcock county you get in comp also and make the best of it." The court held that one of the tracts was 80 acres in Grant precinct, Lancaster county, that the expression "comp" meant "company," that the intention to dispose of all his property by the will was manifested by testator, and that the two children of a deceased son were included in the "comp" and were included in the description "you get." The decree was therefore modified so as to allow them to participate in the distribution of this land. In other words, the decision was arrived at by a construction of the will "from its four corners" aided by the surrounding circumstances. In no sense were these children imported into the will purely by parol evidence naming them as devisees; and the learned trial court erred in taking *Herter v. Herter, supra,* as authority that parol evidence may be considered in deciding that a will may be so construed as to make one a devisee under a will entirely omitting him by name *or by any other description.* It is doubted if authority can be found anywhere authorizing a court so to construe a will in such circumstances as in the instant case.

Section 30-205, Comp. St. 1929, requires all wills (except nuncupative wills mentioned in the next section) to be in writing, signed by the testator (or by some person in his presence and by his express direction), and subscribed in his presence by two or more competent witnesses.

"Patent ambiguities cannot generally be resolved by

parol; but as to such ambiguities the will must be regarded as insensible. Parol evidence, therefore, is inadmissible to prove what is meant by a legacy to '———.'" 2 Wharton, Law of Evidence (3d ed.) sec. 1006.

"Parol proof of mistake is usually inadmissible to correct a will. In contracts there is a distinction in this respect, arising from the fact that a scrivener's mistake is often the mistake of the agent of both parties, and therefore in such cases imputable to both. But in wills, the scrivener can be in no sense the agent of the legatees or devisees whose interests are affected by his supposed blunder, and to them, therefore, can such blunder be in no sense imputable. The mistake, therefore, if there be such, is one of the testator, or of the scrivener adopted by the testator; and to let the will be overridden by parol proof of such mistake would be to subordinate that which the testator declares to be his last will to something which he has not so sanctioned, and which passes through the treacherous medium of parol." 2 Wharton, Law of Evidence (3d ed.) sec. 1008.

"Evidence as to the intention of a testator separate and apart from that conveyed by the language used in the will is not admissible for the purpose of interpreting the will. Extrinsic evidence cannot be heard to alter, detract from or add anything to the provisions of a will, or to explain or contradict its contents, even though the consequences may be the total or partial failure of the testator's intended disposition. Parol evidence is not admissible to show that the testator meant one thing when he said another, or to show an intention not expressed in the will itself, or to aid in making a will which the testator intended to but did not in fact make. This rule is applied especially where the language of a will is plain and unambiguous. However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution." 28 R. C. L. 268, sec. 243.

A testator, after providing legacies for her children left "all the rest, residue and remainder of my *personal estate* (italics ours) to my husband." At her death her personal estate was valued at $4,729, and her real estate at $15,500. In a suit to construe this residuary clause the trial court provisionally admitted parol evidence for the advice of the supreme court of errors showing that husband and wife had made mutual wills and had instructed the scrivener of both wills, including the one in question, so that, with the exception of the legacies to the children, the real estate as well as personal property should go to the surviving spouse. It was held by the supreme court of errors of Connecticut that this evidence was inadmissible to include the real estate in the residuary clause and it was distributed as intestate estate. The opinion is supported by an unbroken line of decisions of that court. *Stearns v. Stearns,* 103 Conn. 213.

A very similar situation arose in Iowa and was the subject of an opinion by Judge Deemer. The testator devised an undivided one-fifth of specifically described real estate to his five daughters and gave "insignificant bequests" to each of his two sons. Later a contest arose between some of the daughters and the two sons. The trial court held with the daughters to the effect that the real estate passed to the daughters under the will. The supreme court reversed the judgment, holding "that the will gave testator's daughters collectively only one-fifth of the real estate described thereby, and as to the other four-fifths of such real estate testator died intestate." The judgment awarded the appellant son his one-seventh of the land not devised by the will and gave him four thirty-fifths of the land. In the third point of the syllabus it is said: "Where there is no ambiguity or uncertainty in a will, testator's intent must be gathered from the will itself, and parol evidence is only admissible for the purpose of affording light whereby what is in the will may be understood and applied, and cannot be received to give the will operative elements, language, or provisions, nor to correct a mistake

in the will or to make a new will for the parties." *Gilmore v. Jenkins*, 106 N. W. 193 (129 Ia. 686).

Citations could be multiplied showing the application of the rules in the same manner as heretofore exemplified. There seems to be no question as to the correctness of these decisions and that, therefore, the trial court erred in holding that the land passed to the appellee under the will. There can be little doubt, from the fact that testator and wife lived together, that she was the natural object of his bounty and that he should have devised the real estate in question to her. Probably he intended to do so but, through the fault of the scrivener, did not. However, these questions cannot be left to speculation or to an otherwise worthy and humane impulse to make for him the will which he should have made or intended to make. But this we are unable to do in this instance without leveling the barriers to fraud and perjury in a multitude of cases to follow adoption of the rule contended for by appellee in this case.

The rule is different where there is any description in the will in any wise referring to the beneficiary, as, for example, "wife," "son," "daughter," or other relative. Where there is sufficient reference in a will to identify the beneficiary—if, for example, a legacy is given by a testator to his "brother John," and it appears from parol or otherwise extrinsic evidence that he had but one brother whose name was James—the latter may be permitted to take, because the description of "brother" in such case would alone be sufficient, and the name may be rejected as surplusage. 28 R. C. L. 220, sec. 181. There must be a basis, found within the four corners of the will, upon which to place an interpretation, before extrinsic evidence may be used to aid the discovery as to what the testator really intended.

Where a testator, in a clause of his will devising real and personal property, omits the beneficiary either by name or by any other reference, and nowhere in the will is there any means of discovering the identity of the in-

tended beneficiary, parol or extrinsic evidence cannot be received to determine that fact.

The judgment of the district court is reversed, with directions to enter a decree in harmony with this opinion; that is, providing for the distribution of the estate, other than the two valid bequests, as intestate estate.

REVERSED.

SUSAN E. REYNOLDS, EXECUTRIX, ET AL., APPELLEES, V. JOY M. WARNER ET AL.: MARY A. REYNOLDS, APPELLEE: COURTRIGHT, SIDNER, LEE & GUNDERSON, INTERVENERS, APPELLANTS.

FILED JANUARY 30, 1935. No. 29029.

1. **Attorney and Client**: LIENS. An attorney has a general, retaining or possessory lien upon all papers of his client coming into his hands in the course of his professional employment.
2. ———: ———. Possession is essential to the creation and existence of an attorney's possessory lien and ends with surrender of possession.
3. ———: ———. An attorney has a lien for a general balance of compensation upon money in the hands of an adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.
4. ———: ———. Under section 7-108, Comp. St. 1929, an attorney's charging lien is confined to fees and costs due for services rendered in the particular case in which it is sought to enforce the lien.
5. **Pleading**: MISJOINDER. Where there is a misjoinder of causes of action apparent on the face of the petition, failure of adverse party to challenge such misjoinder of causes by a proper pleading waives the defect.
6. **Equity**. Where there is no equitable relief granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action.
7. **Jury**. The constitutional right to a trial by jury cannot be defeated by an allegation of an equitable cause of action which does not exist.

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

Courtright, Sidner, Lee & Gunderson, pro se.

Cook & Cook and *G. P. Kratz, contra.*

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

DAY, J.

The executors of the estate of Cassius S. Reynolds by their attorneys Courtright, Sidner, Lee & Gunderson, the interveners here, commenced a suit to foreclose a mortgage on real estate against Warner in Cheyenne county. This asset was assigned to Wilson B. Reynolds, Cassius J. Reynolds and their sister. The sister assigned it to her two brothers. The assignments were placed in the hands of the interveners as attorneys with instructions to proceed with the case. The attorneys filed a lien for fees and expenses in this case and for fees in other cases in Dodge county. The Reynolds brothers then assigned their interest in the decree to their mother, who was made an additional defendant upon a petition of intervention by the attorneys to enforce an attorney's lien. The fees in the Cheyenne county foreclosure case were paid. A small amount was due for costs and expenses at the time this petition of intervention was filed but was paid prior to the taking of any depositions in the case. In their answer, Reynolds brothers alleged that all fees were paid and that they stood willing to pay the expenses upon receiving information as to the amount; that the court was without jurisdiction to decree that the interveners are entitled to a lien upon the amount owing on said decree for fees claimed to be earned in Dodge county cases; that the interveners were not entitled to any fees for that the interveners wrongfully abandoned the case at a critical stage to their damage. The Reynolds brothers prayed judgment against the interveners for the damages sustained by the wrongful abandonment of the case by the interveners.

The interveners filed an answer to cross-petition in which they alleged that terminating their employment was not wrongful; that they withdrew as attorneys for Reynolds brothers in the Dodge county case because they had not been paid, and the financial condition of the Reynolds brothers was such that it did not seem likely that they would be paid; that the Reynolds brothers were not damaged by the action of the interveners.

The trial court held that an attorney cannot enforce an attorney's lien upon money in the hands of an adverse party other than for services performed by him in that particular case and that the fees claimed for services rendered in cases in Dodge county could not be enforced as a lien in this Cheyenne county case; that the fees in the Cheyenne county case were paid prior to filing the petition of intervention and that the costs and expenses were paid before the expense of taking depositions had been incurred; that the court could not enter a judgment for the reasonable value of attorney fees in the Dodge county cases for that it did not have jurisdiction to enter a judgment.

This case presents two issues for our determination: First, are the interveners entitled to a lien upon the amount owing by Warner on the judgment in Cheyenne county for fees claimed in Dodge county cases? Secondly, if the first issue is decided in the negative, are the interveners entitled to a judgment in this case against Reynolds brothers for fees claimed in Dodge county cases?

An attorney's lien upon a judgment obtained by him is allowed and regulated by statute. *Vanderlip v. Barnes*, 101 Neb. 573. Section 7-108, Comp. St. 1929, provides for an attorney's lien as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

The interveners did not have what is often termed a possessory lien for fees in this case. True, they did at one time have in their possession the assignments of the mortgages in their possession, but they filed them in making proof for the purpose of securing the decree of foreclosure. An attorney has a general, retaining or possessory lien upon all papers of his client coming into his hands in the course of his professional employment. But such a lien depends upon possession and attaches only to papers actually in his possession. He cannot enforce by action such a lien upon a note or other obligation to pay money, because the lien attaches only to the evidence of the debt and not to the money in the hands of the debtor. *Cones v. Brooks,* 60 Neb. 698. Where an attorney files papers in his possession in court for the purpose of procuring a judgment, he surrenders his right to possessory lien. He has his choice of action at the time, either to retain the papers and his lien or to give up the papers and surrender his lien. A recognized authority states the rule substantially to be that "possession is essential to the creation and existence of an attorney's retaining lien and it expires when he parts with the possession." 2 R. C. L. 1065, sec. 153. Now, in the case at bar, the interveners, as attorneys for Reynolds brothers, claim a general or possessory lien on the fruits of the litigation, because they had such a lien upon the evidences of the debt. No such lien was created, but interveners lost their lien by parting with possession of the papers.

The interveners had then, if anything, only a so-called "charging lien" on the money due from Warner on the decree of foreclosure. Does the statute give an attorney a charging lien upon money in the hands of an adverse party for a general balance of compensation for services rendered in other cases? Taking from the statute the words applicable to the situation we have: An attorney has a lien for a general balance of compensation upon money in the hands of an adverse party in an action or proceeding in which the attorney was employed from the

time of giving notice of the lien to that party. It shall be a lien for general balance of compensation upon money in the hands of the adverse party for services rendered in an action or proceeding. The statute does not give an attorney a lien for services rendered in other cases or for any fees not connected with the case. Ordinarily, the charging lien is confined to the fees and costs due for services rendered in the particular suit in which the judgment was recovered. We have examined many cases, including those cited by the parties. The statutes of the various states are different. In some, the statutes provide for an attorney's lien which is not limited to compensation for services rendered in the particular case, while the others limit the recovery under the lien to the services rendered in the particular case. This court is unanimously of the opinion that our statute limits recovery under an attorney's lien to services rendered in the particular case. In *Ahalt v. Gatewood,* 109 Kan. 328, the plaintiff filed an action with one attorney in Kansas and another in Missouri against the same defendant on the same cause of action. The defendant settled the case in Missouri after notice of the attorney's lien in the Kansas case. But the lien was enforced in the Kansas case for the attorney in that case.

The only case to which our attention has been directed which squarely held that an attorney has a charging lien against a judgment in one case for fees for services rendered in other cases is *Fillmore v. Wells,* 10 Colo. 228. But the statute in that case provided in unmistakable terms for such a lien.

In *Cheshire v. Des Moines City Ry. Co.,* 153 Ia. 88, the determining factor was the sufficiency of the notice to the adverse party. The lien was enforced in the same case in which the services were rendered.

The general balance of compensation for which a lien is given by our statute is that for services rendered in the case in which the lien is sought to be enforced. The dearth of authorities directly in point suggests that the claim that an attorney has a charging lien for fees for

services in other than the particular case has not been frequently asserted.

In view of our determination that the attorneys do not have a charging lien for services except those rendered in the case in which a lien is sought to be enforced, it is necessary to consider if the court should have entered a judgment in favor of interveners against Reynolds brothers. Where there is a misjoinder of causes of action apparent on the face of the petition, failure of adverse party to challenge such misjoinder of causes by a proper pleading waives the defect. *Porter v. Sherman County Banking Co.*, 36 Neb. 271.

But in the instant case, the misjoinder, if any, was not apparent from the pleadings. The petition of intervention alleged a lien for fees for services and asked equitable relief. The answer denied the allegations of the petition as to any fees being due and challenged the right to a lien, even if due. The answer then alleged in effect that if the court found any fees due and interveners entitled to a lien that they should be allowed a credit in the nature of a recoupment for damages arising from a breach of the contract of employment. The answer did not ask for a money judgment against interveners. There was no waiver of a defect of causes because not apparent. The issues as formed by the pleadings did not present a misjoinder of causes. The Reynolds brothers alleged damages and asked that they be set off against any amount the court found was due as attorney's fees for which a lien was allowed.

Furthermore, the Reynolds brothers at the beginning of the trial objected to the introduction of depositions relating to the value of services of the attorneys, unless the court find that there was a lien for fees in the Cheyenne county case, for that, if there was no equitable relief granted, they demanded a trial by jury on that issue. This preserved their right to a jury trial upon an issue in a law action.

When the trial court determined that the interveners were not entitled to equitable relief, the court was without

power to determine the legal action without the intervention of a jury. It is a general rule that, where a court in the exercise of its equity powers acquires jurisdiction for any purpose, its jurisdiction will continue for all purposes, and it will try all issues. *Seng v. Payne*, 87 Neb. 812; *Bank of Stockham v. Alter*, 61 Neb. 359. But where there is no equitable relief granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action. This is especially true where such a course would operate to deprive a party of his constitutional right to a trial by jury. The constitutional right to a trial by jury cannot be defeated by an allegation of an equitable cause of action which does not exist. See 1 Pomeroy, Equity Jurisprudence (4th ed.) secs. 237, 238; *Stockhausen v. Oehler*, 186 Wis. 277. The interveners were not entitled to equitable relief in this case, and the parties did not waive their right to a jury trial upon the question of the amount, if any, due interveners. In truth, they demanded a jury trial, and the court properly refused to try these issues without a jury, but dismissed the interveners' petition without prejudice to an action at law.

The judgment of the trial court is

AFFIRMED.

DELMAR W. HAMMOND, GUARDIAN, APPELLEE, V. JACOB KEIM, DOING BUSINESS AS KEIM CONSTRUCTION COMPANY, ET AL., APPELLANTS.

FILED JANUARY 30, 1935. No. 29183.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY.** When an employee abandons his job and takes another, and while going to get his tools from the old job is killed, recovery cannot be had from his former employer under the workmen's compensation act, where such employer had no duty or obligation in connection with the return of such tools.
2. ———: ———: ———. If the employee's private business creates the necessity for a trip which would not have been

undertaken otherwise, injury occurring on such trip is not compensable, even though at the time he was doing an errand for his former employer, such fact being but incidental to, and not the primary purpose of, the trip.

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

Sanden, Anderson & Gradwohl, for appellants.

Max G. Towle and *Lester L. Dunn, contra.*

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

PAINE, J.

This is a suit in which Delmar W. Hammond, as guardian and next friend, seeks to recover under the workmen's compensation law for the death of his father-in-law.

Immediately prior to May 26, 1930, on which date he received injuries which resulted in his death, Ed Linquist, hereinafter called the deceased, had been employed by Jacob Keim, doing business as Keim Construction Company, in superintending the construction of a building at Tecumseh, Nebraska, for which he was being paid $1.50 an hour. Deceased was a widower, and left one adult son and an adult daughter, being the wife of the plaintiff, two minor sons, and three minor daughters.

It is unusual to find the facts so little in dispute as they are in this case. On Saturday, May 24, 1930, shortly after noon, the deceased, with two other employees, George Holstein and Robert E. Lee, who also lived in Lincoln, left Tecumseh for Lincoln, where the three were to spend their week-end. Monday morning the deceased informed the other two that he had taken a new job of the construction of a building for Freadrich Brothers at University Place, which job he was to begin at once. He directed Holstein to take his place in completing the building at Tecumseh for the defendant, turning over to Holstein at the same time the defendant's books that he kept as foreman. He notified Lee that he wanted to employ him to start to work

with him at once upon this new job at University Place, and Lee accepted. He stated that he would go right at this new job, and would drive at once to Tecumseh to get his mortar-boxes, shovels, wheelbarrow, and tools, and bring them all back to University Place. Deceased got some rope, which he would need to tie the mortar-boxes onto the truck, and took a truck which he had contracted to buy. Before the deceased had left Tecumseh on Saturday afternoon, Jacob Keim, the defendant, had said that he would like to have certain stair-railing, and also some muriatic acid to wash down and clean the walls of the building about completed, and Keim had requested that the stair-railing and acid be ordered to be shipped by freight from Lincoln, the acid not being needed until late the following week. Lee ordered the stair-railing shipped by freight, and Holstein, who was to take the place of the deceased on the Tecumseh job, decided to drive his own car to Tecumseh, so he would have it to return when he had finished the job, and would have taken the acid down to Tecumseh in his own automobile, but, as it was a new car, and the upholstery would be ruined if the acid splashed, it was finally decided, as the deceased had to go down with his truck to get his tools, to load the jug of acid into the truck of the deceased.

After ordering the stair-railing at the Hedges foundry, the parties started for Tecumseh, with Holstein in his own car, accompanied by the deceased, and Lee driving the truck, in which Mr. Conner also rode. The deceased said they were driving his truck too fast, and had Holstein overtake them just out of Bennet, and the deceased then "bawled" Lee out for driving the truck too fast, and Lee then transferred to the car and deceased rode in the truck, with Conner behind the wheel, the truck following the car. The car and truck soon passed a road maintainer, and in getting back toward the center of the road the truck suddenly went in the ditch and rolled over. The deceased was injured, and was brought to a hospital in Lincoln, where he died.

Jacob Keim testified that he did not request the deceased to bring the acid to Tecumseh, but asked him to have it shipped to Tecumseh, and testified further that the deceased had nothing to do with furnishing material or delivering material, and that all of the other material for the job had been shipped down, and nothing had been hauled by the deceased.

It is insisted by appellants that a compensable injury can only arise while a workman is engaged in or about the premises where his duties are being performed, or where his service requires him to be at the time of the injury and during the hours of service as such workman, and that the accident must arise out of and in the course of the workman's employment. Comp. St. 1929, sec. 48-109.

"Personal injuries arising out of and in the course of employment" covers workmen only when engaged in, on, or about the premises where their duties are being performed, or where service requires their presence during their hours of service as such workmen. Comp. St. 1929, sec. 48-152.

Many cases can be found in other states which throw light upon the case at bar, even though the facts are somewhat different. Let us examine three of these.

In *Edmonds v. Industrial Commission,* 350 Ill. 197, a maid working in the Edmonds home at La Grange, Illinois, was given her Saturdays off after breakfast. On Saturday evening, as she was starting to go out to earn some extra money for herself by taking care of some children in another home, she fell downstairs in the Edmonds home and was injured. It was held that the accident did not arise out of or in the course of her employment, although Edmonds' daughter was ready to drive her over to this other place.

In *Matter of Marks v. Gray,* 251 N. Y. 90, the deceased was a young plumber's helper at Clifton Springs, New York. His wife was visiting relatives at Shortsville, and he had promised to go and get her after his work for the

day was completed. Learning of this, his employer asked him to take his tools along and fix some defective faucets in a dwelling in Shortsville, which work would take him less than 20 minutes. The deceased drove his own or his father's car, and not the plumbing truck, and was killed in a highway accident. He would have been paid for his time if he had fixed the faucets. Chief Justice Cardozo said in his opinion: "He was not making the journey to Shortsville at the request of his employer or for the purpose of doing his employer's work. * * * If word had come to him before starting that the defective faucets were in order, he would have made the journey just the same. * * * We hold that Marks was not placed upon the highway by force of any duty owing to his employer, and that the risk of travel was his own."

In *Barragar v. Industrial Commission,* 205 Wis. 550, a traveling salesman, while bringing his family back from a vacation, was killed in a highway accident. It was held not compensable, even though he had taken along some accounts of his employer for collection. This decision is based upon the ground that the employee's trip proceeded on his own business, and he was on that business when killed, and not on any detour occasioned by the master's business.

The situation is not entirely new in our Nebraska opinions. In *Pappas v. Yant Construction Co.,* 121 Neb. 766, it was held that, where an employee was injured while working upon his truck at his home, a considerable distance from the place of employment, his injuries did not arise out of and in the course of his employment.

In *Pensick v. Boehm,* 124 Neb. 28, this court held that the evidence did not establish that the claimant was in the employ of the defendants at the time of the alleged accident, the contract of employment having terminated on March 8, and the accident having occurred on March 11, 1931.

In the case of *Babcock v. School District,* 123 Neb. 491, Babcock, as superintendent of the Cedar Bluffs school,

made a trip to Omaha on Saturday in his own automobile, and while there ordered certain supplies for his school from the Omaha School Supply Company during the noon hour. He devoted the rest of the day to his own personal affairs, and the accident occurred at about 9:30 p. m. while he was driving home from Omaha, and it was held by this court that this evidence was insufficient to prove that the accident arose out of and in the course of his employment.

In *Hall v. Austin Western Road Machinery Co.*, 125 Neb. 390, it was held: "A compensable injury can only arise while the workman is engaged in, on or about the premises where his duties are being performed, or where his services require his presence as a part of such service at the time of the injury and during the hours of service as such workman."

Other Nebraska cases in point are: *Perry v. Johnson Fruit Co.*, 123 Neb. 558; *Siedlik v. Swift & Co.*, 122 Neb. 99; *Kresl v. Village of Dodge*, 121 Neb. 882.

The appellee cites, in support of the judgment he obtained, *Speas v. Boone County*, 119 Neb. 58, and *Struve v. City of Fremont*, 125 Neb. 463. These cases are not controlling in the case at bar, where the evidence clearly shows the deceased had terminated his employment.

In a late case two young employees of a department store, planning a social trip to a near-by town on Sunday, were asked by the manager to bring certain goods back from the warehouse. The court made a distinction between the primary purpose of their trip and the bringing of the goods, which was merely incidental, and held that the deaths of the two employees did not arise out of and in the course of their employment, it being obvious, said Justice Adams, that from Saturday night until Monday morning the relation of employer and employee was terminated. *Ridout v. Rose's Stores*, 205 N. Car. 423.

In the case at bar, the deceased had entered upon a new job energetically, and was engaged in a trip to get his tools for that purpose. The mere fact that, through a

combination of circumstances, he happened to have some acid belonging to his former employer in the truck at the time of the accident does not reestablish the former relationship between them. Deceased would not have made the trip if someone else had brought his tools to University Place, but he would have made the trip just the same if the acid had not been placed in his truck. The primary purpose of this trip was to bring the tools of the deceased, in which his former employer had no interest.

We are not unmindful of the great loss suffered by the orphaned children in the accidental death of their father, and sincerely deplore it, but we feel compelled to hold that the compensation law, even when very liberally construed in the interests of the plaintiff and those represented by him, does not provide for payment under the undisputed facts in this case. The judgment of the trial court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF CHARLES BOSCHULTE.
FRED BOSCHULTE ET AL., APPELLEES, V. H. W. SCHOETTGER, EXECUTOR, APPELLANT.

FILED JANUARY 30, 1935. No. 29444.

Bill of Exceptions. *Held*, that under section 20-1140, Comp. St. 1929, a trial court is authorized, upon a satisfactory showing of diligence, to enter an order for additional time, not exceeding a total of 80 days from the adjournment *sine die* of that term of court, for the service of the bill of exceptions upon the adverse party, and that such order may be made during such additional time allowed, and after the first 40 days have expired.

APPEAL from the district court for Washington county: CHARLES LESLIE, JUDGE. *Motion to quash bill of exceptions overruled.*

Montgomery, Hall & Young, for appellant.

Abbott, Dunlap & Corbett and *Harry E. Stevens, contra.*

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

PAINE, J.

This cause was presented to the court upon an oral argument on a motion to quash the bill of exceptions for the reason that the trial judge entered an order for an extension of time for preparing and serving the bill of exceptions after the first 40 days had expired.

A decree was entered in this case in the district court for Washington county on August 20, 1934, and on September 10, 1934, the motions for new trial were overruled, said entries being made in the March, 1934, term of the district court for Washington county, which term adjourned *sine die* on September 24, 1934. The bill of exceptions filed herein was served upon appellees on November 16, 1934. An application for an extension of time within which to prepare and serve such bill of exceptions was made to the trial court on November 13, 1934, being more than 40 days, to wit, 50 days, after the adjournment of the term of court. In support of their motion to quash the bill of exceptions, appellees contend that after the expiration of 40 days after the adjournment of the term of court the district court is without jurisdiction or authority to extend the time for the preparation and service of the bill of exceptions.

In support of the motion, appellees cite 4 C. J. 282: "(c) Time for Making Order. An order extending the time within which to present, settle, sign and file a bill of exceptions may be made during the trial, at the time of ruling upon the motion for a new trial, or when the cause is properly on the docket for the purpose of settling the bill; but the time for settlement, signing, or filing a bill of exceptions cannot be extended by an order made after the time prescribed by statute, or previously granted by the court, has expired."

They also cite *Pieser v. Minkota Milling Co.*, 78 N. E. 20

(222 Ill. 139) which holds: "Where, on the entry of a judgment on June 22d, 30 days was allowed within which to file a bill of exceptions, but none was filed within that time, an order entered on August 13th *nunc pro tunc* as of July 22d, allowing additional time for filing the bill of exceptions, was void."

Appellees insist that, under our Nebraska statute, after 40 days after the adjournment of a term of court the district court has lost authority to make any order in reference to an extension of time, and that any order for additional time must be made prior to the expiration of the first 40 days, and insist that the court is without jurisdiction to make an order extending the time within which the bill of exceptions may be presented, and cite the above authorities in support of this holding.

Section 20-1140, Comp. St. 1929, provides that the appellant must, within 40 days from the adjournment *sine die* of the term of court at which the judgment is rendered or the motion for a new trial ruled on, submit a bill of exceptions for examination and amendment to the adverse party, and that, if the party has used due diligence and has failed to secure a settlement and allowance of the bill of exceptions, it shall be competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time allowed, but not beyond 40 days additional. In addition to these 80 days, the same section provides that the party to whom the bill of exceptions is submitted may propose amendments within 10 days after the submission to him, and that such bill of exceptions must within 10 days thereafter be presented to the judge upon five days' notice to the adverse party, at which time the judge shall settle the bill of exceptions. In those cases where a 40-day extension has been duly allowed, then the statute allows a total period of not exceeding 100 days from the adjournment *sine die* of that term of court to have the bill of exceptions settled by the trial judge. In the early cases in Nebraska it appears that at times these definite limits were not closely followed.

But in the recent decisions it has been held jurisdictional that the bill of exceptions must in any event be signed and allowed by the judge within the 100 days granted. The question in this case is whether the application and order granting an additional 40 days must be made within the first 40 days, or can be made thereafter.

It is entirely possible in any case that an official court reporter, in perfect good faith, may have given every assurance to counsel for the appellant that he will have ample time to complete and deliver the bill of exceptions to him within the first 40 days; then, at the last moment, by reason of sudden sickness, or by the calling of a special term of court, which he is required by law to attend, and which he had no reason to anticipate, he finds himself unable to deliver the bill of exceptions within the first 40 days.

It is clearly within the provisions of the statute that, if due diligence is shown to the satisfaction of the trial court, the judge has the power to grant an additional 40 days. In our opinion the trial court had the right, upon the showing presented in this case, to issue an order 53 days after the adjournment of the term *sine die*, granting an additional 40 days, to take effect from the expiration of the first 40 days.

We have been unable to find that this exact point has been passed upon by this court, but decisions have indicated that such might be the holding, and the limit of 100 days is the only definite time which has been held jurisdictional. *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290; *Walker v. Burtless*, 82 Neb. 211; *Shaw v. Diers Bros. & Co.*, 124 Neb. 119; *Chapman v. Person*, 126 Neb. 340. We find no Nebraska opinion to the contrary of our holding herein. It is, therefore, ordered that the motion of the appellees to quash the bill of exceptions be overruled.

MOTION OVERRULED.

WACHOB, BENDER & COMPANY, APPELLEE, V. OMAHA LIFE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 30, 1935. No. 29067.

1. **Statute of Frauds.** Where plaintiff, a broker, purchased for the defendant, at defendant's request, certain school bonds, and at the request of the defendant advanced the funds necessary to pay the purchase price, under an agreement that the defendant would take up the bonds and pay therefor within sixty days, such dealing between said parties did not constitute a sale of the bonds by plaintiff, the broker, to the defendant; said broker in such transaction acting as defendant's agent, the statute of frauds (Comp. St. 1929, sec. 69-404) has no application to said transaction.
2. **Corporations: PURCHASE OF BONDS: ESTOPPEL.** In such case, though the minutes of the proceedings of the board of directors did not show that any committee was ever appointed by said board of directors under section 44-314, Comp. St. 1929, charged with the duty of investing or loaning the funds of the company, the board of directors having knowingly permitted the president to perform the acts that would naturally devolve upon such a committee, and having to all intents and purposes recognized its president as such a committee, in the course of his dealings on behalf of the defendant, with the plaintiff, in similar transactions extending over a period of about four years; and the plaintiff through such previous dealings, knowing of the system of the company in the purchase of bonds, and relying thereon, in good faith having parted with value for the benefit of the defendant, such transaction was not void but at most voidable, and *held*, under the facts in this case, that the defendant is estopped from denying, as against the plaintiff, the authority of its president to purchase the bonds in controversy.
3. **Evidence** examined and *held* to sustain the finding and judgment of the trial court.

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

Brown, Fitch & West, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

ELDRED, District Judge.

This is an action brought by Wachob, Bender & Company, plaintiff and appellee, a corporation engaged in dealing in municipal and corporate bonds, as owner, broker and agent for others, in the district court for Douglas county, against Omaha Life Insurance Company, a corporation, defendant and appellant, engaged in life insurance business, to recover damages for losses sustained on account of the failure of the defendant to take up and pay for certain bonds purchased by plaintiff as agent and broker for the defendant. The amended petition alleges that the plaintiff purchased for the defendant, at the defendant's request, certain school district bonds of the face value of $30,000; that the plaintiff, at the request of the defendant, advanced the funds for the purchase of said bonds, in the sum of $30,797.43, under the agreement that they would be taken up and paid for by the defendant within sixty days; that the defendant failing to take up said bonds, as agreed, plaintiff thereafter sold the same for the aggregate sum of $26,000, being the market price and the highest available price for said bonds; the plaintiff sustaining a loss by reason thereof in the sum of $4,797.43.

The answer of the defendant denied that E. M. Searle, Jr., president of the defendant company, by whom it is claimed the bonds were purchased for the defendant, had any authority to make such purchase, and, further, that the alleged contract sued upon was within the statute of frauds, and void.

For reply, plaintiff denied that it had any knowledge of lack of authority on the part of Searle to make such purchase, and by way of estoppel alleged that, during a period of more than four years prior to the transaction in question, said Searle had purchased, on the defendant's behalf, of the plaintiff, bonds to the total value of $150,000, and that it relied upon such previous transactions in accepting the order of Searle for the purchase of the bonds involved herein.

At the close of the trial the defendant moved the court

to discharge the jury and enter a judgment of dismissal. The jury were thereupon discharged, and the court later, to wit, August 23, 1933, entered a finding and judgment for the plaintiff against the defendant for $4,797.43. The motion for a new trial was overruled and the defendant appeals.

In support of its appeal, the appellant, by its brief, presents four propositions of law for consideration.

First, it is contended that the contract is void under the statute of frauds (Comp. St. 1929, sec. 69-404) relating to contracts to sell or a sale of any goods or choses in action of the value of $500 or upwards.

Plaintiff's cause of action is not founded upon a contract of purchase and sale; but the foundation of plaintiff's claim is that the plaintiff was employed by the defendant, as agent or broker, to purchase for the defendant certain school bonds of the face value of $30,000, and at defendant's request advanced the necessary funds for such purchase under the agreement with the defendant, that the defendant would take said bonds and pay for them within sixty days. The trial court made special findings, two of which are as follows:

"The court specifically finds that the plaintiff herein as the agent or broker of the defendant purchased for the defendant and at defendant's request the bonds described in plaintiff's petition, and that the plaintiff, at the request of the defendant, advanced the funds for the purchase of said bonds, under the agreement of the defendant to take them up and pay for them in sixty days.

"The court finds that the plaintiff was not the owner of said bonds at the time, but thereafter purchased them for and on behalf of the defendant from Wheelock & Company, the then owners of said bonds."

The contract for the bonds was made in the office of the president of the plaintiff company, the negotiations being carried on between Frank J. Bender, on behalf of the plaintiff, and E. M. Searle, Jr., president of the defendant company, on behalf of the defendant, but in the presence

of James T. Wachob. The testimony of Bender and Wachob substantiates the findings of the trial court. E. M. Searle, Jr., who participated in the transaction, on behalf of the defendant, did not testify.

After full examination of the record, this court concludes that the clear preponderance of the evidence sustains the findings of the trial court above set forth.

The plaintiff, as agent of the defendant, purchased, at defendant's request, the school bonds involved herein for the defendant; and at the request of the defendant advanced the funds necessary to pay the purchase price under the agreement that the bonds would be taken up and paid for within sixty days. This did not constitute a contract of sale between the plaintiff and defendant, but a contract of agency; and, in such case, the statute of frauds (Comp. St. 1929, sec. 69-404) is not applicable. *Wiger v. Carr,* 131 Wis. 584; *Hatch v. McBrien,* 83 Mich. 159; *Libaire v. Feinstein,* 231 N. Y. Supp. 3; *Campbell v. Willis,* 290 Fed. 271; *London v. Smith,* 101 S. Car. 340; *Mason v. Spiller,* 186 Mass. 346.

By appellant's proposition of law number three it is urged: "An agent authorized to purchase property for his principal must not, except with the principal's full knowledge and consent, purchase the property from himself either directly or indirectly; and in accordance with this rule an agent employed to purchase cannot, without the principal's full knowledge and consent, purchase the property for himself and then resell it to the principal at an advance."

Such proposition does not arise in this case. The evidence would not justify a finding that the agent purchased the property bought for the defendant from itself. The last paragraph of the special findings of the trial court, heretofore set forth, which we have found to be sustained by a preponderance of the evidence, disposes of this contention.

Proposition of law number two, of appellant, is based upon the provisions of section 44-314, Comp. St. 1929, providing: "No investment, sale or loan, except loans on

its own policies shall be made, which has not first been authorized by the board of directors, or by a committee thereof, charged with the duty of investing or loaning the funds of the company."

From the testimony of the secretary-treasurer of the Omaha Life Insurance Company it appears that the minute book of the company does not show any action taken by its board of directors with reference to the purchase of the bonds involved herein, and the minutes do not show that E. M. Searle, Jr., president, or any other person, was authorized to purchase those bonds on behalf of the defendant, nor that the board of directors at any time constituted a committee of one or more persons delegated with authority to make investments in bonds. Mr. Searle, the president, handled primarily bonds and investments. From the testimony of the secretary-treasurer it appears that the general procedure was that E. M. Searle, Jr., president of the company, was the active officer who did the negotiating for the bonds, and prices to be paid, and then submitted it to the board of directors.

It appears from the evidence that for a period of more than four years prior to the transaction in question, and on a number of occasions during that time, Searle had purchased of the plaintiff for defendant, or authorized the plaintiff to purchase for the defendant, bonds aggregating more than $140,000; many of the bonds were purchased and paid for before any action was taken by the board of directors; that all such transactions were had with E. M. Searle, Jr., president, and none with the board of directors; and the bonds were paid for by the check of the Omaha Life Insurance Company.

It is urged by plaintiff that the investment by defendant in the school district bonds was one authorized by the provisions of section 44-310, Comp. St. 1929, and that the failure of the defendant, in the making of investments, to follow section 44-314, Comp. St. 1929, was a mere irregularity which did not, under the circumstances in this case, render the transaction void, and that ordinary rules of estoppel should apply.

The statute relied upon by the defendant provides no penalty; hence, under the facts in this case, the contract was, at most, voidable and not void. *State v. Farmers State Bank,* 112 Neb. 597.

The contract for the purchase of the school bonds was one which the defendant could lawfully make under said section 44-310, providing: "The capital, surplus and other funds, or any part thereof, of every domestic insurance company may be invested as follows: * * * In legally executed bonds, warrants and securities of any county, incorporated city, or any school district in any state of the United States, or in legally executed bonds, warrants and securities of any municipality in the Dominion of Canada, which has not defaulted in the payment of interest on any of its bonds, warrants or securities within three years last past."

The evidence discloses that there never had been any default in the payment of interest on the bonds. So, the situation is, that the defendant had authority to enter into the contract, but it was exercised in an irregular manner.

There is a clear distinction between contracts outside of the powers conferred upon corporations, and contracts within the general scope of the power conferred, but which have been irregularly exercised.

It appears well settled that, "A corporate transaction which is within the corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a certain class, is voidable only and is valid until avoided, not void until validated; the parties for whose benefit the requirement was enacted may ratify it or be estopped to assert its invalidity, and third persons acting in good faith are not usually affected by an irregularity on the part of the corporation in the exercise of its granted powers. Where the corporation has power to enter into the transaction, neither party to it, who has had the benefit of it, can set up as a defense that the legal formalities were not complied with or that the power was improperly

exercised. And the corporation will be estopped to deny that it did contract in the manner provided by statute as against other persons who have acted upon the assumption that the corporation has done what the law said it should do." 14-A C. J. 312. See *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 612; *Eastman v. Parkinson*, 133 Wis. 375; *G. V. B. Mining Co. v. First Nat. Bank of Hailey*, 95 Fed. 23; *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480.

Notwithstanding the minutes of the proceedings of the board of directors of the defendant do not show that any person or persons were ever appointed by the board of directors charged with the duty of investing or loaning the funds of the company, to all intents and purposes E. M. Searle, Jr., the president of the company, was recognized by the board of directors as a committee for that purpose. Plaintiff, through long-continued dealing with the defendant through said Searle, knew of the system of the company and relied thereon. The board of directors knowingly permitted Searle, its president, to perform the acts that would naturally devolve upon such committee. The board of directors having recognized the course of dealings of said Searle on behalf of the defendant in similar transactions with the plaintiff extending over a number of years, and the plaintiff having dealt with him in good faith and parted with value for the benefit of the defendant, the failure of the board of directors to have actually appointed the president of the company a committee for the purpose provided by section 44-314, Comp. St. 1929, does not make the transaction void but voidable only, and the rule of estoppel is applicable. The court holds that under the facts in this case the defendant is estopped from now contending, as against the plaintiff, that the transaction involved in the purchase of the bonds in question by E. M. Searle, Jr., its president, on defendant's behalf was unauthorized.

The defendant cites *Sturdevant Bros. & Co. v. Farmers & Merchants Bank of Rushville*, 69 Neb. 220, in support

of its fourth proposition of law: "The power of a corporation to make valid contracts is measured by its charter; and the scope of the authority of its officers and agents acting for it is limited, and a person dealing with such corporation is chargeable with notice of such limitations."

No issue is presented by the pleadings as to any limitation on the part of the officers of the company other than said section 44-314, and no evidence appears in the record as to the authority of the officers of the insurance company, as fixed by its charter and by-laws, other than said section 44-314. The question raised by this last assignment not being an issue herein, the authority cited in support thereof has no application.

The defendant having moved the court to discharge the jury, the findings made by the trial court are entitled to the same weight as the jury's verdict. On examination, the evidence is found to sustain the findings and judgment of the trial court. The judgment of the trial court is

AFFIRMED.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, APPELLANT, V. EDWARD WALKER, APPELLEE.

FILED JANUARY 30, 1935. No. 29075.

Master and Servant: WORKMEN'S COMPENSATION LAW. Neither the county court nor the district court have any original jurisdiction to determine the legality of a claim for compensation of an employee against his employer arising under the provisions of the workmen's compensation act.

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

Wells C. Jones, for appellant.

Hoagland, Carr & Hoagland, contra.

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

ELDRED, District Judge.

This action was originally filed in the county court of Lincoln county, by the Zurich General Accident & Liability Insurance Company, Limited, a corporation, as plaintiff, to recover from Edward Walker, defendant, premiums alleged to be due upon an employer's liability insurance policy, issued by said company, under the workmen's compensation law, to said Edward Walker. The defendant, Walker, filed an answer and counterclaim which, in effect, admitted the execution of the policy, and, in substance, alleged that about the 28th day of January, 1932, while plaintiff was insuring defendant under the workmen's compensation law, the defendant had in his employ one William Olson; that said William Olson, in the regular course of his employment, sustained an injury and was totally disabled until March 7, 1932; that he was treated by a physician on occasions up to April 4, 1932; that the reasonable value of medical services incurred was $117; that there became due $90 for the first six weeks of total disability, and $64 for 50 per cent. partial disability, or a total of $271, which plaintiff, as the insurer of the defendant, refused to pay, and the defendant became liable therefor, and was compelled to pay the same. Defendant alleges that under said policy the plaintiff agreed to pay promptly, to any person entitled thereto under the workmen's compensation law, the entire amount of any sum due, and sets out provisions of the policy providing for payment of compensation for injury imposed upon the employer, and for medical services, under the compensation law; and providing further, that the provisions of the workmen's compensation law shall be a part of the insurance contract.

A demurrer was filed by the plaintiff to the counterclaim, and, on adverse ruling, the question raised thereby was saved in the reply filed in that court, and was again carried forward and saved in the pleadings in the district court. The county court found against the defendant on his counterclaim, and the defendant appealed to the dis-

trict court. On September 9, 1933, the district court overruled plaintiff's demurrer to the defendant's counterclaim. Trial was had in the district court, without a jury, and on September 12, 1933, the court found there was due plaintiff from the defendant, on plaintiff's petition, $182.20; and further found that there was due defendant from plaintiff, upon defendant's counterclaim, $252.40. Judgment was entered on finding, in favor of the defendant and against the plaintiff, for $70.20, and costs. The motion of the plaintiff for a new trial being overruled, plaintiff has appealed.

The first question for consideration is: Was the action of the district court in overruling plaintiff's demurrer to defendant's counterclaim correct? The question raised by the demurrer, as well as by the other assignments of error involving rulings by the court during the progress of the trial, may be reduced to one proposition, that is: Did the county court, or the district court, on appeal from the county court, have any jurisdiction to determine the legality of the claim of William Olson against his employer, arising under the provisions of the workmen's compensation law?

Appellee, in his brief, states the issues presented as follows: "Whether or not Edward Walker's agreement with William Olson on the amount of compensation for which he was liable could be offset against the claim of the insurance company for premiums?" But the counterclaim does not plead that there was any agreement between said Walker and said employee as to the amount of said compensation, nor make any reference to an agreement of that character. Further, it is not alleged in the answer and counterclaim, nor does the evidence taken on the trial disclose, that the legality of the claim involved herein was ever presented to the compensation commissioner; or that the compensation commissioner made any award thereon, or that he approved any settlement between the defendant and his employee; nor was it alleged in said answer and counterclaim that a copy of any settle-

ment between the defendant and his employee, Olson, was ever filed with the compensation commissioner.

In the district court some evidence was offered as to settlement on amount of compensation, and the trial court made some findings thereon. The case has been briefed and argued in this court on the theory that a settlement was agreed upon between defendant and his employee; hence, though not made an issue by the pleadings, we will consider the case upon the pleadings and the evidence.

The question presented to this court involves the consideration of several sections of the workmen's compensation law.

Section 48-137, Comp. St. 1929: "All disputed claims for compensation or for benefits under this article must be submitted to the compensation commissioner for an award. If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court of the county in which the accident occurred."

Section 48-133: "All disputed claims for compensation or benefits shall be first submitted to the compensation commissioner, as provided in section 3680 (48-139)."

Section 48-120: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the compensation commissioner."

Section 48-136: "The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article: Provided, that a copy of such settlement shall be filed with the compensation commissioner, and no such settlement shall be binding unless in accord with the provisions of this article."

Section 48-140: "The amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability,

which may be commuted only upon the order or decision of the district court."

Section 48-141: "All settlements by agreement of the parties with the approval of the compensation commissioner and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment: Provided, however, no settlement shall be final unless it be in conformity with the provisions of this article, a finding of the compensation commissioner, the district court or any appellate court."

Section 48-147: "Every policy for the insurance of the compensation herein provided, or against liability thereof, shall be deemed to be made subject to the provisions of this act."

Sections 48-139 and 48-157 provide for procedure in cases of disputed claims.

From these provisions it would seem clear that the intention of the legislature was that the compensation commissioner should have exclusive original jurisdiction in handling the claims for compensation and medical services coming within the provisions of the workmen's compensation law; and to that end it is provided: "The compensation commissioner shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of article 8, chapter 35, Revised Statutes of Nebraska for 1913 (48-101 to 48-161), and any act or acts amendatory thereof." Comp. St. 1929, sec. 48-157.

We have been cited to no provision in the workmen's compensation act giving the county court jurisdiction of such matters under any circumstances. The district court appears not to have been given any jurisdiction, except as provided in the foregoing quotations from said workmen's compensation law; none of which applies to the situation involved in this case.

The authorities cited by appellee in his brief on this question are clearly distinguishable from the case at bar. *Bailey v. United States Fidelity & Guaranty Co.*, 99 Neb. 109, and *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, were proceedings involving the approval of lump sum settlements, under section 48-140, Comp. St. 1929, and the court held, in effect, that such settlements could be consummated upon agreement of the parties, with the consent of the district court. But both of these cases arose prior to the amendment of said section made in 1917 (Laws 1917, ch. 85, sec. 16). At the time involved in those cases section 48-140 did not contain any requirement that the agreement to consummate should be "with the approval of the compensation commissioner," which clause was inserted in said section at the place where it now appears in the foregoing excerpt therefrom by the amendment of 1917.

We have not been cited to any authority holding that since said amendment the approval of the compensation commissioner was not necessary.

Perry v. Huffman Automobile Co., 104 Neb. 211, also cited by appellee, was modified on rehearing, and another opinion written, which appears in the same volume, beginning on page 214, in which the necessity of submitting proposed settlements to the compensation commissioner for his approval is recognized.

The case of *Otis Elevator Co. v. Miller & Paine*, 240 Fed. 376, is also cited by appellee. The cause of action arose in 1915; the opinion was filed in 1917, and involved sections 48-118 and 48-139 of our workmen's compensation law as they existed prior to recent amendments.

All of these sections have been materially amended since that opinion was written. To section 48-136, has been added the clause, "Provided, that a copy of such settlement shall be filed with the compensation commissioner, and no such settlement shall be binding unless in accord with the provisions of this article." And section 48-139 has been amended by changing the words at the

beginning of the section, "Either party may file in the district court a verified petition," so as to read, "Either party may file with the compensation commissioner a verified petition."

It is suggested in the appellee's brief that section 48-136 does not say that a settlement must be agreed to by the compensation commissioner, but that copy of settlement should be filed with him. However, that section does say that no such settlement shall be binding unless in accord with the provisions of this act. When that section is considered in connection with sections 48-140 and 48-141, it seems clear that any settlement, to be in accord with the provisions of that article, should have the approval of the compensation commissioner, and if not so approved it would not be final. In the instant case, however, the settlement, if one was agreed upon, was not even filed with the compensation commissioner.

Neither the county court nor the district court had any original jurisdiction in this case to determine the legality of the claim of the defendant for compensation for his employee under the workmen's compensation law. Under the issues as made by the counterclaim, and under the evidence, the finding and judgment should have been in favor of the plaintiff and against the defendant on the defendant's counterclaim.

A number of other errors have been assigned, but in view of the conclusion reached as to the principal issues herein, they become immaterial. No objection, by cross-appeal or otherwise, has been made to the findings of the trial court on plaintiff's petition. The judgment in favor of the defendant and against the plaintiff on his counterclaim is reversed and the cause remanded, with directions to dismiss said counterclaim, and enter a judgment in favor of the plaintiff and against the defendant on the findings made on plaintiff's petition, with legal interest from the date of said findings, and costs.

REVERSED.

IN RE ESTATE OF THOMAS M. ALEXANDER. JENNY WHITLA, APPELLEE, V. OLIVER G. ALEXANDER, APPELLANT.

FILED FEBRUARY 8, 1935. No. 29136.

1. **Appeal.** The verdict of a jury in a law action, based on conflicting evidence, will not, ordinarily, be disturbed on appeal.
2. **Pleading.** It is proper to exclude proffered evidence relating to an issue not presented by the pleadings.
3. **Trial.** Error cannot be predicated on failure of the court to give requested instructions, where the court has fully and properly instructed the jury with reference to the issues.
4. **Appeal.** Error cannot be predicated on improper statements made by counsel in argument to the jury, unless objection is made thereto at the time, and a ruling by the trial court had thereon.

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

William A. Ehlers and *L. G. Nelson*, for appellant.

H. D. Curtiss and *William M. Ely, contra.*

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

GOOD, J.

This cause originated in the county court of Rock county in a proceeding to probate a written instrument as the will of Thomas M. Alexander, deceased. From an order of that court admitting the instrument to probate, Oliver G. Alexander, the only child of decedent, appealed to the district court, where a petition was filed, asking the probate of the instrument, and contestant filed objections thereto, on the ground of the mental incompetency of testator to make a will. A trial of the issue resulted in a verdict, and judgment thereon, for proponent. Contestant has appealed.

The principal assignment of errors relates to the sufficiency of the evidence to sustain the verdict.

Thomas M. Alexander was born in Scotland, came to

this country in his youth, later was married, and to this marriage was born one child, the contestant herein. Thomas M. Alexander lived in Rock county, Nebraska, for many years and was engaged in the ranching business. He accumulated considerable property and acquired a ranch of 1,600 acres. Several years before his demise he sold this ranch, receiving only a part of the purchase money, with which he purchased 640 acres of land. Subsequently, through failure of the vendee to pay for the ranch, Mr. Alexander became repossessed and the owner of the ranch. He lived with his wife until her death in the spring of 1931. Mr. Alexander died July 22, 1932. The will in controversy was executed March 16, 1932.

On behalf of contestant evidence of three physicians and of some other witnesses was introduced, tending to prove that Mr. Alexander was suffering from arteriosclerosis, and that his mental faculties were so impaired that he was incompetent to make a will. There was sufficient evidence on behalf of contestant to have sustained a finding, had one been made, to the effect that Mr. Alexander was incompetent to make a will. On the other hand, there was the evidence of a number of friends and acquaintances of Mr. Alexander, whose relations extended over a long period of time, many of whom had dealings and transactions with him, to the effect that they never observed anything in his demeanor, conversation, conduct or business transactions that would indicate that he was of other than sound mind, and that in their opinion he was of sound mind.

There was evidence that Mr. Alexander transacted his own business and managed his affairs successfully throughout the period of his life, until within a few weeks of his death; that a few months before he died he entrusted the management of his ranch to the two persons whom he designated as executors of his will, and gave them directions with respect to the rental and management of the ranch; that he kept the taxes on his property paid; that he collected interest and attended to renewal of notes;

that he sold and marketed his produce, collected pay therefor, and in no instance was there disclosed anything to indicate incompetency in his business transactions. Even the physicians who testified for contestant stated that Mr. Alexander was always prompt in paying his bills to them and never allowed them to run more than a very short time; that he knew the amount of his bills and did not wait for statements to be sent, but sought out the physicians and paid their bills, usually by check.

It is argued that the will, in itself, is indicative of incompetency and a disregard of the obligations which testator owed to his only child. In the will it is recited that testator had previously conveyed the 640-acre farm to his son Oliver; that he divided his property into 14½ shares, while, in fact, the shares bequeathed aggregate but 13½ shares. This is evidently an error in computing the number of shares. Of these shares one was devised to contestant, one to contestant's daughter, and, in addition, his household goods were given to the son and his daughter in equal shares. The remainder of his estate was bequeathed to various relatives of himself and his wife. To each of two nephews in Scotland who were deaf and dumb, and who were orphans, he devised two of the 13½ shares.

It must be observed that the law empowers any man of sound mind to make a will disposing of his property in the manner he sees fit, with certain limitations respecting the rights of the spouse. Comp. St. 1929, sec. 30-201. Here there was no surviving spouse. Mr. Alexander might have disinherited his son entirely if he were so disposed. That was his right. Such is the purpose of the law in empowering a man to dispose of his property by will. *Isaac v. Halderman,* 76 Neb. 823, 830. There may have been just reasons in the mind of Mr. Alexander for not giving a larger portion of his estate to his son.

From a consideration of the entire record, it is clear that a conflict of evidence is disclosed. In a law action, where the evidence is in conflict, the jury are the triers of fact, and their verdict, based on conflicting evidence, will

not be disturbed unless clearly wrong. We are convinced that reasonable minds might have drawn different conclusions from the evidence as to the mental competency of Mr. Alexander. There is ample evidence to support the finding of the jury. *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746; *Anderson v. Chicago, B. & Q. R. Co.*, 102 Neb. 497; *In re Estate of Lyell*, 116 Neb. 827.

Contestant contends that Jenny Whitla was not the real proponent of the will and that he should have been permitted to prove this fact before the jury. Mrs. Whitla was a niece of the testator and a legatee under the will; she signed the petition for the probate of the will in the county court, and also signed the petition in the district court, and was properly designated as proponent. There was no issue raised by the pleadings upon this question, and the court properly denied contestant's offer of proof upon the subject.

Contestant complains of the failure of the court to give certain requested instructions. The only issue for the jury's determination was the question of testator's mental competency. The court in its instructions stated the rule substantially as laid down by this court in *In re Estate of Gunderman*, 102 Neb. 590, and *Carter v. Gahagan*, 102 Neb. 404. The applicable law was correctly stated, and no error in this respect appears.

Contestant complains of prejudicial statements alleged to have been made by counsel for proponent in their arguments to the jury. The record does not disclose that any objection was made, or any ruling by the court sought thereon, and it is a well-established rule that such objection must be brought to the attention of the court and ruling had thereon as a requisite to a review of the question by this court.

The record appears to be free from prejudicial error. Judgment

AFFIRMED.

MINNIE I. ASHBY, APPELLEE, V. RICHARD C. PETERS ET AL., APPELLANTS.

FILED FEBRUARY 8, 1935. No. 29295.

1. **Banks and Banking**: LIABILITY OF DIRECTORS. Directors of a trust company may not delegate their responsibility, and are not excused from liability because they committed some of their duties to an executive committee, or to the directors of a wholly owned subsidiary of their corporation. They are held to that care which men of common prudence take of their own concerns.
2. **Corporations**: LIABILITY OF DIRECTORS. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon.
3. ———. A corporation has no thought or will of its own, and its every act is the act of the individuals who are running it.
4. ———: FRAUD. Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacity.
5. **Principal and Agent**: LIABILITY OF PRINCIPAL. "A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently." 1 Restatement, Law of Agency, 565.
6. **Corporations**: LIABILITY OF DIRECTORS. It is the duty of directors to know that material statements in bonds issued under their authority, as in the case at bar, and for the benefit of their company, are true. Such directors are liable for damages sustained by any one buying such bonds who relied upon the truth of such statements which are now proved to have been false when made.

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

Dorsey, Baldrige & Chew, John J. Ledwith, Frank E. Randall, Brogan, Ellick & Shoemaker, Wells, Martin, Lane & Offutt and *Virgil J. Haggart,* for appellants.

Howard Saxton and *Allen & Requartte, contra.*

Reed, Ramacciotti & Robinson and *George N. Mecham, amici curiæ.*

Heard before GOSS, C. J., EBERLY, DAY and PAINE, JJ., and CHAPPELL and LOVEL S. HASTINGS, District Judges.

PAINE, J.

The petition charged a conspiracy to defraud against certain named directors of the Peters Trust Company, of Omaha. The jury returned a verdict for damages against all defendants, upon which verdict a judgment was duly entered.

This is the second appearance of this case in this court, the first opinion being found in 124 Neb. 131, in which certain legal principles were settled.

The original petition in the case at bar was filed against the five directors of the Keystone Investment Company and of the Peters Trust Company, and against Alfred C. Kennedy, who was secretary of the Keystone Investment Company, and charged that these defendants conspired with certain other persons, who were connected as salesmen, or otherwise, in the handling of said bonds, to cheat, wrong and defraud the plaintiff by fraudulent representations made to purchasers of the Keystone Investment Company bonds.

At the first trial in the district court for Lancaster county the trial court directed a verdict for the defendants, and this court reversed that judgment on the ground that, the testimony being in direct conflict upon many material points upon which reasonable minds might draw different conclusions, the cause should have been submitted to a jury for their determination.

After this decision was released, and on July 1, 1933, the plaintiff filed an amendment and supplement to her original petition, which had consisted of 17 paragraphs, and the amendment and supplement to the petition added paragraphs 18 and 19, alleging that the Peters Trust

Company was the parent company of the Keystone Investment Company, which was its affiliate, and for the purpose of borrowing money for the benefit of the Peters Trust Company, without disclosing to the lenders of such money the fact that the Peters Trust Company was the actual owner of the leasehold, the Peters Trust Company acquired all of the 1,810 shares of the capital stock of the Keystone Investment Company.

The nineteenth paragraph alleged that James A. Sunderland, Willson O. Bridges, W. B. Tyler Belt, and another who was not served, were also parties to the fraud and conspiracy mentioned in the original petition, and were directors and stockholders of the Peters Trust Company, and conspired together with the other defendants for the purpose of defrauding purchasers of said bonds in the manner set out in the original petition; that is to say, all of the allegations of the original petition were, by general averment, made applicable to the three additional defendants.

Separate amended answers were filed by W. B. Tyler Belt, Willson O. Bridges, and James A. Sunderland, in which answers said defendants denied knowledge of any alleged fraud or conspiracy respecting the sale of the bonds to the plaintiff.

Trial was had in the district court for Lancaster county, and on April 18, 1934, the jury returned a verdict against all of the defendants in the sum of $2,068. A separate motion for new trial was filed by each of nine defendants, and each was overruled, and judgment entered. Notice of intention to prosecute appeal was filed by each defendant, and supersedeas bonds duly filed. Briefs were filed in this court by the plaintiff and appellee, while on behalf of the defendants and appellants briefs were only filed by the additional defendants, Sunderland, Belt and Bridges. These three defendants presented, in addition to their briefs, a printed abstract of the evidence, which has been of great value. It is indexed as to witnesses, stipulations, exhibits, and also as to the meetings of the stockholders,

directors, and executive committee, the briefs and such abstract making altogether some 700 pages of printed matter.

The facts may be briefly summarized as follows: A seven-story office building at the northwest corner of Seventeenth and Farnam streets in Omaha was known as the Bee Building. The fee of this property was owned by the Bee Building Company, and was encumbered with a first mortgage of $250,000 to the New York Life Insurance Company. On February 1, 1917, the Keystone Investment Company secured a 99-year lease on said building. The entire capital stock of the Keystone Investment Company was afterwards purchased for $181,000, paid by the Peters Trust Company, and 1,805 shares of it placed in the name of the Peters Trust Company, and five certificates, of one share each, were issued to five directors of the Peters Trust Company, although never at any time their individual property, but so issued simply to qualify them to act as dummy directors of the Keystone Investment Company, it being at all times wholly owned by the Peters Trust Company.

It has been held that where a share of stock in a corporation was transferred to a person for the purpose of qualifying him as a director in the corporation, he constituted what is commonly called a "dummy" director. *Hoopes v. Basic Co.*, 69 N. J. Eq. 679.

On May 8, 1919, the first bond issue of $400,000 was issued by the Peters Trust Company through its subsidiary, the Keystone Investment Company, to the Peters Trust Company as trustee, and sold to customers for $400,000, upon the property they had just purchased for $181,000. On May 17, 1923, the Peters Trust Company, through and in the name of the Keystone Investment Company, issued $400,000 of "refunding" bonds to take up its first issue of the same amount, maturing June 1, 1924. This refunding issue bore 6 per cent. interest from June 1, 1923, and matured June 1, 1933. These refunding bonds were each designated "Peters Trust Building Refunding

First Mortgage Real Estate Gold Bond." The plaintiff purchased $1,600 of these bonds during the years 1923 and 1924. It is charged by plaintiff that the Peters Trust Company owned the leasehold, but did not disclose the fact of its ownership to the purchasers, bearers, owners, or holders of the Keystone bonds.

On December 10, 1929, the Peters Trust Company filed a voluntary petition in bankruptcy, and on the same date was adjudicated bankrupt. On October 15, 1930, the Bee Building Company secured judgment for possession and restitution of the Bee Building premises in an action of forcible entry and detainer, founded upon the default in the payment of the rentals of the 99-year lease by the Keystone Investment Company, and on November 5, 1930, a decree was entered in the district court for Douglas county, canceling said lease and quieting title to the real estate in the Bee Building Company.

The interest upon the $400,000 issue of bonds of the Keystone Investment Company was paid promptly at the office of the Peters Trust Company up to and including the coupons due June 1, 1929, after which date the interest was not paid, and all of the bonds became absolutely worthless in the hands of their holders, including the plaintiff in this case.

James A. Sunderland, one of the defendants, testified that he was 73 years old, and had lived in Omaha over 50 years, during which time he had been an officer of the Sunderland Brothers Company continuously; that he owned 62 shares of stock in the Peters Trust Company, but that he never transacted any business with the company except in connection with his membership on its board of directors. The minutes of the stockholders' meetings show that he was elected a director each year from 1920 to 1925, but he testifies that he did not serve under the last election.

Dr. Willson O. Bridges testified that he practiced medicine in Omaha for 46 years until he retired in October, 1929. The minutes of the stockholders' meetings show

that he was elected a director of the Peters Trust Company from 1920 to 1926 inclusive.

W. B. Tyler Belt testified that he had lived in Omaha 50 years, and was president of the Northwestern Bell Telephone Company; that he owned stock in the Peters Trust Company, for which he had paid $14,133, and the minutes of the annual stockholders' meetings show that he was elected a director each year from 1919 until he resigned July 15, 1929.

These three are the only defendants filing briefs, and contesting the matter in this court. They call our attention to the fact that they were never officers nor directors of the Keystone Investment Company, and insist that they had nothing to do with the issuance of the bonds by the Keystone Investment Company, and that while they were directors of the Peters Trust Company the two corporations were separately officered and managed. These three defendants deny that they knowingly authorized or consented to the issuance of bonds containing any false misrepresentations.

They also insist that the plaintiff has failed to prove that any of them had any knowledge of the phraseology of the bonds, or of any statements or representations in them, until after they were sued by the plaintiff in July, 1933, and that the only mention of these bonds at a Peters Trust Company directors' meeting was at a meeting held June 30, 1923, six weeks after the bonds had been issued by the Keystone Investment Company, at which meeting the chairman of the executive committee of the Peters Trust Company reported to the directors that the executive committee had undertaken to sell the Keystone building refunding bond issue for a small commission.

These three defendants further contend that there was no fraud in the mere issuance of the refunding bonds, while the plaintiff alleges that the fraud was in so wording the bonds as to misrepresent their nature and security. Defendants insist that they should not be held liable upon the sole ground that they were directors of the Peters

Trust Company at the time the bonds were issued, and insist that this court must pass upon the question whether a director can be held individually liable for the fraud, failure of duty, or wrongful act of his corporation to a third person, or for the wrongful acts of other directors or agents of his corporation, of which he had no knowledge and in which he did not participate.

It will be necessary to examine the evidence in relation to these points. The records of the directors' meetings of the Peters Trust Company show that between January 27, 1920, and December 30, 1924, some 24 meetings were held, and of these meetings Mr. Sunderland attended some 17, and Dr. Bridges and Mr. Belt 18 each, showing that they were quite regular in their attendance for busy men, and the records show they were paid $10 for each meeting they attended. They also received dividends upon their stock, which were paid for a considerable period at the rate of 12 per cent. per year. The profits of the Keystone Investment Company were, of course, the property of the Peters Trust Company.

At the directors' meeting of March 30, 1921, provision was made for the executive committee to consist of seven members, and then followed this provision: "Regular minutes of the proceedings of the committee shall be kept by the secretary in a book provided for that purpose, which shall always be open for inspection by any of the directors."

It was shown that it was the custom of the chairman of the executive committee to take such minute book of the executive committee meetings and give a digest of its contents at the next meeting of the board of directors. When such report was made at the directors' meeting on March 30, 1923, Sunderland made the motion, and Belt seconded it, that the action of the executive committee be approved.

It appears that on May 7, 1923, a meeting of the executive committee of the Peters Trust Company was held, and a resolution was there adopted that the new $400,000 ten-

year bond issue, being the refunding issue of the Keystone Investment Company, should be made. On May 17, 1923, the Keystone Investment Company directors held a meeting for the same purpose, and at the meeting of the board of directors of the Peters Trust Company held June 30, 1923, when the defendants Belt, Bridges and Sunderland were all present, a detailed synopsis of all of the proceedings in the meetings of the executive committee was given to the board of all that took place in the executive committee for the three months prior to June 30, 1923. This included telling the board of directors that the new refunding bond issue of the Keystone Building Company was to be authorized as set forth in those minutes, and after such complete report was made, and on motion of Mr. Belt and seconded by Dr. W. O. Bridges, the report was approved and adopted. Mr. Sunderland testified: Q. 2807. "Well, what did he say that was to refund—or did you already know if he didn't say it? A. I don't think he said, but I knew it referred to the refunding of the leasehold bonds for $400,000." And in his next answer he said that he knew there was a $250,000 mortgage on the fee.

The three defendants contesting the case at bar rely, as did the other directors in the cases of *Ashby v. Peters,* 124 Neb. 131, and *Paul v. Cameron,* 127 Neb. 510, upon the defense that the bonds were prepared by the attorney for the Peters Trust Company, who attended to all of the details, including the language employed in the bonds themselves.

In the case at bar, the record shows that Belt, Bridges and Sunderland participated by giving their final approval in the directors' meeting by ratifying and approving the bond issue that was to be put upon the market.

The bonds were issued by the Keystone Investment Company, but that was merely another form of the Peters Trust Company, which owned all its capital. It was under the exclusive jurisdiction and control of the directors of the Peters Trust Company, and what they did upon any point was what governed. There is not the slightest

doubt that the real authority and power lay with the Peters Trust Company. Any man taking a position as director in the Keystone Investment Company took it with the knowledge that he was merely a figurehead to carry out the plans and purposes directed by the board of directors of the Peters Trust Company. What directors individually did when they voted to affirm the action of the executive committee and the Keystone Investment Company was their individual act, and the effect of it must be judged by what it did.

1. The defendants are charged with conspiring to defraud the plaintiff. The presumption is that all men act honestly, and therefore fraud is never presumed, but must be proved by the plaintiff. Fraud in Nebraska may be without scienter or knowledge. Where one makes misrepresentation of material facts without knowledge that the same is false, he may, under some circumstances, become liable if damage arises therefrom. The crux of the case, as proved by the plaintiff to the satisfaction of the jury, is that the directors of the Peters Trust Company, through their agents, and through the language duly authorized to be printed in the bonds themselves, and in the circulars put out to sell the bonds, represented that the bonds were first mortgage bonds, and further represented that the bonds were secured by a first mortgage on real estate, and that both of these statements were false, although the plaintiff believed them, and invested her money on the strength of them. In a conspiracy there must be a meeting of the minds of the parties charged, for the purpose of bringing about the act charged, and this may, as in this case, be proved by circumstantial evidence.

The opinion in *Kavanaugh v. Commonwealth Trust Co.*, 118 N. Y. Supp. 758, is illuminating. It was an action brought by a stockholder to recover funds of a trust company alleged to have been lost through the negligence of the directors. It holds that directors of a trust company may delegate their work to assistants, but may not dele-

gate their responsibility, and are not excused from liability because they committed their duties to an executive committee. The stockholders elected the directors, not the executive committee; and if the directors saw fit to rely on the executive committee, it was their own reliance and their own risk. It quotes from the old case of *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513, in which it was said: "I think the question in all such cases should and must necessarily be, whether they have omitted that care which men of common prudence take of their own concerns? To require more would be adopting too rigid a rule and rendering them liable for slight neglect, while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care and expose them to liability for gross neglect only—which is very little short of fraud itself."

2. Directors of trust companies are not spies upon the officers, nor are they expert bookkeepers. It cannot be required that directors should make at each meeting a complete examination of their company, but they should personally have a general knowledge of the condition of the institution.

Directors are required to give the same degree of care and prudence as is generally exercised by men in their own affairs. The law requires of directors such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard all the interests committed to them. The idea formerly prevailed, to some extent at least, that a director was chosen because he was a man of good character and outstanding financial ability, and for those reasons he would add prestige to the financial institution, and that he had nothing further to do but simply let the officers run the corporation. This is not the rule in Nebraska. Directors, it has well been said, are not gilded ornaments to enhance the attractiveness of an institution, and to supinely allow the officers to run the institution until some event occurs

which arouses their suspicion. This theory would lead to the idea that the more ignorant directors could prove they were about its affairs, the more they could escape from any liability in connection therewith.

Directors should know of, and give direction to, the general affairs of the institution and to its business policy, and have a general knowledge of the manner in which the business is conducted. No custom or practice can make a directorship a mere position of honor, void of responsibility. It has also been said: "The personnel of a directorate may give confidence and attract custom; it must also afford protection." *Kavanaugh v. Commonwealth Trust Co.*, 223 N. Y. 103.

Where the duty of knowing exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon.

3, 4. In *Hamilton Ridge Lumber Sales Corporation v. Wilson,* 25 Fed. (2d) 592, it is said that, where the facts justify it, courts will look beyond the mere corporate entity to the persons who compose the corporation, and the rule is not limited to cases where corporate entity has been resorted to for purely fraudulent and criminal purposes, but extends to acts amounting to constructive fraud only. Although a corporation is considered a legal person in law, distinct from its stockholders, and is so recognized when there is no reason against it, yet it is just as well settled that this general doctrine should be disregarded, and the acts of the persons examined who constitute the corporation. A corporation has no thought or will of its own, and its every act is the act of the individuals who are running it, and where fraud is committed by the corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacity. 14 C. J. 59; Clark, Corporations, 10; *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145; *In re Muncie Pulp Co.*, 139 Fed. 546; *Cosmopolitan Trust Co. v. Mitchell,* 242 Mass. 95; *Talich v. Marvel,* 115 Neb. 255; Morse, Banks and Banking (6th ed.) sec. 128.

5. In *Paul v. Cameron,* 127 Neb. 510, being an action brought to recover upon the same issue of Keystone Investment Company bonds, a verdict was recovered, and this court affirmed the judgment entered thereon. It also was held: "In this state, in actions for false representations, proof of a scienter is not essential to recovery; and where a petition in this class of cases clearly and positively alleges that the representations relied on by the plaintiff were false, while the further allegation in effect 'that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact,' is in accord with good practice, it is not essential to recovery that either be incorporated in such pleading or covered in the instructions to the jury."

The action of the Keystone Investment Company directors taken May 17, 1923, was ratified on June 30, 1923, by the directors of the Peters Trust Company, with these three defendants taking part therein and voting to adopt the resolution. Plaintiff insists that it is not necessary that all of the directors know the false representations in the bonds, although the jury could properly infer that fact from the evidence. The board of directors of the Peters Trust Company approved, ratified, and affirmed the issuance of these bonds by the Keystone Investment Company. The word "approve" means to sanction officially, to regard as good, to commend; "ratify" means to give sanction to, as to something done by an agent or a servant, as to ratify a contract, and to affirm means to confirm or ratify.

1 Restatement, Law of Agency, 565, sec. 256, upon the subject of misrepresentations by an agent without knowledge of the principal, holds: "(1) A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is

liable as if he himself had made them negligently." This section of this new work may be said to be in line with decisions of the Nebraska court, such as *Willard v. Key*, 83 Neb. 850; *Howard v. Duncan*, 94 Neb. 685; *Peterson v. Schaberg*, 116 Neb. 346.

6. In *Ashby v. Peters*, 124 Neb. 131, it was held that, save for the purpose of conveyance, a lease for more than one year is not real estate, and that the purchaser of a bond has a right to rely upon the representations on the face of the bond as to the security for the bond unless he has knowledge to the contrary, which is a question for the jury. We also determined in that case: "The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant."

The charge made against these three defendants, of fraud and conspiracy, was submitted to a jury in the district court, under instructions in which no prejudicial error has been pointed out, and the jury determined the fact adversely to the defendants. It was decided by this court in *Ashby v. Peters, supra,* that a careful examination of the two different circulars would have disclosed that the bonds were secured by a first lien on the leasehold of the Peters Trust building, but that plaintiff would not have discovered the important fact that the fee of the premises was encumbered by a prior mortgage for $250,000 to the New York Life Insurance Company.

The directors who are defendants all knew of this first mortgage outstanding. Many investors would refuse to buy if they knew that mortgage was outstanding ahead of this issue of $400,000 of refunding bonds. Therefore, this vital, material fact was skilfully concealed from the plaintiff by action of the board of directors, to her injury.

In *Paul v. Cameron, supra,* it was said: "In substance, it is the claim of plaintiff that, accepting as true, and dealing on the basis of, the recitals set forth in and on the

bonds he purchased, and relying on the representations thus made, the obligations he bought were secured by a first mortgage on the building he had inspected which was real estate; that these representations were false, and he was deceived thereby, for in truth his mortgage security was neither a first mortgage, nor was it upon real estate."

It was the duty of the defendants in the case at bar to know that the material statements in these bonds put out and sold under authority of the board of directors of the Peters Trust Company in a meeting which they attended were true. Such directors are liable for damages sustained by any one purchasing such bonds who had relied upon the truth of such material statements which are now proved to have been false.

Additional cases supporting the principles set out herein are: *Gerner v. Mosher,* 58 Neb. 135; *Gregory v. Binghampton Trust Co.,* 154 N. Y. Supp. 376; *Omaha Electric Light & Power Co. v. Union Fuel Co.,* 88 Neb. 423; *Hilligas v. Kuns,* 86 Neb. 68; *Masonic Bldg. Corporation v. Carlsen, ante,* p. 108; *State v. Farmers State Bank,* 127 Neb. 139; *Gibbons v. Anderson,* 80 Fed. 345; *Strauss v. United States Fidelity & Guaranty Co.,* 63 Fed. (2d) 174; *People v. Mancuso,* 255 N. Y. 463; *Cleland v. Anderson,* 66 Neb. 252; *Farley v. Peebles,* 50 Neb. 723; *Deupree v. Thornton,* 97 Neb. 812; *Marsh-Burke Co. v. Yost,* 98 Neb. 523; *Dunbier v. Mengedoht,* 119 Neb. 706; *Foley v. Holtry,* 43 Neb. 133; 12 R. C. L. 347, 348, 359, secs. 102, 103, 113.

While the evidence is conflicting, yet it appears to be ample to sustain the verdict of the jury. Other errors, of which complaint is made, were examined, but found not to be prejudicial, and the judgment of the district court is

AFFIRMED.

GLADYS CALLAHAN, APPELLEE, V. ALLIED MILLS, INC., APPELLANT.

FILED FEBRUARY 8, 1935. No. 29394.

1. **Master and Servant**: COMPENSATION AWARD: NOTICE OF APPEAL. The notice of intention to appeal to be filed with the compensation commissioner within seven days after an award, as required by section 48-157, Comp. St. 1929, is intended to give information to the opposing party and may be waived by him when the appeal was otherwise properly completed in the time required by law.
2. ———: ———: ———: WAIVER. Where a party litigant objects in his answer for the first time to the filing of the notice of intention to appeal, required by section 48-157, Comp. St. 1929, more than seven days after the award, such defect of service appearing on the face of the petition and the appeal being regular in all other respects, the defect in the time of filing the notice will be deemed to have been waived.
3. ———: ———: PROOF. Evidence examined and *held*, under the facts set forth in this opinion, that claimant has failed to prove by a preponderance of the evidence that the death of the deceased was caused by an accident arising out of and in the course of his employment.

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

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

Leon & White, contra.

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

CARTER, J.

This suit was instituted by Gladys Callahan to recover compensation for the death of her husband, Walter Callahan, under the workmen's compensation law of this state. The record discloses that the case was heard by the compensation commissioner and a dismissal of plaintiff's claim entered on March 24, 1933. Notice of intention to appeal

was filed with the compensation commissioner on April 1, 1933. The petition was filed in the district court on April 4, 1933, and the defendant answered thereto on April 10, 1933. The petition alleges that, "on March 24, 1933, an award was made by the compensation commissioner of the state of Nebraska, denying the plaintiff's request and prayer for judgment and dismissing the plaintiff's petition," and the further statement that "notice of appeal was given to the defendant on April 1, 1933." Among other defenses, the defendant in its answer alleges "that notice of appeal from the said petition was not filed within the time required by the compensation laws of the state of Nebraska, and that the said order of dismissal is binding upon the plaintiff and the defendant." There were no pleadings filed in the district court except the petition and answer referred to herein. Appellant, Allied Mills, Inc., contends that under this state of facts the district court was without jurisdiction to hear this case and that the dismissal by the compensation commissioner is a final determination of the case.

Subdivision g of section 48-157, Comp. St. 1929, provides: "Every order and award of the compensation commissioner shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition of the order or award." The petition discloses on its face that the notice was given more than seven days after the order of dismissal was entered, the appeal in all other respects being properly made. Unless the defendant has waived the giving of the notice within the seven days, the district court did not obtain jurisdiction over the defendant. This court has held: "The provision for the filing of notice with the compensation commissioner was for the purpose of giving the adverse party knowledge of the appeal. Upon the filing of such notice, no further duty devolved upon the compensation commissioner. The filing of such notice did not affect the award; on the other hand, the award

continues to be binding until the appeal is perfected and service had. It is apparent that such notice is for the benefit of the opposing party, and in such cases it is generally held that the party for whose benefit the provision is made may waive the giving of the formal notice, and that this may be done by a voluntary appearance in the court where the appeal is lodged." *Mucha v. Morris & Co.*, 105 Neb. 180.

In the case at bar, the defect in the notice appeared on the face of the petition. The rule has been well established by this court that objections to jurisdiction which do not arise upon the summons, the indorsement, or service thereof, or upon the face of the petition, may be raised for the first time by answer in connection with other defenses. *Hurlburt v. Palmer*, 39 Neb. 158; *Herbert v. Wortendyke*, 49 Neb. 182. But where it appears on the face of the petition that the notice of intention to appeal was filed more than seven days after the award of the compensation commissioner, and the objection thereto is raised for the first time in the answer, the defect in the time of the service of the notice will be deemed to have been waived and the court properly obtained jurisdiction of the case.

The evidence in this case discloses that on and prior to April 4, 1932, the deceased, Walter Callahan, was in the employ of the defendant, Allied Mills, Inc., as a night watchman; that on April 4, 1932, while in the course of his employment, he received injuries in a fire, consisting of numerous and severe burns about his back, arms, neck and head that necessitated his removal to a hospital for a period of 26 days and the services of a physician until May 18, 1932. He was paid compensation for his injuries and returned to work on May 31, 1932. On August 16, 1932, the deceased became ill, complained of severe pains in the region of the pit of his stomach, was operated upon August 22, 1932, and died August 24, 1932. The plaintiff contends that the deceased died as a result of a gastric duodenal ulcer caused by the burns incurred in the fire of

April 4, 1932, while it is the contention of the defendant that death was caused by an acute attack of appendicitis. The trial court found for the claimant and the defendant, Allied Mills, Inc., brings the case here for review.

The evidence of claimant consists of the testimony of the members of the family to the effect that the burns incurred on April 4, 1932, caused deceased continual pain to his back until the time of his last illness, that he was unable to eat and lost weight after the fire and that said injuries had never healed. Claimant also called a Dr. Philip Levy who testified as an expert that, in his opinion, the history and symptoms in the case indicated that the deceased suffered from a poisoning from the burns received and a derangement of the gastro intestinal tract. Dr. Levy also testified that gastro duodenal ulcers are sometimes caused by severe burns upon the body, which statement is not disputed.

The evidence of the defendant consists primarily of the two attending physicians, Dr. Joseph P. Swoboda and Dr. J. W. Duncan. Dr. Swoboda testified that he cared for the deceased while he was recovering from the burns above referred to and that the patient was wholly recovered on May 18, 1932. He further testified that, at the time of the second illness of the deceased, he diagnosed the case as an acute attack of gall bladder trouble, a perforated gastric duodenal ulcer or a very acute attack of a high-lying appendix. Dr. Duncan testified that he diagnosed the case the same as Dr. Swoboda. The symptoms indicated that his trouble was in the upper right quadrant of the abdominal area instead of the lower right quadrant which is the usual position of the appendix. There can be no question that both Doctors Swoboda and Duncan were somewhat uncertain in their diagnosis because of the unusual position of this appendix. Both Dr. Swoboda and Dr. Duncan were present at the operation, Dr. Duncan performing it and Dr. Swoboda assisting. Both testified positively that when the abdominal cavity was opened a large amount of free pus came out and that a detached

gangrenous appendix floated on it. Dr. Duncan testified that the cecum, to which the appendix attaches, lay unusually high under the liver, was attached there and had never been in the position where they are generally found. The testimony of these two doctors explains fully any uncertainty they may have had before the operation as to the cause of the illness of the deceased. Both testified that the gangrenous appendix and the resulting general peritonitis were the cause of death. Claimant's counsel makes much of the fact that the incision at the time of the operation was in an unusual location for an operation for appendicitis and in the usual place for an operation for a gastro duodenal ulcer. The doctors explain this satisfactorily when they state that the incision was made at the point where the symptoms indicated the pathology to be. That this is the usual practice among surgeons is not denied. The medical testimony is all to the effect that the burns suffered previously have no relation to the gangrenous appendix. The positive evidence of the two doctors who cared for the deceased, made the diagnosis of the case, performed the operation and noted the actual condition of the deceased at the time is so reasonable and logical that it must prevail over that of Dr. Levy who never saw the patient and merely expressed his opinion from a state of facts presented to him. Dr. Swoboda and Dr. Duncan both made a careful examination of the stomach and duodenum by inspection and palpation and found no evidence of an ulcer. After a careful examination of all the evidence, upon a trial *de novo,* we are constrained to hold that the trial court's findings are not supported by the evidence. The burden of proof is upon the claimant to show with reasonable certainty that Walter Callahan's death was proximately caused by the burns he suffered in the fire heretofore mentioned. This she has failed to do. That the death of the deceased was the result of a gangrenous appendix and resulting complications is amply proved by the evidence offered. The evidence clearly preponderates in favor of the defendant.

In view of the above findings by this court, it is not necessary to consider other alleged errors in the record.

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

REVERSED AND DISMISSED.

CHARLES D. AMMON, APPELLEE, V. CUSHMAN MOTOR WORKS, APPELLEE: OTHELLO BEEZLEY ET AL., INTERVENERS, APPELLANTS.

FILED FEBRUARY 8, 1935. NO. 29064.

1. Corporations: PREFERRED STOCK: REDEMPTION. The defendant, a manufacturing corporation, issued preferred stock to plaintiff's assignors, upon which it agreed to pay specific quarterly dividends, with provision that they should be cumulative. The articles of incorporation contained like conditions, and provided that a sinking fund for the retirement of preferred stock should be created out of the net earnings of the corporation; and provided, further, the course to be pursued and the conditions under which a holder might have his preferred stock repurchased or redeemed. The provisions of the stock certificate conformed to the articles of incorporation. *Held*, the provisions of the articles of incorporation and stock certificate, together with the general law, establish a contract between the corporation and the holder of the stock; and that such agreement is valid and enforceable where it appears that the redemption and retirement of the stock will not impair the rights of the corporate creditors.
2. ———: ———: ———. In such case, the financial condition of the corporation is material only as to the time when the request for the repurchase or redemption of the stock was made.
3. ———: ———: ———. "While the relation of a holder of preferred stock, in some of its aspects, is similar to that of a creditor, such holder, however, is not a creditor save as to dividends after the same have been declared." *Miller v. M. E. Smith Building Co.*, 118 Neb. 5.
4. ———: ———: ———. The provisions of the articles of incorporation, "but until so used (i.e., to retire preferred stock), any sums to the credit of the sinking fund may be employed in the business of the corporation," did not create a

method whereby the sinking fund could be extinguished; and the fact that it may have been so employed did not destroy the existence of the account, nor affect the right of a holder to have his preferred stock redeemed.

5. ———: ———: ———. The articles of incorporation providing that the holder of preferred stock shall be entitled to dividends of a specific amount, payable quarterly, and that such dividends shall be cumulative; the further provision that the stock shall be redeemed "at par with accrued dividends" manifestly contemplates the adding together of the par value of the stock and the amount of the dividends that shall have accumulated or accrued to make up the aggregate value of the stock for the purpose of redemption.

6. ———: ———: ———: TRANSFEREES. In such case, where the shares of stock are transferred, and there is no agreement to the contrary, the transferee will be entitled, as an incident to his ownership of the stock, to the dividends not declared prior to the transfer, though the profits out of which they should be paid were earned before such transfer. And where the transferee of such stock is asking its redemption, under the provision that the redemption shall be made "at par with accrued dividends," the amount of accrued dividends may be considered in making up the value of the stock for the purpose of redemption, though said dividends were never declared by the corporation.

7. ———: ———: ———: DAMAGES. The measure of damage in such case, in the event of failure on the part of the corporation to make redemption pursuant to the terms of the contract, is the amount the corporation has agreed to pay the holder of preferred stock as the redemption price.

8. **Evidence** examined, and *held* to sustain the findings and judgment of the district court.

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

George I. Craven and *Skiles & Skiles*, for appellants.

Perry, Van Pelt & Marti and *J. P. O'Gara, contra.*

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

ELDRED, District Judge.

The plaintiff, appellee, the holder of preferred stock in the defendant corporation, brought this action to recover

from the defendant the par value of 88 shares of preferred stock of the Cushman Motor Works, with accrued dividends at 7 per cent. per annum from May 1, 1921, under the provisions of article VII of its amended articles of incorporation, providing: "The corporation when requested so to do, in writing, at least ninety days before the end of any fiscal year, by the holder or holders of preferred stock, shall, at par with accrued dividends, within thirty days after the end of such fiscal year, purchase, redeem, and retire of the preferred stock designated in such request, a total amount up to, but not in excess of, three per cent. of the aggregate of all amounts of preferred stock that shall have been issued."

In his petition the plaintiff sets out articles V, VI, VII, and VIII of the amended articles of incorporation of the Cushman Motor Works, and alleges that said corporation issued stock certificates representing 2,938 shares of preferred stock; that plaintiff was the owner of 509 shares of said preferred stock; that during 1919 and 1920 the defendant corporation paid dividends on its preferred and common stock; and that during said years there was set aside from the net earnings of the corporation, and credited to the preferred stock sinking fund account, the sum of $17,010. On August 1, 1931, plaintiff made written request of the defendant to purchase, redeem and retire 88 shares of his preferred stock, and tendered stock certificates to the defendant. It is further alleged that the defendant corporation is a going concern whose assets far exceed its liabilities. Plaintiff prays judgment for the par value of 88 shares of preferred stock, together with accrued dividends thereon from May 1, 1921, aggregating $15,884.

An answer was filed by the defendant corporation, the material allegations of which are incorporated in the amended answer of the interveners, the substance of which is later referred to herein.

On February 25, 1933, a judgment was entered in favor of the plaintiff and against the defendant for $15,884,

with interest. April 8, 1933, Othello Beezley and 21 other holders of preferred stock in the defendant corporation filed an application, on behalf of themselves and all other stockholders similarly situated, to vacate said judgment. After a hearing on said application the court, on May 16, 1933, set aside and vacated said judgment and permitted the interveners to file an amended answer instanter, which amended answer admitted the corporate existence of the defendant, and the amended articles of incorporation set out in plaintiff's petition, and that the defendant issued 2,938 shares of preferred stock; and denied, generally, the other allegations of the plaintiff's petition. Further answering, the interveners allege that the purported sinking fund of $17,010 was but a bookkeeping transaction; that during the years said sinking fund was carried on the books of the defendant corporation to January 1, 1931, said corporation sustained financial losses to such an extent that all its surplus was exhausted. Further answering, the interveners allege that articles VI and VII of the amended articles of incorporation are void; that the interveners own a total of 189 shares of preferred stock; that the fair and reasonable market value of the assets of the defendant corporation is less than the value of the preferred stock issued and outstanding; that if the plaintiff is permitted to recover on his preferred stock he will secure an unfair preference.

No copies of replies appear in the transcript; but brief of appellee states that replies were filed, and that statement not being challenged by appellants, it will be assumed that issues were joined on the answers.

On June 15, 1933, the case went to trial before a jury. On June 16, 1933, the jury were discharged and trial continued before the court, and on submission was taken under advisement. On August 1, 1933, there was a finding and judgment in favor of the plaintiff and against the defendant, Cushman Motor Works, for the sum of $15,884, with interest at 7 per cent. Motion for a new trial on the part of the interveners was filed, which, on the 15th day of

September, 1933, was overruled, and the interveners have appealed to this court. No appeal has been taken by the Cushman Motor Works, defendant.

Articles V and VI of the amended articles of incorporation of the Cushman Motor Works provide: "V. The holders of the preferred stock shall be entitled to dividends out of the net earnings of the corporation at the rate of seven per cent. per annum, and no more, payable quarterly on such specific days in each year as the by-laws shall provide; and such dividends shall be cumulative, so that if the corporation shall fail to declare and pay, in whole or in part, any quarterly dividend, such dividend shall thereafter be declared and paid before any dividend shall be declared, paid upon, or set apart for the common stock. * * *

"VI. A sinking fund for the retirement of the preferred stock by redemption shall be created out of the net earnings of the corporation that shall remain after deducting therefrom any accrued dividends upon the preferred stock. For that purpose, there shall be credited to an account to be called the preferred stock sinking fund account, at the end of each fiscal year a sum equal to three per cent. of the aggregate of all amounts of preferred stock that shall have been issued, including any such preferred stock that may have been retired or redeemed, until the preferred stock sinking fund account shall equal the redeemable value of the preferred stock issued and outstanding. * * * The sinking fund provisions are to be cumulative and contingent only on net earnings in excess of the preferred stock cumulative dividends. * * * The sinking fund shall not be made the basis of any dividend whatever upon the common or preferred stock, nor shall said fund be depleted in any way except for the retirement or redemption of preferred stock; but until so used, any sums to the credit of the sinking fund may be employed in the business of the corporation."

The provisions of the preferred stock certificate are in accord with the provisions of the articles of incorporation.

The fiscal year of the corporation ends October 31.

In addition to the facts admitted by the pleadings, it appears from the evidence, without substantial conflict, that the plaintiff owned 509 shares of preferred stock of the defendant corporation; that during the years 1919 and 1920 the defendant paid dividends on its preferred and common stock, but no dividends have been paid since; the plaintiff at no time has been paid dividends on stock held by him; plaintiff made a written request of the defendant corporation that it repurchase, redeem and retire 88 shares of his preferred stock, and tendered stock certificates to said defendant, and that no preferred stock was ever repurchased, redeemed or retired by the Cushman Motor Works.

Likewise it appears, without substantial conflict, that during the years 1919 and 1920 there was set aside from the net earnings of the corporation a sinking fund aggregating $17,010, and that none of said sum has been used for the purpose of repurchasing, redeeming or retiring any stock; but the appellants challenge the legal effect of the proceedings had for the purpose of creating said sinking fund.

In their brief appellants have confused the provisions of the articles of incorporation, applying where the corporation is the moving party seeking to redeem and retire stock, and the provisions applicable where a stockholder is seeking to have his stock repurchased or redeemed. In the latter case no action by the board of directors is necessary. The articles made it obligatory on the corporation to create a sinking fund; the provisions of article VI, heretofore set forth, providing therefor. The account was opened by the bookkeeper, on instructions of officers of the company, after the report of auditors was made showing the existence of net earnings in 1919 and 1920, out of which a sinking fund should be created. The fund in this case was created from the source and in the manner contemplated by that section, and such account has been so carried on the books of the corporation since that time, and also shown on its income tax returns.

It is further urged that this sinking fund was used in the business of the corporation under the authority of the provisions of article VI, providing: "But until so used (i.e., to retire preferred stock), any sums to the credit of the sinking fund may be employed in the business of the corporation." It was not the intention, by the provision quoted, that the account would be extinguished when the funds belonging thereto were so used; and the fact that any part or all of that account may have been so employed did not destroy the existence of the account, nor would it affect the right of the holder of preferred stock to have his stock redeemed, if otherwise entitled thereto. In legal effect, the fund still remains intact.

The appellants challenge the following special findings made by the trial court:

"That the defendant is a going concern with assets far exceeding its liabilities and that the purchase and redemption of plaintiff's said shares and the accrued dividends thereon would not impair the rights or endanger the security of defendant's creditors.

"That not only have the assets of the defendant corporation greatly exceeded the amount of its general indebtedness, that is to say, all of its indebtedness of every kind except its stock liability to its stockholders, but at the present time the value of such assets is much greater than the amount of its indebtedness."

The liability of the corporation to its stockholders does not make the stockholders creditors within the scope of the law involved in this case. "While the relation of a holder of preferred stock, in some of its aspects, is similar to that of a creditor, such holder, however, is not a creditor save as to dividends after the same have been declared." *Miller v. M. E. Smith Building Co.*, 118 Neb. 5.

That the corporation, at the time of the request for the redemption of the stock by the plaintiff, and at the time of the commencement of this action, was a going concern is not seriously controverted. A material issue here presented is as to the financial condition of the corporation at

the time the request for the repurchase or redemption of the stock was made. *Campbell v. Grant Trust & Savings Co.*, 97 Ind. App. 169; *McIntyre v. E. Bement's Sons*, 146 Mich. 74.

It appears that the corporation during the fiscal year ending October 31, 1919, operated at a net profit of $120,106.54, and during the fiscal year ending October 31, 1930, operated at a net profit of $69,230.24. Public accountants were employed to audit the affairs of the corporation, who made a report as of October 31, 1920, disclosing assets of $1,818,135.27, and that there was on that date a surplus of $141,749.93. The sinking fund account was opened at that time. The annual reports, or balance sheets, of the corporation for the years following 1920 are in evidence and disclose that the corporation sustained heavy losses and depreciation of assets during the years following. The balance sheet of October 31, 1930, the last one submitted prior to the date of the request by plaintiff for the redemption of his preferred stock, not including an item of good will of $100,000, about which there is some dispute, shows assets $524,681.26, and liabilities $92,255.79; and the balance sheet for October 31, 1931, three months after request for redemption was made, not including said item of $100,000 for good will, shows assets of $471,196.25, and liabilities of $57,207.53. These balance sheets were prepared under the supervision of Othello Beezley, one of the interveners. Othello Beezley was connected with the company as bookkeeper from 1917 to 1923, when he became chief accountant, until 1931, and was secretary in 1931, 1932, and until January 9, 1933; he testified that in his opinion the corporation was insolvent January 1, 1933; but further stated, in forming that conclusion he took into consideration, as part of the liabilities, the outstanding capital stock. "Q. You are not undertaking to say that either now or at any other time the company does not have sufficient assets to pay the debts owing people other than stockholders? A. No, sir."

Charles D. Ammon, plaintiff, testified that the assets, in

his opinion, would sell for an amount sufficient to pay all indebtedness of the company, plus a judgment of $16,000.

Space will not permit a review of all the evidence on this issue. The testimony thereon was conflicting, and there being evidence to support the findings of the trial court, such findings are entitled to the same weight as the findings made by a jury. This court concludes that the findings of the trial court, above referred to, are sustained by the evidence.

The provisions of the articles of incorporation and stock certificate for the repurchase and redemption of preferred stock, together with the general law, evince a contract between the corporation and the holder of such stock. *Miller v. M. E. Smith Building Co.*, 118 Neb. 5; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133. Such an agreement is valid and enforceable where it appears that such redemption will not impair the rights of the corporate creditors. *Grotte v. Rachman*, 114 Neb. 284; *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419; *Booth v. Union Fibre Co.*, 137 Minn. 7; *id.*, 142 Minn. 127; *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307; *Koeppler v. Crocker Chair Co.*, 200 Wis. 476. The measure of damage in such case, in the event of failure on the part of the corporation to repurchase or make redemption pursuant to the terms of such contract, is the amount the corporation has agreed to pay the holder of the preferred stock as the repurchase or redemption price. *Heller v. Speier*, 119 Neb. 787.

It appears from the evidence that the greater part of the dividends in controversy was earned prior to the time the plaintiff purchased the stock in question, and one assignment of error is that the dividends belong to the owner of the stock at the time the dividends are declared, and that the purchaser of stock has no claim, right or interest to the dividends that have been declared prior to said purchase, unless the purchaser, by special agreement, bought the dividend as well as the stock. The authorities cited by appellant support this contention. In the case at

bar, however, the last dividend paid on the preferred stock now owned by the plaintiff was on May 1, 1921. Since that date the evidence does not disclose that any further dividends were ever declared. None of the dividends which the plaintiff is seeking to recover were declared prior to the purchase by the plaintiff of the stock involved herein. Under the amended articles the dividends should have been paid quarterly, and article V provides that such dividends shall be cumulative; while article VII provides that the corporation, when requested so to do in writing, at least 90 days before the end of the fiscal year, by the holder or holders of preferred stock shall, at par with accrued dividends, repurchase, redeem and retire such stock. There is no requirement that the accrued dividends must be declared before they can be recovered. The stock having been transferred prior to the dividends in question being declared, and there being no agreement to the contrary, the transferee became entitled to the dividends as an incident to the ownership of the stock.

It is further urged that the dividends cannot be paid out of the sinking fund provided for the redemption of preferred stock. This proceeding is not to secure the payment of a dividend, nor in conflict with the provisions of the articles providing: "The sinking fund shall not be made the basis of any dividend whatever upon the common or preferred stock, nor shall said fund be depleted in any way except for the retirement or redemption of preferred stock." But it would seem that the intent was that the amount of the accrued dividends should be considered as a part of the sum required to make up the aggregate amount necessary to make redemption of the stock. The provision of the articles is that the dividends "shall be cumulative." And the provision, "shall, at par with accrued dividends," contemplates adding together the par value of the stock and the amount of dividends that have been accumulated or accrued to make up the aggregate value of the stock for the purpose of redemption; all to be paid from the sinking fund.

Both in the record and in the brief of the appellants, the amount paid by appellee for stock he purchased from third persons has been repeatedly referred to; but we do not consider that a material issue in this case. The former owners of the stock are not here complaining. Likewise, evidence as to proceedings had, after request for redemption was made, relative to the dissolution of the corporation and sale of its assets, are also immaterial to the issues here involved.

Appellants cite, as sustaining their first five propositions of law, the case of *Miller v. M. E. Smith Building Co.*, 118 Neb. 5. In that case it was held, under the facts there involved, that all of the holders of preferred stock should constitute one class and be treated alike; and appellants urge that such holding should be applied here. The trial court held the *Smith Building Company* case not to apply to the case at bar. The application of that case depends largely upon whether, at the time of the request of the plaintiff for the redemption of his stock was made, the corporation was a going concern with assets exceeding its liabilities? We have already held that the finding of the trial court, as to this issue, is sustained by the evidence. In the *Smith Building Company* case the court, in effect, found that such facts did not exist. There are a number of other distinguishing features between the two cases. The provisions of the articles of incorporation materially differ. In the *Smith Building Company* case the articles provided for the issuance of preferred stock in series, payable one series each year, over a period of twenty years, from the earnings of the corporation. It developed that the building was constructed for the use of M. E. Smith & Company, a mercantile concern, for storage purposes; that company agreed to pay a rental of $120,000 a year, which was sufficient to pay the taxes, upkeep, dividends on preferred stock, and redeem one series of stock each year. M. E. Smith & Company failed, and the Smith Building Company was not able thereafter to secure sufficient rental to pay more than the taxes and upkeep of the

building; the court found that the purpose for which the corporation was organized had failed, and that there were no longer any earnings out of which the different series of stock could be redeemed as they matured; so, the vital question in that case was: How were the rights of the holders of the different series of preferred stock to be protected, where the only means provided by the articles for redeeming the stock had failed? The action was brought in equity, seeking an adjudication as to the right of the holders of preferred stock, for appointment of a receiver, and the dissolution of the corporation. From this it will be seen that there is a marked distinction between salient facts and legal questions involved in that case, and those involved in the case at bar, as hereinbefore set forth. Hence, the decision in *Miller v. M. E. Smith Building Co.*, *supra*, cannot be considered as controlling in this litigation.

Plaintiff having brought himself clearly within his contractual right under the articles of incorporation and stock certificates, and no prejudicial error appearing in the record, the finding and judgment of the district court should not be disturbed. Judgment

AFFIRMED.

A. L. EICHHOLZ ET AL., APPELLEES, V. E. H. LUIKART, RECEIVER OF SOUTH OMAHA STATE BANK, APPELLANT.

FILED FEBRUARY 14, 1935. NO. 29101.

Appeal: TRIAL DE NOVO. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson*, 110 Neb. 511.

APPEAL from the district court for Douglas county:

WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

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

Votava & McGroarty, contra.

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

GOSS, C. J.

In this action for an accounting defendant appeals. When the bank closed, on August 12, 1931, and E. H. Luikart was appointed receiver, plaintiffs owed the bank $4,500 on their note dated June 22, 1931, due in 60 days, with a collateral agreement on the same printed form pledging as security certain items. The first one described is a savings bank account No. 5542, in the name of Emma Witt. The book was delivered to and held by the bank with the other collateral.

The savings bank account was in the savings department of the same bank holding the note. Plaintiffs pleaded that they had become the owners of the deposit represented by the book on or about January 24, 1931, and that they were entitled to have the balance in said savings account set off against the amount due the bank on the note. They asked for an accounting on this and other items of collateral on which collections had been made and that the securities pledged and still in the hands of defendant be returned to them.

Defendant duly traversed the allegations of the petition and by cross-petition set out the note of plaintiffs describing the collateral pledged and what collections had been made and credited on the note. The cross-petition alleged that, when the bank closed, plaintiffs had on deposit in their checking account a balance of $285.19, which on January 7, 1932, was duly offset against plaintiffs' note; that on October 29, 1931, defendant collected $791.64 on a pledged assignment and credited it on the note, and that there is still due defendant $3,703.91, with interest from

October 7, 1932; defendant prays for an accounting, foreclosure of the items pledged, and an order of sale to the sheriff to sell them at public sale to the highest bidder for cash.

The court found that plaintiffs became the owners of the savings deposit on or about January 24, 1931, and were entitled as a matter of law to have its balance of $4,082.50 on the date the bank closed offset, together with the $285.19 in the checking account and the $791.64 collected October 29, 1931, on the assignment heretofore mentioned, leaving $656.58 due plaintiffs as of October 29, 1931. The court ordered this sum, with interest to August 10, 1933, a total of $734.68, paid to plaintiffs; and ordered their $4,500 note canceled and returned to them together with the remaining collateral pledged to secure the note.

Eichholz did business under the name Interstate Plumbing and Heating Company. This was a corporation. Most of the stock was in his wife's name, a few shares in his. Sometimes notes to the bank were made in the corporate name with Eichholz or his wife as comaker. At times Eichholz alone signed them and at other times they were signed by himself and wife. The note in suit was signed by plaintiffs only.

The controversy hinges on the ownership of the Emma Witt pass-book account. If plaintiffs owned it when the bank failed and went into the hands of the receiver, the trial court was right and plaintiffs were entitled to a set-off against the amount they owed the bank.

Emma Witt is the mother of Mrs. Eichholz. She had frequently lent her credit by means of the pass-book to plaintiffs and it had been used as collateral for money evidenced by notes of plaintiffs to the bank. Five canceled notes were introduced in evidence by defendant, the first dated September 19, 1930, and the last dated January 22, 1931, on which this pass-book is listed as collateral. The purpose of putting these notes in evidence was to impeach the credibility of Eichholz, who had testified that the pass-book was at home (probably meaning at the home of Mrs.

Witt) on January 24, 1931, when, he testified, the plaintiffs gave their note to Mrs. Witt and became the owners of the pass-book.

Mrs. Witt and another daughter, Mrs. Merkle, lived together. Emma Merkle testified that she lived with her mother, who is a widow and never has been in business. The witness usually aided her mother on any business matters. On January 24, 1931, her sister, Mrs. Eichholz, came to her mother and requested more funds. Mrs. Merkle asked if she and her husband would give a note. Upon receiving an assent she made out a note for what she remembered to be the balance on the pass-book, which was not there, but was either at the bank or in a safe deposit box to which both witness and her mother had access. The note is for $4,066, dated January 24, 1931, in favor of Emma Witt, signed by A. L. Eichholz and Adelia Eichholz.

There is in evidence an undated and blank receipt, being a printed form used in the savings department when a holder of a pass-book withdraws money. This was signed by Mrs. Emma Witt. Eichholz testified, "That is a check on Mrs. Witt to cancel the book," that it was procured at the suggestion of Mr. McGurk (president of the bank), and that it was held with the savings deposit book. Eichholz testified, in answer to a question by the court, that he took it to the bank and put it in at the same time as the book. He was not able to tell when the pass-book and receipt were delivered to the bank. The withdrawal receipt was not a check, but would operate to assign the account, if other evidence favored this interpretation.

The theory of defendant is that the note set up by plaintiffs as given to Mrs. Witt for the pass-book was a sham and that there never was any transfer of the savings account to plaintiffs except as collateral. The note was for $4,066, dated January 24, 1931, which Mrs. Merkle, who drew it, testified was the balance of the principal on the account. An examination of the pass-book discloses the balance shown on January 1, 1930, to be $4,066.10. The

book shows later credits of interest as follows: July 1, 1930, $60.99, and January 1, 1931, $61.90, leaving the balance as of the last named date $4,188.99 and not $4,066, the amount for which the note was given. The book then shows there was a withdrawal on February 6, 1931, of $161.90. As this occurred after plaintiffs claimed to have full title to the pass-book account, defendant argues that it shows there had been no *bona fide* transfer of the account on January 24, 1931, or at any other time. Mrs. Merkle, who had suggested the note, and who drew it for her mother, testified that she did not have the book and that she took her "last recollection of the amount in the book." While it was not the then balance of the book, it was within ten cents of the principal due on the account a year before.

As to the withdrawal on February 6, 1931, by Mrs. Witt, of $161.90, defendant argues that it militates against the claim that plaintiffs obtained title and entire dominion over the account on January 24, 1931. Mrs. Merkle testified that she made the withdrawal, presenting to the bank the receipt signed by her mother. She thought it was for the difference between the face of the note and the balance in the pass-book or the amount of the interest credited.

Then Emma Witt, in the receivership, made proof of claim on this pass-book account on September 29, 1931, and it was allowed in the total sum of $4,082.50. The claim recites "Above savings account now held as security to A. L. Eichholz note No. 2051 of $4,500.00." Mrs. Merkle testified that the blank was sent to Mrs. Witt at the same time another was sent by State Bank of Omaha and she went to both banks and "made a claim for both banks according to the way it said it had to be made out." She went with her mother to South Omaha State Bank. They did not consult an attorney nor tell Mr. Eichholz they intended to file the claim, but talked to the man in charge. Of course Mrs. Witt, who signed the claim filled out by the man in charge for the receiver at the bank, could not thereby change the real title to the account, but

that they made the claim affects their credibility in the appraisal of their testimony as to any change of title to the account, vesting it in plaintiffs.

Mr. Eichholz testified in substance that he had told Mr. McGurk, the president of the bank, that he had given a note to Mrs. Eichholz for the pass-book and that plaintiffs owned the account, but wanted it held as collateral. An adjournment of two weeks was taken for defendant to secure the testimony of Mr. McGurk, who was produced and positively denied this testimony of Eichholz. He stated that he never had any such knowledge or notice.

The evidence is very unsatisfactory. The parties are unused to accurate business and legal ways. Mrs. Witt's testimony is almost entirely valueless. The case is one purely of fact. We are rather impressed from the record that the witnesses for plaintiffs are telling the truth. The trial judge observed them and their manner of testifying and thus had a better opportunity than we to decide where the real truth is. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson,* 110 Neb. 511. We have so held in many cases. We apply the rule here.

The judgment of the trial court is

AFFIRMED.

LOUIS NAEVE, APPELLANT, V. THOMAS E. SHEA ET AL.: NATIONAL SECURITY FIRE INSURANCE COMPANY ET AL., APPELLEES.

FILED FEBRUARY 14, 1935. NO. 29125.

1. **Pleading**: DEMURRER. "A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated." *Meeske v. Baumann*, 122 Neb. 786.
2. **Insurance**. Insurance companies and their agents are forbidden by law to procure or effect fire insurance on property in Nebraska in companies not licensed to write it. Comp. St. 1929, sec. 44-218.
3. **Contracts**. An agreement partly written and partly oral may, in legal effect, be regarded in its entirety as a parol contract.
4. **Fraud**. Fraud perpetrated by creditors in making collections from debtors, if resulting in pecuniary damage to an innocent third person, may be pleaded and proved by the latter as an actionable wrong.
5. **Insurance**: ACTION FOR FRAUD: PLEADING. Petition to recover damages for fraud perpetrated by licensed fire insurance companies, through an insurance agency owned, controlled and operated by them, in causing worthless fire insurance policies to be issued by unlicensed, nonexistent or insolvent fire insurance companies to plaintiff, an innocent third person who paid the premium and sustained a loss by fire, *held* not demurrable.

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

Ziegler & Dunn, for appellant.

Morsman & Maxwell, Shotwell, Monsky, Grodinsky & Vance and *Silber, Isaacs, Clausen & Woley, contra.*

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

ROSE, J.

A dance hall and contents in Naeve's Park, Sarpy county, were destroyed by fire September 7, 1932, and this is an action by the owner of the property, Louis Naeve, plaintiff, to recover the resulting loss of $8,750, from the National Security Fire Insurance Company, the Concordia Fire Insurance Company, and Thomas E. Shea and Henry

C. Dross, partners engaged in soliciting and writing fire insurance as the Shea-Dross Insurance Agency, defendants.

The action is not based on fire insurance policies issued by defendants to plaintiff, but on alleged actionable wrongs making them liable to him for the loss caused by the fire. Each insurance company named as defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action against demurrant. The trial court sustained the demurrers. Plaintiff refused to plead further and appealed from a dismissal of the action as to demurrants.

The question presented by the appeal is the sufficiency of the petition to state a cause of action against the two demurring insurance companies. Their relation to the Shea-Dross Insurance Agency, as shown by the petition, was the subject of elaborate discussion on both sides. Plaintiff took the position that the insurance companies owned, controlled and operated the agency or were engaged with it in a joint enterprise, in either situation being liable in tort for the loss occasioned by fire. This position was assailed by demurrants on the grounds that plaintiff attached to his petition as a part of it a written contract showing the relation of the Shea-Dross Insurance Agency to the insurance companies was that of debtor and creditor; that the purpose of the written instrument was to require application of the net earnings of the agency to preexisting debts owing by it to the insurance companies; that the rights, duties and obligations of the parties were fixed by the writing which did not provide for a partnership or a joint enterprise, but did provide for a legitimate method of collecting debts on terms which could not be varied or contradicted by parol agreements pleaded in the petition, there being no charge of fraud or mistake inhering in the written contract. The document attached to the petition reads thus:

"Memorandum of Agreement by and between Dan F. Brown, Local Manager of the Southern Surety Company

of Des Moines, L. P. Carpenter, State Agent of the Concordia Fire Insurance Company of Milwaukee and P. K. Walsh, Vice President of the National Security Fire Insurance Company of Omaha, and Thos. E. Shea and Henry C. Dross, Partners in the Shea-Dross Agency of Omaha, Nebraska, entered into this 28th day of April, 1928.

"By mutual understanding, it is agreed in meeting held this day as follows:

"1. That from and after this date all premiums on policies or other contracts of insurance or indemnity, issued through the Shea-Dross Agency, shall be paid into the account of Shea-Dross Agency in the Live Stock National Bank of Omaha, without any deductions whatsoever, and shall remain in said account subject only to check drawn by Shea-Dross Agency, signed by Thos. E. Shea and Henry C. Dross, and countersigned either by Dan F. Brown or P. K. Walsh or L. P. Carpenter. It is further understood that in the case of the Southern Surety Company there are certain accounts which are by previous custom paid direct to the branch office in Omaha, which shall be excepted from the foregoing agreement, with the exceptions of the net commissions thereon, which are to be accounted for in accordance with the terms of this agreement.

"2. That on the 15th day of each month, beginning May 15th, 1928, unless that be a holiday or Sunday, when the 16th day will be appointed, in the presence of either Dan F. Brown or P. K. Walsh, the Shea-Dross Agency will issue checks against the above mentioned bank account, payable to the insurance companies for balances due said companies and other brokerage accounts as may be due and payable at that time under the intent of this agreement and office expenses necessary to the conduct of the business. The payments to each company shall be carried forward on the basis of their status on the books of the Shea-Dross Agency and the companies at this date; and if the amount on hand in said bank account is not sufficient to pay the whole amount, then due for any

month to the companies under this agreement, the amount on hand shall then be prorated equitably among the companies whose accounts would then have been payable under this contract. Any balance remaining due the companies shall be carried forward until the 15th day of the succeeding month when such remainders of balances shall be first paid before prorating on the balances up for consideration and payment on that date, and should there be a bank balance it is to be prorated and applied on the next monthly balance in order to the companies.

"It is the intent of the foregoing paragraph that each month's balances due companies, beginning with October balances, shall be paid in succession as rapidly as funds will permit.

"It is further mutually agreed that the office expense shall be limited to salaries of $175 each month to Thos. E. Shea and Henry C. Dross and to $65 per month to L. Doneghan, being one-half of this amount on the first and 15th of the month, plus office rent of $45 per month and the incidental essentials to the maintenance of the office.

"Shea-Dross agree to instruct the Live Stock National Bank, in writing, and to secure new signature card for Shea-Dross account, in accordance with the above immediately.

"It is further agreed that on the 15th day of each month or as near that date as practical, either Dan F. Brown, P. K. Walsh or L. P. Carpenter will in company with Henry C. Dross and Thos. E. Shea make a verification of agency accounts due to the agency and due to the companies and brokers, including collections and cancelations, as well as business written.

"In witness whereof, each and all of us have this day subscribed our names as individuals representing the above named firms, subject to home-office approval.

"Thos. E. Shea
"Henry C. Dross
"Dan F. Brown
"L. P. Carpenter
"P. K. Walsh."

A mere summary of some of the facts pleaded in detail by plaintiff will be sufficient for the purpose of reviewing the ruling on the demurrers when the petition is tested by the following standard:

"A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated." *Meeske v. Baumann,* 122 Neb. 786. See *Roberts v. Samson,* 50 Neb. 745.

By direct charge or by reasonable and fair intendment from facts stated, the petition contains pleas that the Shea-Dross Insurance Agency was formed as a partnership in September, 1922, and transacted the business of an insurance agency until April 28, 1928, when indebted to the demurring insurance companies and the Southern Surety Company of Des Moines in approximately $15,000; that those insurance companies were authorized to transact business in Nebraska, but that the latter is not now in existence; that upon demand for payment of the agency's debt, at a meeting of the parties April 28, 1928, Shea and Dross said they were unable to discharge the obligation; that the agents and the three insurance companies named entered into an oral agreement by which the companies took over, owned, controlled and operated the Shea-Dross Insurance Agency; impounded its gross earnings; provided for the payment of its expenses out of its income; fixed salaries of Shea and Dross for future services in soliciting new business for the new owners; controlled the gross and net proceeds of the agency; required the agents to go out on the streets and procure risks for the demurrants; assumed and afterward, through the agency, canceled fire risks on plaintiff's property; took premiums for and procured on plaintiff's dance hall five worthless fire insurance policies in spurious companies which were insolvent or nonexistent or without authority to transact business in Nebraska and retained the commissions of the agency for procuring the risks; supervised and controlled the bookkeeping of the agency and required records disclosing its accounts, the amounts due insurance companies and brok-

ers, collections, cancelations, new business and the names of the insurers in which the new business was written; that the written instrument was a sham; that by means of the fraudulent and wrongful acts committed by defendants pursuant to the oral and written agreements the demurrants wrongfully and fraudulently caused the loss of insurance to which plaintiff was entitled; that the written agreement did not contain the entire contract of the parties to it; that after the writing was executed the contracting parties by mutual consent carried out oral terms not contained in the written instrument and issued the worthless policies by which plaintiff was defrauded, he not knowing until after the fire that they were written in the names of unlicensed or insolvent or nonexistent insurance companies; that plaintiff gave due notice of his loss and demanded payment, which was refused.

The facts outlined are shown in detail by direct charges or are by reasonable and fair intendment implied from facts stated in the petition. The demurring insurance companies are charged as tort-feasors, operating through an agency owned, controlled and operated by them. If they defrauded plaintiff by primary, affirmative acts of their own through their own agency, the right of plaintiff to recover does not depend on allegations showing that all defendants were engaged in a partnership or in a joint enterprise. Demurrants were engaged in procuring and insuring fire hazards. That was their business. Insurance companies and their agents are forbidden by law to procure or effect fire insurance on property in Nebraska in companies not licensed to write it. Comp. St. 1929, sec. 44-218. The action is not based on the parol agreement or on the written instrument or on both combined. Plaintiff is not seeking to enforce either, but both, according to the petition, are factors in the alleged wrongs by which demurrants procured for plaintiff worthless fire insurance policies in spurious, insolvent companies.

The argument in support of the demurrers and the decision sustaining them seem to disregard a well-established

principle of law applicable to the controversy, as shown by the following statement of a text-writer and by excerpts from opinions of courts generally:

"A contract partly in writing and partly oral is, in legal effect, an oral contract. It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract; or where there is first a written contract, and afterward it is changed orally." Bishop, Contracts (2d ed.) sec. 164.

"It is a well-established rule of law that, when the whole of a contract has not been reduced to writing, such a contract in its entirety is to be regarded as a parol contract, subject to all the incidents of purely parol contracts, and proper to be proved entirely by parol testimony, notwithstanding that there may be documentary evidence of parts of it, and parts of it even may have been reduced to writing. Greenleaf on Evidence, sec. 284a; *Jervis v. Berridge,* L. R., 8 Chan., 351; *Wright v. Weeks,* 25 N. Y. 153." *Evans v. Schoonmaker,* 2 App. D. C. 62.

"A written contract is one which, in all its terms, is in writing. A contract partly in writing and partly oral is, in legal effect, an oral contract. The contract cannot be said to be in writing unless the parties thereto, as well as the terms and provisions thereof, can be ascertained from the instrument itself." *Railway Conductors Benefit Ass'n v. Loomis,* 142 Ill. 560.

"Where a written memorandum is made of an oral contract for the sale of real property, and the terms of the contract are afterwards changed by oral agreement of the parties, the whole thereupon becomes an oral contract." *Snow v. Nelson,* 113 Fed. 353. See, also, *Murphy v. Cicero Lumber Co.,* 97 Ill. App. 510; *Louisville, N. A. & C. R. Co. v. Reynolds,* 118 Ind. 170; *Tishbein v. Paine,* 52 Ind. App. 441; *Brotherhood of Locomotive Firemen and Enginemen v. Corder,* 52 Ind. App. 214; *Miller v. Sharp,* 52 Ind. App. 11; *Stauffer v. Linenthal,* 29 Ind. App. 305.

Fraud perpetrated by creditors in making collections from debtors, if resulting in pecuniary damage to an inno-

cent third person, may be pleaded and proved by the latter as an actionable wrong.

Since the law treats the partly written and partly oral contract pleaded by plaintiff as being entirely in parol, the petition is not demurrable. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

JOHN C. PETERSEN, JR., APPELLEE, V. O. J. HITCHCOCK, ADMINISTRATOR, APPELLANT.

FILED FEBRUARY 14, 1935. No. 29149.

1. **Appeal.** An administrator has right of appeal from an adverse decree in an action against him in his official capacity for specific performance of a contract between plaintiff and administrator's decedent.
2. **Quære.** Whether oral contract outlined in petition is sufficiently definite to be susceptible of enforcement, *quære*.
3. **Specific Performance:** PAROL CONTRACT. "A parol contract is enforceable in a court of equity when one party has wholly performed his part and the other has not performed his part, when it clearly appears that nonfulfilment would work a fraud upon the party who has fully performed." *Davis v. Murphy*, 105 Neb. 839.
4. ———: ———: PROOF. An action for the specific performance of an oral contract, whereby one agrees to make a will, leaving his property to another, will not lie unless the proof is clear, satisfactory and unequivocal that the contract was made and substantially performed by the party seeking its enforcement.

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

George H. Risser and *R. O. Johnson*, for appellant.

Henry J. Beal and *Max G. Towle, contra.*

Heard before ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

GOOD, J.

This is an action for specific performance of an alleged

oral contract between plaintiff and James Japson, now deceased, wherein Japson agreed to make a will giving to plaintiff all of his property of which he might die possessed. Hitchcock, as administrator of the estate of Japson, is the sole defendant.

The following is the substance of the oral contract declared upon: That in 1904 Japson was living in Havelock, Nebraska, and plaintiff was living in Plattsmouth, Nebraska; that Japson agreed that, if plaintiff would come to Havelock, take care of Japson and help him in his business affairs and live at Havelock with him, he, Japson, would will to plaintiff all of his property upon his death; that, pursuant to such promise and relying thereon, plaintiff moved to Havelock, Nebraska, in 1904, and lived there continuously until 1911. It is further alleged that during that time plaintiff looked after Japson, assisted him in his business affairs, taking care of him when he was sick and injured, and fully complied with plaintiff's part of the contract.

The answer admitted the death of Japson intestate and that defendant was duly appointed and qualified as administrator of Japson's estate, and denied the other allegations of the petition. Trial to the court resulted in a decree for plaintiff. Defendant has appealed.

Plaintiff contends that the defendant, as administrator, has no right of appeal, on the theory that the order is one for a final distribution of decedent's estate. Plaintiff overlooks the fact that this is not a proceeding in the county court for the distribution of decedent's estate, but is a claim asserted by him against the estate. The administrator represents not only the heirs, if any, but the creditors of the estate, and is charged with its preservation against any unjust claims. The fact that plaintiff makes the administrator sole defendant shows that he regarded defendant as authorized to represent and defend the estate. It would indeed be a strange thing that the estate which defendant represents could be bound by the decree, and that defendant was a proper person against whom the

decree should run, and yet he could not appeal from an adverse decision.

In *Packer v. Overton,* 200 Ia. 620, it was said (p. 622): "An executor or administrator acts in a representative capacity. By fiction of identity he is the person of the testator, and it is to him that all interested parties must look. He is charged with the duty of resisting unfounded claims, and to see to it that there is no improper diversion of funds or property in his hands. *Briggs v. Walker,* 171 U. S. 466, 43 L. Ed. 243. He represents all parties and all interests in the estate. *Leighton v. Leighton,* 193 Ia. 1299. For this reason he was made the party defendant in the instant case, and he is the only party who could appeal and preserve rights, if any, adversely affected by the judgment." Among other authorities holding to a like view are the following: *McKenney v. Minahan,* 119 Wis. 651; *Agnew v. Agnew,* 52 S. Dak. 472; *In re Estate of Heydenfeldt,* 117 Cal. 551; *Marion County Court v. Wilson* 105 Ky. 302; 3 C. J. 627.

Before taking up a discussion of the facts, we think it proper to say that it is very doubtful whether the contract alleged is sufficiently definite, in its terms, to constitute a valid agreement, if made. Plaintiff was to go to Havelock, take care of Japson, help him with his business affairs, and live with him at Havelock. What work was he to do in taking care of Japson? What was he to do in helping him in his business affairs? How long was he to live with him? How long was he to take care of and render service to Japson? Was it for a day, a week, a month, a year, or during the life of Japson? We are left in doubt. However, in view of the conclusion hereinafter reached on another proposition, we find it unnecessary to pass upon the question of whether the contract is sufficiently definite to be the basis of an action.

In general, the facts disclosed by the record may be summarized thus: Japson was a native of Denmark. He came to this country in 1880 and to Plattsmouth, Nebraska, in 1885, where he was employed in the shops of

the Burlington Railroad Company. Soon after his arrival in Plattsmouth he became acquainted with one Petersen, father of the plaintiff, who was also a Dane. Apparently, Japson was on very friendly and intimate terms with the Petersen family. He seems to have been very fond of the Petersen children, of whom there were four, and often referred to them as his "kids," or his children. He was later transferred from the Burlington shops in Plattsmouth to the Burlington shops in Havelock, Nebraska. When his transfer was effected is not clear. One of plaintiff's witnesses testified that it was in 1892, while plaintiff testified that it was in the late '90's or possibly in 1900. When asked how he fixed the time, plaintiff stated that Japson, together with plaintiff's father, mother and sister, attended the World's Fair in Chicago in 1893, and he knew it was some years after that time. Later he testified that he was born in 1887, and that his mother died seven weeks afterwards.

There were a number of witnesses for plaintiff who testified to conversations with Japson in which he stated, in substance, that he had no relatives or intimate friends, other than plaintiff, and that whatever property he might have at his death would go to plaintiff. One of plaintiff's witnesses testified that subsequent to the time of the alleged agreement Japson several times stated that he would leave his property to the Petersen children, without designating any one of them. But two witnesses approached the subject of proving an actual contract. One, a sister of plaintiff, testified, in substance, that in 1904, at their home in Plattsmouth, Mr. Japson requested plaintiff to move to Havelock; that Japson said he would like to have "Charlie" (plaintiff) come to Havelock; that he would not be sorry; that he would make it right with Charlie; that he would see that Charlie was taken care of when he was gone; that he would leave his estate or his money to Charlie; that he would make a will and it would be in Charlie's favor. Witness Hermanson testified that Japson took his meals at his mother's home in Havelock, and that on one

occasion he had a conversation with Mr. Japson in which the latter stated, in response to a question as to what he was going to do with his money or property, that he (Japson) had asked Charlie "if he wouldn't come down to Havelock;" that he "wanted someone to associate with," and help him; that Charlie finally went to Havelock "on the promise that Mr. Japson would take care of him if he came to Havelock." Witness asked Mr. Japson if he had made a will and he said "No." Witness stated to him: "Well, it would simplify matters a lot if you had," to which Japson replied: "Well, Ed, I will tell you what we will do, you go back to law school and when you get out of school I will have you make out my will for me." Witness was then asked: "Did he say who he was going to make the beneficiary in that will?" and answered "Charlie Petersen."

Without so deciding, let us assume that the evidence is sufficient to establish the making of the contract as alleged; still, plaintiff may not recover unless he has proved substantial performance upon his part. The record discloses that plaintiff left his home in Plattsmouth and went to Havelock, and worked in the Burlington shops from some time in December, 1904, until the spring of 1911. During no part of this period does it appear that plaintiff lived with Japson, and there is no competent evidence that he performed any service for him except to be frequently in his company. There is no proof that he assisted Japson in his business, or that he took care of him, save one answer of the plaintiff when he was asked where he (plaintiff) roomed or stayed after Japson had suffered an injury. To this question he answered: "I went over and took care of Mr. Japson, helped him." The answer was not responsive to the question, and motion was made to strike it out. The motion was overruled. We think it should have been sustained.

In *Kofka v. Rosicky,* 41 Neb. 328, it was held: "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other

party partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it." This rule was reannounced in *Damkroeger v. James*, 95 Neb. 784. See, also, *Hespin v. Wendeln*, 85 Neb. 172; *Harrison v. Harrison*, 80 Neb. 103.

In the case of *Peterson v. Bauer*, 83 Neb. 405, this court held: "An oral contract to adopt the daughter of a stranger and leave her property by will may be enforced by specific performance, where she has fully performed her part and established the agreement by clear and satisfactory evidence."

In *Powers v. Norton*, 103 Neb. 761, this court held: "An action for the specific performance of an oral contract for the conveyance of land will not lie, unless the proof is clear, satisfactory and unequivocal that the contract was made and substantially performed by the party seeking its enforcement."

In *Davis v. Murphy*, 105 Neb. 839, it was held: "A parol contract is enforceable in a court of equity when one party has wholly performed his part and the other has not performed his part, when it clearly appears that nonfulfilment would work a fraud upon the party who has fully performed." To the same effect is the opinion in *Nielson v. Kammerer*, *ante*, p. 57.

In 25 R. C. L. 310, sec. 124, speaking of contracts like that under consideration, it is said: "The evidence to sustain such an agreement must in all particulars be clear, positive, and convincing, and the performance relied on as the basis of the desired relief must likewise be proved by clear and sufficient evidence."

From a careful scrutiny of the entire record, we are convinced that it fails to show substantial performance of the contract on the part of the plaintiff, and without such substantial performance the court will not grant specific performance of the alleged contract.

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

REVERSED AND DISMISSED.

PAINE, J., dissents.

IN RE ESTATE OF JAMES C. TUCKER. COMMERCE TRUST COMPANY, APPELLANT, V. ESTATE OF JAMES C. TUCKER ET AL., APPELLEES.

FILED FEBRUARY 14, 1935. No. 29118.

1. **Executors and Administrators: CLAIMS AGAINST ESTATE.** Where the creditor of an estate, having failed to present his claim within the time allowed therefor "in the first instance" by the probate court, makes application for that purpose "within three months after the expiration of the time previously allowed," the court may, for "good cause shown," allow further time not exceeding three months for the filing and determination of such claim.
2. ———: ———. "Good cause," as employed in our statute of nonclaim, is not definitely defined therein, and the proper interpretation and application thereof must depend upon the circumstances of each case and be determined by the court in the proper exercise of a sound judicial discretion.
3. ———: ———. Evidence in the instant case examined, and *held* to establish "good cause shown" entitling applicant to relief under the provisions of section 30-605, Comp. St. 1929.

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

Flansburg, Lee & Sheldahl, for appellant.

Sackett & Brewster, contra.

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

EBERLY, J.

This is an appeal by Commerce Trust Company from a judgment entered in the district court for Gage county in favor of the First Trust Company of Lincoln, Nebraska (executor under the will of James C. Tucker, deceased), and Sarah E. Tucker, objectors and appellees, denying appellant's application for further time for the filing and determination of its claim against such Tucker estate. This action originated on a demand based on an obligation in the nature of a written contract of guaranty executed

by James C. Tucker, deceased, and delivered to the Commerce Trust Company of Lincoln, Nebraska, wherein was guaranteed the payment to the Commerce Trust Company of certain mortgage bonds in accordance with their terms, issued by and upon the properties of the Lutheran Hospital Association of Beatrice, Nebraska.

It appears that James C. Tucker, the deceased, a resident of Beatrice, Nebraska, died there on July 3, 1931. His will was admitted to probate, after due notice of publication, on July 31, 1931.

By an order made and entered by the county court of Gage county in said cause, it was directed that three months be allowed creditors to present their claims against said estate from September 1, 1931, and, pursuant thereto, notice to creditors setting forth this fact and the dates on which claims so filed would be heard by the county court was published in the Beatrice Daily Sun of Beatrice, Nebraska, in each and every Monday issue of said newspaper for three successive weeks, the last publication being on August 31, 1931.

Claims thus filed were heard and determined, and a decree barring unfiled claims against this estate was duly entered in said cause by the county court on December 2, 1931. Final report of the executor and petition for final settlement of its accounts was filed January 29, 1932. The day fixed for hearing on this petition for final settlement of the estate was February 23, 1932. Final distribution had not been made at the time of the commencement of the instant proceeding.

On March 1, 1932, and within the statutory three months after the expiration of the time limited by the county court for filing claims against the estate, claimant filed its application for leave to file its claim and fix a date for hearing thereon. This claim set forth as a part of the application was in the sum of $2,125, based on the written guaranty of the mortgage bonds, and which, it was alleged, accrued, or would accrue pursuant to the terms of the guaranty, subsequent to the expiration of the time

limited for filing claims against the estate of the deceased. It was also alleged that claimant's place of business was at Lincoln, Nebraska; that it had no knowledge of the death of James C. Tucker, or of the administration of his estate, or of the time limited for filing claims against his estate, until January 13, 1932; and that the failure of claimant to learn these facts could not have been avoided.

On March 3, 1932, the objectors filed answer and objections to this application being granted. In this pleading facts concerning the regular administration of the estate were set forth, and the right of applicant to relief was challenged. Upon a hearing the county court determined "that no good cause has been shown by the applicant to open or set aside the said decree barring the filing of claims herein, and to permit the applicant to file its alleged claim against said estate," and denied any relief to applicant. On appeal to the district court, and a trial there *de novo,* relief was again denied the claimant. This matter, on appeal, is now presented to this court for its determination.

While, as between the parties to this appeal, there is at least an apparent dispute as to the dates when defaults in the payment of the bonds guaranteed occurred, and thereby the guaranty thereof became absolute so far as immediate payment was concerned, yet the fact of the due execution of the written guaranty in suit, its validity, and the further fact that the mortgages guaranteed were in default at the time of trial seem not to be in substantial controversy. In truth, the record in its present form discloses a valid unpaid claim in behalf of applicant, and the controlling question on appeal appears to be as to the right of applicant to have a hearing thereon and the due allowance thereof at the time of its presentation to the county court of Gage county, in view of the terms of our statute of nonclaim. That statute, so far as applicable to the present controversy, embraces the following provisions:

Section 30-601, Comp. St. 1929: "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 said court to receive, examine, adjust, and allow all lawful claims and demands of all persons against the deceased: Provided, said judge shall within forty days after the issuance of such letters testamentary or of administration, give notice of the date of the hearing of claims against the deceased and the limit of time for the presentation of claims by creditors, which notice shall be given by posting in four public places in said county, or by publication in a legal newspaper of said county three successive weeks, or in any manner which the court may direct."

Section 30-603: "The court shall allow such time as the circumstances of the case shall require for the creditors to present their claims for examination and allowance, which time shall not in the first instance exceed eighteen months nor be less than three months, and the time allowed shall be stated in the order."

Section 30-604: "The court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years."

Section 30-605: "On the application of a creditor who has failed to present his claim, if made within three months after the expiration of the time previously allowed, the court may for good cause shown allow further time not exceeding three months for the filing and determination of such claim, upon the notice prescribed in the preceding sections of this chapter, in which he shall give notice to parties interested of the time and place of the hearing of such claims."

Section 30-609: "Every person having a claim or demand against the estate of a deceased person whether due or to become due, whether absolute or contingent, who shall not after the giving notice as required in this chapter exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same in any action whatever;" etc.

All questions as to the regularity of the administration of this estate, and the proper giving of the notice required, are foreclosed by the record before us. Applicant having filed its application "within three months after the expiration of the time previously allowed" creditors to file their claims against this estate, its right to further and additional time must be determined by the proper construction of the sections of our statute above quoted, and particularly the interpretation of the words "good cause" as employed in section 30-605.

In other words, do the allegations of claimant's application, and proof adduced in support thereof, entitle it to "further time not exceeding three months for the filing and determination of such claim" as for "good cause shown?"

The use of the words "good cause," as a condition upon which statutory rights may depend, or upon which relief under the terms of legislative provisions may be conditioned, is not an infrequent device of the lawmakers. These words are noted by Blackstone in his Commentaries in connection with the writ of mandamus. 2 Cooley's Blackstone (3d ed.) 264.

Among other matters of legislation in connection with which the term under consideration is employed are the following:

Necessity of "good cause" to secure a review. *Jones v. Curling,* 13 Q. B. Div. (Eng.) 262; or, "good cause" for transferring proceedings. *In re Laxon & Co.* (1892) 3 Ch. Div. (Eng.) 31.

It is also to be noted that usually, where a statute directs that a court may do a thing on "good cause" shown, irrespective of the connection, the force of this language thus employed is to vest in the tribunal to which directed a judicial discretion in the matter or thing to which it relates. *Kerchner v. Singletary,* 15 S. Car. 535; *Kendall v. Briley,* 86 N. Car. 56; *People v. Sessions,* 62 How. Pr. (N. Y.) 415. See, also, *Ruffner v. Love,* 24 W. Va. 181, 185; *Hubbard v. Yocum,* 30 W. Va. 740; *Jones v. Curling,*

13 Q. B. Div. (Eng.) 262; *Huxley v. West London Extension R. Co.*, 14 App. Cas. (Eng.) 26; *Whitcher v. Benton*, 50 N. H. 25; *Green v. Goodloe*, 7 Mo. 25.

It is quite evident that from the consideration of these cases, arising under statutes relating to different subjects, in which the words "good cause" are incorporated, and wherein that which constitutes "good cause" is not stated nor definitely defined, the proper application thereof must depend on the circumstances of each case, and be determined by the sound discretion of the court. But such cases require the exercise of a proper judicial discretion.

In *Felts v. Boyer*, 73 Or. 83, 95, in construing a statute which provided in substance that a defendant, upon good cause shown, and upon such terms as may be proper, may be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just, the supreme court of Oregon said in part:

"The construction, we believe, that is best adapted to advance the ends of justice, is that section 59 (the statute last above referred to) supplies the defendant, who comes within its terms by showing that he has a good defense and had no actual notice of the pendency of the suit or action, an opportunity to defend as a matter of statutory right and not of judicial discretion. *Lyon v. Robbins*, 46 Ill. 276; *Lord v. Hawkins*, 39 Minn. 73; *Boeing v. McKinley*, 44 Minn. 392; *Brown v. Conger*, 10 Neb. 236; *Green v. Goodloe*, 7 Mo. 25; *Albright v. Warkentin*, 31 Kan. 442; 23 Cyc. 916."

See, also, *Greeley & Loveland Irrigation Co. v. Handy Ditch Co.*, 77 Colo. 487, in which it was determined that no notice of proceedings constitutes "good cause."

In line with the policy generally emphasized in the American states, of securing the earliest possible settlement of the estates of deceased persons compatible with the just rights of creditors, Nebraska has enacted special laws of limitation applicable to demands against the estates of deceased persons. "These limitations exist independent of and collateral to the general law of limitation affecting

alike the right of action against living persons and the representatives of those deceased." 2 Woerner, American Law of Administration (3d ed.) sec. 400.

The statutes of Nebraska hereinbefore quoted are the statutes of nonclaim applicable to the present proceeding, and are not to be construed together with, or as attached to, the general statutes of limitation, but independent thereof. Indeed, in most states the statutes of nonclaim, or of limitations especially as to estates of deceased persons, are applied more rigorously than the general statutes of limitation. *State v. Probate Court of Hennepin County,* 145 Minn. 344. See, also, *Morgan v. Hamlet,* 113 U. S. 449.

In this view of the controlling issue presented in the instant case, no aid whatever is afforded by the following cases, cited by appellees: *Nebraska Wesleyan University v. Bowen,* 73 Neb. 598; *Estate of Fitzgerald v. First Nat. Bank of Chariton,* 64 Neb. 260; *Burling v. Allvord,* 77 Neb. 861. In these cases eight months, seven months, and almost two years, respectively, had elapsed after the time limited by the proper probate court for filing of claims had expired. Relief was not sought, and, under the facts in each case, could not have been sustained, under the controlling statute in the instant case. Necessarily the provisions of this statute (Comp. St. 1929, sec. 30-605) were not, and could not have been, involved in any of these three cases last cited. Any discussion relating thereto, if such is to be found in those opinions, must be deemed as *obiter dicta,* and in no manner binding on this tribunal. *State v. Marsh,* 107 Neb. 637; *Dempster v. Ashton,* 125 Neb. 535.

But, in the instant case, the applicant filed its application within the three months "after the expiration of the time previously allowed." It negatives all knowledge of the death of deceased, or of the pending administration of his estate; sets forth the basis of its claim; controverts negligence; and alleges the exercise of proper diligence.

Under the evidence in the record, the applicant simply

did not know of facts that would challenge its attention to the actual situation, and thus its lack of knowledge was in no manner due to lack of diligence and care in the prosecution of its business, or in failing to promptly follow up any information received, or in fact due to any negligence whatever. Under these circumstances, it failed to file its claim within the three months as limited "in the first instance" by the county court of Gage county, but as soon as information as to the death of deceased came to hand it moved with reasonable promptness and did file a proper application within the three months allowed by section 30-605, Comp. St. 1929.

The instant case is not an attempt to avoid the bar of the statute of nonclaim, but rather is an attempt to secure rights expressly granted by its terms, entirely consistent with the terms of the statute creating the bar. Until the three months have elapsed immediately following the time limited "in the first instance," "good cause shown" is ample to sustain relief; after that period we are relegated for relief, if relief is to be had, to other statutes and the general principles of equity.

This court is committed to the rule: "A court of equity, in granting relief against judgments, is not restricted to cases where the court entering the judgment complained of was without jurisdiction, but will extend its assistance in cases where jurisdiction was obtained, but the defendant, without fault or negligence on his part, but by accident or misfortune, was prevented from making his defense, provided it be further shown that he had a good defense to the merits." *Radzuweit v. Watkins*, 53 Neb. 412. See, also, *Horn v. Queen*, 4 Neb. 108; *Young v. Morgan*, 9 Neb. 169; *Poeggler v. Supreme Council, C. M. B. A.*, 102 Neb. 608; *Thompson v. Sharp*, 17 Neb. 69.

It would seem obvious that the requirements of "good cause" as applied to filing a claim against an estate would not in any event exceed the requirement for relief against service of process duly and lawfully made in ordinary actions. Indeed, it would seem that the terms of the con-

trolling statute here under consideration indicate a less degree of proof in its expressed requirement of "good cause."

We regard the question here presented as not controlled by our previous decisions, and, upon due consideration thereof, are unanimously of the opinion that the pleadings and the proof in the instant case established "good cause" within the purview of our statute of nonclaim; and that the trial court erred in determining to the contrary.

The judgment of the district court is, therefore, reversed and the cause remanded, with directions to provide for the giving of notice to all persons in interest, for granting additional time to claimant to file its claim, and for hearing such claim upon the merits.

REVERSED.

JULIA H. LEEDS, ADMINISTRATRIX, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

FILED FEBRUARY 14, 1935. No. 29108.

1. Witnesses: PRIVILEGED COMMUNICATIONS. A physician may testify to the number of times he was called, and the dates of his professional visits, as these facts are not within the privileged communication rules set out under sections 20-1206 and 20-1207, Comp. St. 1929.
2. ———: ———. If a patient is accompanied by a friend, who remains with her during examination by a physician, the fact that this third person was allowed to be present is not in itself a waiver of privilege by the patient.
3. ———: ———: WAIVER. A proper cross-examination of such third person, present during the examination by the physician, should not be construed as a waiver of privilege.

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

Beghtol, Foe & Rankin, J. E. Ray and *Ralph W. Hyatt*, for appellant.

J. E. Willits, contra.

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

PAINE, J.

This is an action brought upon a life insurance policy, payable upon the death of Mabel Fernandez to her administrator or executor. A verdict was returned by ten jurors in the sum of $587.50, and in entering the judgment thereon the court awarded an attorney's fee of $200 as part of the costs. Defendant appeals.

Mabel Fernandez was employed at times in various restaurants, and had been carrying two life insurance policies, of the industrial type, issued by the Prudential Insurance Company of America, in the sum of $500 each, upon which she made weekly payments of premiums. In 1930 the limit allowed for industrial policies, which were written without medical examination, was raised to $1,500, and the agent for the defendant at Hastings went to see the deceased at her mother's home, after the two older policies had been transferred to the Hastings office for the collection of premiums, and solicited her to take out a third policy for another $500. This agent testified that he had written hundreds of industrial policies for the defendant company, and had been employed by it from 1926 until about two months before the time of the trial, at which time he was no longer in its employ. The application for a third policy was signed by her on June 3, 1930, and later the agent delivered the policy to her. The agent testified that he wrote down her answers on the application, exhibit 3, in the presence of her mother, Mrs. Julia H. Leeds, and also a Mr. James Whitticker, who roomed at the house. Mr. Whitticker testified that the agent asked Mabel Fernandez to sign the application at the bottom of the printed part; that there was nothing written on it at the time she signed it, but that he told her if she would sign her name to it, as she was leaving for Omaha, and send the money back to her mother, that he would fill the application in and send her the policy.

"Q. 499: Did he ask her any questions about health or sickness or anything of that kind? A. No." Mrs. Julia H. Leeds, the mother, testified that she was also present with her daughter Mabel and Mr. Whitticker when the agent came there, and that the application, exhibit 3, was blank when her daughter Mabel signed it; that the agent told her that she had two policies before and that he knew what was on there, and that he would fill it out himself. Mrs. Leeds testifies that there was nothing said about consumption, tuberculosis, or spitting of blood, or anything like that; that she never heard the agent ask her daughter any questions, and that her daughter signed a blank application, which the agent took away from the home in that form, and that the daughter left for Omaha the next day, but was in no hurry about going; that this conversation all took place in the front room of her home at 808½ West First street, Hastings, Nebraska; that Mabel was sitting in a rocking-chair at the library table when she signed it; that she never saw the agent sign the application at all.

It is admitted that the Prudential Insurance Company of America promptly paid $500 each on the two older policies which Mabel Fernandez had been carrying for some time, and that it refused to make payment upon the third and last policy of $500 in suit in the case at bar, and alleges in its answer that Mabel Fernandez was not in sound health on June 9, 1930, the date the policy was delivered, but was suffering from pulmonary tuberculosis, and for that reason the policy never took effect; that she represented to the company that she had never suffered from consumption or spitting of blood, and that her health was good, and that she had no physical defect, whereas they allege the truth was that she was then, and had been for several years, afflicted with pulmonary tuberculosis, and had been treated therefor; that her statements in her application were false and fraudulent, and deceived the defendant to its injury, and that the defendant company would not have issued the policy if it had not been de-

ceived by said false statements; that it did not learn of these facts until after the death of Mabel Fernandez, at which time it tendered to the plaintiff the premiums that had been paid upon the policy in the sum of $17.94, which tender was refused by the plaintiff, and which is now brought into court and tendered in complete satisfaction of its liability. Mabel Fernandez died April 23, 1931, near Keystone, Nebraska, and was at the time of her death a resident of Hastings, Nebraska. All weekly payments due were fully paid at the time of her death, and the policy was in full force and effect. Julia H. Leeds was duly appointed administratrix of her estate, and letters of administration were issued by the county court of Adams county. The assistant district superintendent came to the plaintiff following the death of Mabel Fernandez, and said he had come to make settlement for the amount due on the policy, and that it was necessary for him to have the policy and send it in to the head office to have such office send payment thereof, and the plaintiff gave him the policy of insurance, and he has not returned said policy, nor has the defendant paid the amount due thereon, and, although requested, said defendant has failed, refused, and neglected to return the policy to plaintiff.

In the "Attending Physician's Certificate of Death," being exhibit 4, Dr. Edward Bridges says that he made the first visit to the deceased on March 4, 1931, and that she died April 23, 1931, and gives tubercular laryngitis as the immediate cause of death.

In exhibit 2, being the death claim sent in to the defendant, we find that the first two policies of $500 each are shown to be both dated September 5, 1927. The third, or policy in dispute, is No. 82,472,858, dated June 9, 1930. In this exhibit 2 it shows that the deceased was divorced, and left no children.

Nell Kaufman, a checker and cashier in the Fontenelle restaurant, with whom the deceased roomed in Omaha in 1927, 1928, and a part of 1929, was called as a witness by the defendant, and testified by deposition taken in Omaha

November 1, 1933. She stated that, when the deceased was taken sick one night, she called Dr. W. H. Betz, who had been her own doctor, and later took her to his office, and was present during his examination, and heard all of his suggestions and directions to the deceased in regard to her care of her health. After the direct examination of Nell Kaufman, she was then examined on cross-examination by the attorney for the plaintiff. The defendant then offered in evidence the deposition of Dr. E. W. Fiske, taken in the city of Santa Fe July 24, 1933, to which the defendant objected on the ground that it was a privileged communication between physician and patient, and that the deceased had in no way waived her privilege before her death, and that the estate represented by the plaintiff insisted that the evidence of the doctor was all privileged, and should not be allowed to be divulged. The jury were excused and the matter argued at length to the court. It was insisted that the plaintiff had waived the privilege by reading to the jury the cross-examination of Nell Kaufman, who was present during all of the examination of deceased by Dr. Betz, and having thrown down the bars had waived the privilege as to any and all doctors who had treated the deceased, and that the defendant had the right to offer the deposition of Dr. Fiske in relation to her condition while in Santa Fe, New Mexico.

The case principally relied upon is the Nebraska case of *Sovereign Camp, W. O. W., v. Grandon,* 64 Neb. 39. In examining this case, we find that the suit was between the representative of a deceased policyholder and an insurance company, and that the physician who attended the deceased in his last illness was called by the defendant, but objections to his testifying generally as to the condition of the deceased or his ailment were sustained, but thereafter the attorney for the plaintiff examined the physician as to a written statement that he had given that the deceased was not seriously sick until just before his death, and on the cross-examination by the plaintiff the physician admitted making the statement, and the same was offered

and admitted in evidence as part of the cross-examination, constituted a waiver of privilege on the part of the plaintiff, and that on redirect examination the defendant company should have been allowed to examine the physician generally as to the condition of his patient, and for that reason a reversal was entered in this court. In the course of the decision it is stated that this prohibition cannot be used both as a shield and a sword, and if a party of his own volition places before the jury the evidence of the physician he cannot longer object on the ground of privilege.

Following this *Grandon* case in the Nebraska Reports, Judge Wilbur F. Bryant, the deputy reporter, added a very valuable note, beginning on page 49, discussing the common-law rules and the Codes of the various states, showing that in some states such a physician shall not be called as a witness, nor can he be examined, and in other states showing that the privilege covers not only communications made to the physician by the patient, but all facts which came to the physician from his professional connection with the patient. Nebraska has not gone as far as many states, and our court allows a physician to be called and to testify that he was the attending physician, and to give the dates of his call, as such facts are not under the privilege.

In *Friesen v. Reimer*, 124 Neb. 620, there was a full discussion of sections 20-1206 and 20-1207, Comp. St. 1929, and it was pointed out that this court had held in *Struble v. Village of DeWitt*, 89 Neb. 726, that when part of a confidential communication between physician and patient is put in evidence by one party, the other party may give the whole communication on the same subject, but in this case Elizabeth Friesen took the stand and testified in minute detail with reference to her physical condition after she had been injured in an automobile accident.

The case at bar does not present as simple a proposition for solution, and because some questions were asked on cross-examination of Nell Kaufman about the physical

condition of the deceased, we are asked to rule that this opened up the entire subject and was a complete waiver of privilege on the part of the plaintiff. In examining the cross-examination, it is clear that the examiner kept entirely within the bounds of a proper cross-examination; that he did not go outside the usual limits, as was done in the *Grandon* case, *supra,* and seek to introduce evidence on his own case, but, rather, his cross-examination may be properly considered as in limitation or modification of the answers made on direct examination by this witness. There is nothing that indicates that he was seeking independent evidence at the time of the taking of the cross-examination, and it appears that such a cross-examination cannot be considered as the evidence of the party who calls the witness unless they go too far afield in their examination.

Another question arises at this point: The roommate of the deceased, Nell Kaufman, was very anxious to take the deceased to her own doctor for examination, and being acquainted for several years with the doctor, she went into the private examination room with her roommate and listened to all that the doctor said. To now argue that taking a third party with her is in itself an entire waiver of privilege does not appeal to this court. It might, and often does, arise that a patient who cannot speak the English language takes with her a close friend who can interpret between the doctor and herself. It is quite often true that an old gentleman making a will takes with him into the private consultation room his son, who listens to all the conversation, or that the stenographer of the attorney is present. It does not seem that the mere fact of the presence of a third person is a waiver of the confidential relations between attorney and client, or physician and patient. Nor is the cross-examination of such third person, when called by the other side to answer such questions as may be unobjectionable, a waiver of the right of privilege, which should be jealously guarded to protect the rights of the one whose lips are closed by death.

Our legislature, in enacting sections 20-1206 and 20-1207, Comp. St. 1929, has followed an example prevailing in many other states, and which is in the interest of justice, and leads to a lack of embarrassment on the part of a patient or client in disclosing the most confidential facts to their physician or attorney, and this right of privilege should be cherished and protected by the courts, and not easily set aside.

Defendant charges that deceased wilfully and fraudulently concealed the fact that she was suffering with tuberculosis when she signed the application for the third policy. Two reputable witnesses, who were present in the room during the entire transaction, testified directly against the defendant's agent on this point. The weight of the testimony is that she made no representation about her health, and no answers had been filled in on the application when she signed it. A few days later the agent personally delivered the policy to the deceased, and question No. 114 was: "Did you talk to her after that day? A. Yes; I delivered the policy to her. Q. Was there anything unusual about her voice that you noticed? A. It wasn't to me. She talked rather husky, maybe, but that wasn't out of the ordinary to me because that's the only way I had known that she talked."

Then, in examining exhibit 2, the claim sent in to the insurance company, there is an impression of a rubber stamp across near the top, with the words, "Received by Div. Mgr.," and on the blank line following this, in ink, the signature, "J. Ray," and following this signature the words, "Agt. to be dismissed. 7/23."

It is our conclusion that the defendant has failed to prove by the weight of the evidence that any untrue answers were made by the insured.

Some of the authorities in support of statements herein are: *Roberts v. Hennessey,* 191 Ia. 86; *Burgess v. Sims Drug Co.,* 114 Ia. 275, 54 L. R. A. 364; *Burns v. City of Waterloo,* 187 Ia. 922; 10 R. C. L. 958, sec. 132; *Towle v. New York Life Ins. Co.,* 121 Neb. 175; *Lauer v. Banning,*

152 Ia. 99; *Coca Cola Bottling Works v. Simpson*, 158 Miss. 390, 72 A. L. R. 143.

We have examined all the reasons assigned for reversal, and finding no prejudicial error, the judgment of the district court is hereby

AFFIRMED.

KATHRYN L. DALY, APPELLEE, V. PUBLIX CARS ET AL., APPELLANTS.

FILED FEBRUARY 21, 1935. No. 29152.

1. Carriers: CARE REQUIRED. Common carriers of passengers "are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence." *Griffen v. Lincoln Traction Co.*, 118 Neb. 459.
2. ———: LIABILITY. A common carrier of passengers is liable for personal injuries to a passenger, if caused by the concurrent negligence of the carrier's servant and third persons.
3. ———: ACTION FOR DAMAGES: OFFER OF PROOF. In an action by a passenger, injured in a taxicab struck by an automobile, against the owner and also the driver of the taxicab and the driver of the automobile, all guilty of negligence resulting in the collision, an offer of proof that the driver of the automobile paid the damages to the taxicab, *held* properly excluded, being hearsay as to plaintiff who was free from negligence.
4. Appeal: REMITTITUR. Where a record for review is free from error except for an excessive verdict not resulting from passion or prejudice, the error may be corrected by the requiring of a remittitur, if the excess can be estimated with reasonable certainty.

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

Kennedy, Holland & De Lacy, Wear, Garrotto & Boland and *Swarr, May & Royce*, for appellants.

Johnsen, Gross & Crawford, Bernard J. Boyle, Harry L. Welch and *Joseph J. Vinardi, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

ROSE, J.

This is an action to recover damages in the sum of $7,500 for personal injuries which Kathryn L. Daly, plaintiff, alleged she suffered as the result of a collision between a taxicab and an automobile about midnight December 24, 1932, at the intersection of Twentieth and Dodge streets in Omaha. A common carrier of passengers, Publix Cars, owner of the taxicab, Harry Cartwright, operator of the taxicab, and Richard Tizard, driver of the automobile, are defendants. The negligence imputed to Publix Cars and to Cartwright is that the taxicab, headed east on Dodge street, was abruptly halted at the intersection of Twentieth street, without any tail light or other signal or warning to persons in the rear, and that Tizard came from the west at a high speed and drove the automobile into the left rear side of the taxicab. Tizard was charged with negligence in operating the automobile at a dangerous speed; in operating the automobile while under the influence of intoxicating liquor; in failing to have the automobile under proper control; in failing to make any attempt to avoid hitting the taxicab in which plaintiff was riding; in failing to keep a proper lookout for traffic at the point of the collision. It is also alleged in the petition that, as a result of the impact, plaintiff's head struck the glass in the rear of the taxicab, causing severe personal injuries; that the negligence of defendants and of each of them was the cause of the damages which she seeks to recover.

The answer of Publix Cars was a general denial. Cartwright, in his answer, admitted he was headed east on Dodge street at the time of the accident; that a red stop light was shining against traffic from the west on Dodge street at the intersection of Twentieth street; that he lowered his speed and came to a complete stop, and that thereafter the rear of his car was struck by Tizard's au-

tomobile. Unadmitted allegations of the petition were denied by Cartwright.

Tizard answered that the taxicab stopped suddenly without a proper tail light or signal to indicate Cartwright's intention to stop suddenly; that Tizard was following the taxicab at a reasonable distance; that without warning by tail light or signal he was unable to stop in time to avoid a collision, though he made every possible effort to do so; that plaintiff's injuries, if any, were not the result of negligence on his part. The reply of plaintiff to the several answers of defendants was a general denial.

Upon a trial of the issues the jury rendered a verdict against all defendants for $2,000. From a judgment therefor they appealed.

It is first argued by Publix Cars and Cartwright, as a reason for a reversal, that the evidence is insufficient to warrant a verdict against them in favor of plaintiff. The argument is based on two propositions: Negligence on the part of Publix Cars and Cartwright cannot be inferred from the evidence. Even if such an inference could be drawn, the inferred negligence was not the proximate cause of the collision; Tizard's actionable negligence being the sole cause of the accident and resulting damages. In determining the questions thus raised, the duty owing by Publix Cars to plaintiff must be considered. That corporation was a common carrier of passengers for hire. It was acting in that capacity when plaintiff was injured. In its taxicab plaintiff was a fare-paying passenger. She had no part in any negligence resulting in the accident. A law applicable to common carriers reads:

"They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence." *Griffen v. Lincoln Traction Co.*, 118 Neb. 459.

Though testimony of witnesses for Publix Cars and Cartwright tends to disprove the negligence with which

they were charged, there is evidence of the following facts, referring to the time and place of the collision: The night was misty and cloudy. There was no tail light on the taxicab before it was struck by the automobile. A tail light would have acted as a guide for Tizard. There was no signal to indicate Cartwright's intention to stop. Concerning the tail light, the drivers of the vehicles had a disagreement at the scene of the accident. Tizard, who approached from the rear, said there was no rear light and was contradicted by Cartwright. There was no light at the rear of the taxicab after the accident. There was also testimony tending to prove that the taxicab stopped abruptly when it arrived at the intersection; that it stopped before it reached the intersection; that it was going 10 or 15 miles an hour and stopped within perhaps 7 feet after the brakes were applied. There were marks three or four feet long on the street where the wheels of the taxicab skidded in coming to a stop. Some of the testimony tends to prove what is thus briefly stated and must be considered with the duty of the person operating the car in the rear to anticipate the proper stopping of the car ahead in the event of an emergency or a stop-light signal or of a stop signal from a traffic officer, and to exercise ordinary care to prevent a collision. It does not follow, however, that the driver in front may entirely escape the consequences of his own negligence, if, without a tail light at night, he stops suddenly without signaling to the car of his intention to do so, where such negligence concurs with that of the driver of the car in the rear and thus causes a collision in which a third person free from negligence is injured. The jury believed the testimony in favor of plaintiff and rendered a general verdict in her favor. They also found in answer to special interrogations that Tizard was negligent in operating his automobile at an excessive speed; in operating it while under the influence of intoxicating liquor; in failing to have his automobile under proper control; in failing to avoid the collision;

in failing to keep a proper lookout. The jury also specially found that the negligence of Tizard was not the proximate and sole cause of plaintiff's injuries. Tizard's negligence was clearly shown. A consideration of all the circumstances leads to the conclusion that the evidence is sufficient to sustain a finding that the concurrent negligence of all defendants caused plaintiff's injuries. The law is that a common carrier of passengers is liable for personal injuries to a passenger, if caused by the concurrent negligence of the carrier's servant and third persons. *Griffen v. Lincoln Traction Co.*, 118 Neb. 459.

One of the assignments of error challenges the exclusion of offered proof that Tizard paid the damages to the taxicab. The rejected testimony was offered on behalf of Publix Cars and Cartwright. In the petition each defendant was charged with negligence resulting in damages to plaintiff. There was evidence supporting the allegations of the petition. Defendant Tizard blamed the accident on the other defendants and they blamed it on him. The issues for the determination of the jury were between plaintiff and each and all defendants. Plaintiff was not a party to payment of such damages. She did not admit or prove they were paid. What Tizard did individually in that particular at a later date in absence of plaintiff did not bind her. He did not represent her in any capacity. She made no admission against her interests. An admission of Tizard, if made, was not plaintiff's admission. The offered proof, considered as an admission or as an attempt to bolster up other evidence or as affecting the credibility of witnesses or as a settlement between defendants, was hearsay as to plaintiff and properly excluded as such. Whether such testimony under other circumstances would be admissible in an action between joint tort-feasors is a question not now open for consideration.

Disregarding the amount of the verdict, which is assailed as excessive, error prejudicial to any defendant has not been found upon a review of the entire record.

An examination of the evidence relating to plaintiff's injuries and damages, however, leads to the conclusion that the recovery for $2,000 is excessive, but the judgment will nevertheless be affirmed to the extent of $1,200, if plaintiff files herein within 20 days a remittitur for $800. Otherwise, the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

IN RE ESTATE OF JOHN H. BARTMESS. FIRST STATE BANK OF DICKENS, APPELLANT, V. WILLARD BARTMESS, EXECUTOR, APPELLEE.

FILED FEBRUARY 21, 1935. No. 29153.

1. Contracts: VALIDITY. One is mentally incompetent to make a valid contract if at the time of the execution he does not have sufficient mental capacity to understand the nature, extent, and consequences of the obligation.
2. Evidence: NONEXPERT WITNESSES. Where the mental competency of a person is in issue, a nonexpert witness who has an extended intimate acquaintance with such person may state his opinion, where he has given the facts and circumstances upon which it is based.

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

Beeler, Crosby & Baskins, James T. Keefe and *Bruce K. Lyon,* for appellant.

Hastings & Hastings and *Halligan, Beatty & Halligan, contra.*

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

DAY, J.

This is an action to recover on a promissory note as a claim against the estate of John H. Bartmess, deceased. Objections were filed to the allowance of the claim, among which were the allegations that the de-

ceased was mentally incompetent to execute the note. The county court did not allow the claim, and an appeal was perfected to the district court, where by stipulation it was tried upon the same pleadings as in county court. The trial court withdrew from the consideration of the jury questions relating to consideration for the note and to fraud and misrepresentation made at the time the note was executed. Only the question of mental capacity to execute the note was submitted to the jury. The jury returned a verdict against the claimant.

The record requires a review of the judgment of the trial court that the deceased did not have the mental capacity to execute the note. Much of the testimony in the record relates to the questions of consideration and fraud and misrepresentation.

It is urged that it was error for the trial court to permit certain friends and acquaintances who had known him for many years to testify as to unusual circumstances and then to state that he did not understand the nature of a business transaction and was incapable of transacting his own business. The appellant insists that the question is whether the deceased was sane or insane. We do not deem the issue so narrowly confined. In *Keiser v. Keiser,* 113 Neb. 645, it is said: "Sanity and competency to manage an estate are not synonymous terms. A man may be sane in the sense that it is not necessary to incarcerate him in an asylum and yet be incompetent to manage an estate, even though he be not a spendthrift or a drunkard."

In *Hall v. Hall,* 124 Neb. 798, it is said: "Where one is by reason of old age, disease, weakness of mind, or from any cause unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed."

Very recently, this court, in *Shotwell v. First Nat. Bank,* 127 Neb. 676, held: "The question whether one * * * was incapable of making a valid contract depends upon whether, at the time of executing the contract, his under-

standing was so deficient that he had no knowledge of the consequences of the act."

The nonexpert witnesses in the cases were asked, after relating the details indicating physical and mental condition, if in their opinions, based upon these facts, the deceased was able to transact ordinary business affairs and know the nature and extent of the ordinary business transactions. Appellant apparently complains because the witnesses were not asked whether the deceased was in their opinion sane or insane. In *Keiser v. Keiser,* 113 Neb. 645, this court differentiated between mentally incompetent and incapable and insanity.

Where the mental competency of a person is in issue, a nonexpert witness who has an extended intimate acquaintance with such person may state his opinion, where he has given the facts and circumstances upon which it is based. *Kehl v. Omaha Nat. Bank,* 126 Neb. 695.

In *In re Estate of Cheney,* 78 Neb. 274, the issue was the competency of deceased to make a will. The nonexpert witnesses were asked if in their opinions the deceased was capable of making a will. The witnesses here were not asked if the deceased was capable of executing a note, but whether deceased, in their opinions, understood ordinary business transactions and the nature and extent of such transactions. There is evidence in the record tending to prove that John H. Bartmess was by reason of old age, disease, and weakness of mind unable to understand the ordinary business transactions and incapable of managing his property. The issue was properly submitted to the jury.

The plaintiff complains about the admission of certain evidence between the deceased and his sons relative to a family, one member of which was an officer of the bank which filed this claim. The admission of this evidence was not error for that it indicated the mental condition of the deceased. Objection was made to the admission of other evidence which was introduced upon issues raised by the pleadings herein but which was with-

drawn from the consideration of the jury and was not therefore prejudicial to the appellant.

Certain instructions are challenged as erroneous, the basis of the criticism being that they did not submit to the jury the question of sanity or insanity, which the appellant contends was the only issue in this case. We have examined the instructions, and, taken in connection with all the other instructions in the case and the evidence, we are constrained to hold that they are not prejudicially erroneous in this case. All of the errors argued relate to the question of the mental incompetence necessary to invalidate a contract. In view of our determination of this question, the trial court committed no error in the admission of evidence or the giving of instructions.

AFFIRMED.

IN RE ESTATE OF IDA MAY ALTON.
L. W. MCDONALD, EXECUTOR, APPELLEE, V. RALPH ALTON CRESSLER, APPELLANT.

FILED FEBRUARY 21, 1935. No. 29166.

1. Wills: UNDUE INFLUENCE. The burden of proving that the will resulted from undue influence is on the contestants, and the mere suspicion of undue influence on testatrix is insufficient to require submission of the question to the jury.
2. Trial: VERDICT: IMPEACHMENT. "Matters inhering in the verdict of a jury cannot afterward be attacked by affidavits of the jurors." *Iman v. Inkster*, 90 Neb. 704.

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

Albert M. Seff, George W. Koehn and *Julius D. Cronin*, for appellant.

Frank S. Howell, Fred A. Wright, Thomas J. Kennedy and *G. A. Farman, Jr., contra.*

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

DAY, J.

This is an appeal from the judgment of the district court for Brown county confirming the judgment of the county court allowing the probate of the proffered will of Ida May Alton, deceased. The contestant alleged, first, that the said document was not the will of Ida May Alton, deceased, because of undue influence having been exercised and, secondly, that at the time of execution Ida May Alton was not mentally competent to make a will. Upon the trial the court withdrew the issue of undue influence from the consideration of the jury and submitted only the question of the mental competence of Ida May Alton. The jury returned a verdict in favor of the will. This appeal presents only two matters for our consideration and determination: First, the sufficiency of the evidence to require a submission to the jury of the issue of undue influence; and, secondly, the alleged misconduct of a juror as grounds for a new trial.

The contestant is a nephew of deceased, 47 years of age, who had not seen his aunt for 30 years prior to her death. Ida May Alton lived the last 20 years of her life with a sister, Sarah, and a brother, Will, in Norfolk, Nebraska. The nephew never corresponded with the deceased or the aunt and uncle who made up the household. He heard indirectly through relatives about 27 years ago. He heard of the death of Ida May Alton through an attorney, whereupon he contested the will.

The will, the last of a series of five executed by the deceased, left the property to those who had been close friends to her and her brother for many years. Most, if not all, of the property had been left to deceased by her brother. The person contestant alleges exerted undue influence over deceased to procure the will was Mrs. Bessie McDonald, a friend and neighbor. Mrs. McDonald received nothing under the will except some personal effects and furniture. There is no evidence tending to prove that any other beneficiary had anything to do with the execution of the will. The record establishes that the deceased

made her first will in December, 1929, and the last, the one involved herein, in May, 1931. These wills were prepared by the attorney who had assisted her in the probate of her brother's estate. The wills were substantially the same, in that each expressed the intention to leave nothing to her nephew, the contestant here, and left the property to about the same friends. The occasion for the execution of this last will was a new baby in a family whose children were beneficiaries and the testatrix wished to take care of this child. The contestant relies upon the testimony of the witnesses, LaVerne Fridley and Naomi Nordwick, as most favorable to his claim. An examination of the record as well as the abstract of evidence in contestant's brief reveals that this testimony by women employed by the testatrix to care for her falls far short of tending to prove that Mrs. Bessie McDonald or any one else exercised undue influence over the testatrix. The evidence adduced by the contestant does not establish undue influence, nor facts and circumstances from which a jury could infer such undue influence. The evidence does not bring this case within the rule announced by this court in *In re Estate of Noren,* 119 Neb. 653.

To be specific as to the established facts, it is said that Mrs. Bessie McDonald said upon occasion that the testatrix could will her certain articles about the house; that she called upon her frequently; that she took her riding Sundays and rendered other attentions not unusual for an old friend and neighbor. There is no evidence that Mrs. McDonald was present at the time of the execution of any of the wills or that she made any suggestions which were incorporated therein. The attention Mrs. McDonald gave the deceased was only the attention the testatrix would have expected from an old friend whom she had made a beneficiary under her will. There is testimony that the deceased told several other parties than the beneficiaries that she was leaving them something in her will. The fact that the will provided nothing for them is urged as proof that undue influence was exerted. It is not such

proof. It is not unusual for old people to tell many people that they will will them something. It is one method old age sometimes adopts to secure attention from younger generations. Even assuming that the testatrix intended to do so but forgot or neglected to make the promise effective, a validly executed will is not set aside thereby.

The burden of proving that the will resulted from undue influence is on the contestants, and the mere suspicion of undue influence on testatrix is insufficient to require submission of the question to the jury. *In re Estate of Dovey,* 101 Neb. 11; *In re Estate of Wilson,* 114 Neb. 593.

This testatrix was not mentally incompetent to make a will; the will was not an unnatural one; no confidential advisor was actively concerned in the execution, and there is no evidence of undue influence or of facts and circumstances from which a reasonable inference of undue influence could be drawn. *In re Estate of Noren,* 119 Neb. 653. The trial court was not in error in withdrawing the question of undue influence from the consideration of the jury.

The verdict of the jury on the question of the mental competence of the testatrix to make a will is assailed because of misconduct of a juror. The misconduct of the juror is exhibited by an affidavit of one of the attorneys for the contestant about a statement of a juror, made after the verdict was returned, and by an affidavit of another juror. These affidavits were considered by the trial court on the motion for new trial. The contestant seeks to impeach the verdict by the affidavits of jurors.

"The testimony of jurors will not be received to impeach or avoid their verdict in respect to matters which essentially inhere in the verdict itself, as that they agreed to the verdict from motives of ill-will toward the unsuccessful party or a third party supposed to be directly interested in the controversy, or other matters resting alone in the breasts of the jurors." *Johnson v. Parrotte,* 34 Neb. 26.

"Affidavits of jurors that during their deliberations a

juror said he had made up his mind before the case had ended are incompetent for the purpose of impeaching the verdict." *Trimble v. State,* 118 Neb. 267.

"Matters inhering in the verdict of a jury cannot afterward be attacked by affidavits of the jurors." *Iman v. Inkster,* 90 Neb. 704.

It should be said in fairness to the juror that the affidavits, if true, establish that he said that it was embarrassing for him to decide upon a verdict. Perhaps it would have been better had another served upon the jury. This juror did agree to the verdict returned, even though it is charged that he refused to participate in the discussion preliminary to reaching a verdict. There is no misconduct which justifies a reversal of the judgment.

AFFIRMED.

GOLD WELTY, ADMINISTRATOR, APPELLEE, V. HENRY H. SCHMUTTE ET AL., APPELLEES: WILLIAM L. RICHARDSON, INTERVENER, APPELLANT.

FILED FEBRUARY 21, 1935. No. 29177.

Mortgages: FORECLOSURE: STAY. The word "defendant" in section 20-1506, Comp. St. 1929, providing for a nine months' stay in a mortgage foreclosure, means the mortgagor or one in privity with him.

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

John J. Wilson, for appellant.

Mockett & Finkelstein and *L. B. Fuller, contra.*

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

DAY, J.

This is a mortgage foreclosure, and the appeal is prosecuted by William L. Richardson, an intervener, whose re-

quest for a stay was denied by the trial court. The decree of foreclosure was entered October 10, 1933, and the request for stay was filed by Richardson October 30, 1933.

The history of this litigation is somewhat involved, but not difficult of understanding, although awkward of statement. February 23, 1926, Schmutte executed a mortgage on his farm to the Conservative Mortgage Company to secure certain bonds issued by that company. At the same time, he executed a second mortgage to the company which was foreclosed against Schmutte, and on June 13, 1932, the land was sold to Oeschger C. Wood, attorney for the company. Wood conveyed the title to Lantie May Frost, mother-in-law to John H. Fowler, president of the company. This suit was brought by the owner of a large amount of the bonds. Richardson was not a party to this suit and acquired his claim of title, after *lis pendens* had been filed, by a warranty deed, dated August 28, 1933, and filed September 8, 1933. The decree was entered October 10, 1933. By a warranty deed, dated September 2, 1933, which was not recorded, Richardson conveyed the property to Schmutte for a valid consideration. The question for determination is whether Richardson was, on October 10, in privity with the mortgagor and his successors in title and the owner of the equity of redemption.

In ruling on the motion to strike the request for a stay, a question of fact was presented to the trial court. Since this court is required to try this case *de novo* on the record, we have read all the evidence. From the record we reach the conclusion that the judgment of the trial court was the correct one.

The mortgage foreclosed herein was defaulted June 1, 1929. This mortgage was executed to the Conservative Mortgage Company as trustee for the bondholders. It was the duty of the trustee, Conservative Mortgage Company, to protect the interest of the bondholders. The Conservative Mortgage Company foreclosed a second mortgage securing it and sold the property subject to the first mortgage at judicial sale June 13, 1932. It was purchased by

Oeschger C. Wood, attorney for the company. The property was transferred by him to Lantie May Frost, mother-in-law to John H. Fowler, the president of the company. There is testimony that, after a meeting of the bondholders who were hostile to the company, Fowler advised her to do away with the deed, whereupon she transferred it to Richardson who, with Fieselman, a close business associate and vice-president of the company, executed a warranty deed to the property. Schmutte had lost the property by a judicial sale above described after he had the benefit of a stay of nine months. The idea of Richardson and also of Fieselman, who was so active in this transaction that he cannot be ignored, was that Schmutte should take another stay in this suit. Schmutte was unwilling to do this, and thereupon he handed the deed to Richardson who destroyed it.

Much of the time in oral argument and much of the space in the briefs was devoted to the question of the effect of the execution and subsequent destruction of this deed. It seems so unnecessary to labor with this question. The fact is that Schmutte did not claim any interest in this property, and Richardson did not have any. It is a fair inference, not based upon imaginative suspicion but upon facts in the record, that officers of the Conservative Mortgage Company and their business associates were transferring the title from person to person to the detriment of the bondholders. Richardson himself testified that it was his notion for Schmutte to take a stay and then he "would endeavor to deal with the bondholders, pick up all the bonds," presumably at a discount. And a part of the scheme was to reduce the price of the bonds by means of the stay to prevent the bondholders from realizing anything upon them except by a sale to him. The aid of the court was sought to accomplish this. The trial court properly sustained the motion to strike the request of Richardson for a stay from the files. The word "defendant" in section 20-1506, Comp. St. 1929, providing for a nine months' stay in a mortgage foreclosure, means the

mortgagor or one in privity with him. *Clark v. Pahl*, 75 Neb. 161.

But Richardson testified that he expected to purchase the bonds and refinance for Schmutte for a commission. This is inconsistent with his claim of ownership. Upon his testimony Schmutte was the real owner of the property. Schmutte disclaims any interest in the real estate, and any claim of interest by the Conservative Mortgage Company would be inconsistent with its duty as trustee to the bondholders. So that Richardson who filed the stay was not the mortgagor of the property or one in privity with him. Equity and good conscience require the affirmance of the judgment.

AFFIRMED.

CHARLES F. KRELLE, APPELLANT, V. ROY BOWEN ET AL., APPELLEES.

FILED FEBRUARY 21, 1935. No. 29176.

1. **Fraud.** "Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him." *Davidson v. Crosby*, 49 Neb. 60.
2. **Appeal: TRIAL DE NOVO.** "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson*, 110 Neb. 511.

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

Carroll O. Stauffer and *John A. McKenzie*, for appellant.

W. M. Hopewell, contra.

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

CARTER, J.

This is an action brought by appellant in the district court for Burt county to set aside an assignment of a judgment which had been obtained by the appellant against his son C. F. Krelle, Jr., and Hugo Erickson in the amount of $2,231.20. At the time of the making of the assignment in question, an execution had been issued and levied on the undivided one-half interest of Erickson in 406 acres of farm land in Burt county and the land was being advertised for sale. The undisputed evidence was that it was worth $70 an acre and that the undivided one-half interest of Erickson was encumbered, including the judgment heretofore mentioned, to the extent of $6,800.

The record discloses that on September 7, 1933, the appellees Roy Bowen and Luther A. McDonald and their attorney, Orville Chatt, called at the law offices of Fischer & Fischer in Omaha for the purpose of purchasing the judgment above mentioned, Fischer & Fischer having been the attorneys for appellant in procuring the judgment. It appears that Krelle, Sr., was confined to his home because of illness. William Krelle, another son of appellant who resides in Omaha, was called to the office where Chatt made an offer of $1,100 for the judgment. The Fischers informed them that they did not believe that Krelle, Sr., would accept the offer. However, William Krelle and Herbert Fischer went to the home of Krelle, Sr., and talked the matter over with him. They were informed by Krelle, Sr., that he wanted $1,500 for the judgment, but for them to do the best they could. On their return to the office, they offered to sell the judgment for $1,250, which was refused, and they finally accepted an offer of $1,119.50 and the assignment was then made. On September 25, 1933, this suit was filed to set aside the assignment because of alleged fraudulent representations made to the Fischers and William Krelle, and which were claimed to have been communicated to appellant, as to the condition of the land and improvements on which the judgment was a lien. The trial court found for the defendants below and appellant brings this appeal.

Appellant was 78 years of age at the time the assignment was made and testified that he was not familiar with land values and that he had never been engaged in farming. The Fischers and William Krelle testified, in substance, that Bowen stated that he was a close relative of Erickson, one of the judgment debtors, and that they wanted to purchase the judgment and hold it for Erickson so that he could save the farm; that the outbuildings were run down and needed paint; that the farm had not been properly taken care of and was all run down, and that it would not bring over $1,000 above the mortgage. William Krelle and the Fischers testified that they believed the statements made and relied upon them. The testimony is that all of the alleged fraudulent statements were conveyed to appellant and relied on by him.

The testimony of Bowen, McDonald and Chatt is that Bowen was a first cousin of Erickson's wife, that they made an offer of $1,100 for the judgment and refused to consider paying more than that amount. They testified that statements were made that the improvements on the farm needed repairing, but made no statements concerning the value of the judgment or of the land against which it was a lien. The balance of the evidence of appellees was to the effect that the statements alleged by appellant to be fraudulent were not made.

It appears from the record that appellant had been represented by Fischer & Fischer for several years in attempting to collect the money due him from Erickson and C. F. Krelle, Jr. They had made investigation of the records of the register of deeds before having the levy made upon the land. It would seem that they should have known something about this land. The evidence shows that Krelle, Sr., was badly in need of money. He believed, according to the testimony, that the judgment was worth from $1,500 to $1,700. He consulted William Krelle and Herbert Fischer before selling for the $1,119.50. We do not believe that the record discloses any overreaching on the part of appellees. They went directly to the office of

Fischer & Fischer to try to buy this judgment with the knowledge that they were attorneys for appellant. Their actions do not sustain the proposition that they were intending to take any advantage of appellant.

It is further argued that the equity in the land was ample and that the judgment was worth its face value. The evidence does show an equity of approximately $7,000 in the land which could be subjected to the judgment. It was, however, an equity in an undivided one-half interest. The possibility of litigation and other expense in collecting the judgment are items to be considered in determining its value. There can be no question that the judgment was not worth its face value at the time the assignment was made; how much less we cannot say. We have made no attempt to set out all of the evidence, but suffice it to say that the evidence on the part of appellant not set out herein is in direct conflict with that of appellees. This court has held: "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson,* 110 Neb. 511. The alleged fraudulent statements of appellees have not been proved by a preponderance of the evidence. The appellant had the advice of his son, William Krelle, and of two competent attorneys who had made some investigation of the facts in order to enforce collection. The fact that the transaction was highly successful from the standpoint of the appellees, they having collected the judgment in full, cannot change the situation. The purchase of a judgment is often a transaction involving a risk that could easily result in loss. The evidence shows that the parties dealt at arms length and that there were many offers to sell that were rejected. It is quite apparent from the record that Krelle, Sr., wanted

this judgment sold for the best price he could obtain. In our opinion the appellant has failed to prove that the assignment was procured by fraud and misrepresentation. This court has held: "Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him." *Davidson v. Crosby,* 49 Neb. 60.

After a consideration of all the evidence, we find that the trial court arrived at the proper conclusion. The judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEWMAN GROVE STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: FIRST NATIONAL BANK OF LEIGH, INTERVENER, APPELLEE.

FILED FEBRUARY 21, 1935. No. 29051.

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." *Wheeler v. Brady,* 126 Neb. 297.
2. ———: ———: BANKS AND BANKING: RECEIVERS. The receiver of a state bank is a privy in estate to such bank, and is concluded by a judgment against the insolvent bank rendered prior to the receivership proceedings adjudicating that said bank held certain funds deposited therein in trust for another.

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

F. C. Radke, Barlow Nye, Moyer & Moyer and *G. E. Price,* for appellant.

Kelsey & Kelsey and *Wagner, Wagner & Albert, contra.*

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

HASTINGS, District Judge.

This is an action by the First National Bank of Leigh, Nebraska, hereafter referred to as the national bank, intervener and appellee, to recover from the receiver of the Newman Grove State Bank, hereafter referred to as the state bank, money alleged to be trust funds in the hands of that bank prior to insolvency.

On the trial the intervener was decreed to have a preferred claim in the sum of $9,032, and the receiver was ordered to pay said sum to the intervener from the assets of the state bank. The receiver appeals from said decree.

The state bank was placed in the hands of a receiver on August 16, 1929. Prior to that time the intervener had commenced an action in equity in the district court for Platte county against the state bank, then a going concern, Henry Knudson and George H. Gutru. On June 8, 1929, the intervener recovered judgment in that case against the state bank. The receiver prosecuted an appeal from that judgment to this court, which affirmed the judgment of the district court. *First Nat. Bank of Leigh v. Knudson,* 119 Neb. 887. The intervener's right to have his claim allowed as a preferred claim is based upon the judgment entered in the Platte county case and its affirmance by this court.

It is alleged in the petition of intervention that the court in the Platte county case found and determined that the money sought to be recovered in this action constituted a trust fund in the hands of the receiver. The controlling question in this case is whether that judgment adjudicated that the state bank had trust funds in its hands belonging to the intervener.

The record and evidence in the Platte county case are in evidence in this case. The plaintiff in that case alleged, in substance, that on October 2, 1928, one Henry Knudson fraudulently obtained a loan of $7,000 from the

national bank, and deposited the funds in his checking account in the state bank, and at that time he was owing to the state bank, on his past-due note given to it, a balance of $6,874.34, and that on October 11, 1928, said bank applied said deposit in payment of said note, without the consent of the national bank. It was alleged that the national bank on or about December 1, 1928, discovered the fraud, rescinded the loan, and tendered back the note given therefor. It was further alleged that by reason of the premises the state bank was the trustee of said fund, and prayed that it be decreed to hold said money in trust for plaintiff, and that plaintiff have and recover from the defendants Knudson and the state bank, jointly and severally, said $7,000, and have such other and further relief as equity might require. The defendant Knudson did not plead.

The state bank in its answer in that case, for want of knowledge, denied that Knudson had obtained the loan by fraud, and admitted taking the money from the checking account of Knudson and applying it to the payment of his obligation to it.

In the decree entered in the Platte county case, the court found in favor of the plaintiff, the national bank, and against the defendants Henry Knudson and the state bank, and that the allegations of plaintiff's amended petition were true; that plaintiff had a lawful right to and did rescind the contract with the defendant Knudson, set forth in the amended petition, and that the state bank, on October 11, 1928, received from the defendant Knudson $6,874.34, money of the plaintiff then held by him in trust for the plaintiff, and that the defendant bank at all times since then had held said sum in trust for the plaintiff; that there was due from the defendant bank the sum of $6,874.34, with interest at 7 per cent. from October 11, 1928, and from the defendant Henry Knudson the sum of $7,000, with interest at 7 per cent. from October 2, 1928, but that when the state bank should pay said sum it should be credited upon the judgment against the defendant

Knudson, entered herein, and said bank might then apply for judgment against him therein for the sum so paid by it, with interest.

On said findings it was adjudged and decreed that the plaintiff have and recover from the Newman Grove State Bank $7,179.10, and from the defendant Henry Knudson the sum of $7,376, and the costs of the suit; that the judgment against said defendant Knudson included the judgment against the state bank, and if he paid the judgment against him it would at the same time satisfy the judgment of the defendant bank, and if the defendant bank paid the judgment against it, such payment should be credited on the judgment against the defendant Knudson. In such event the defendant bank was to have the right to apply for judgment against Knudson for the sum so paid. The case was dismissed as to the defendant Gutru.

The receiver for his answer in this case alleged, in substance, that, at the time of the deposit of the $7,000, and its withdrawal by the state bank from the checking account of Knudson, Knudson was not indebted to it in any sum, but that he had given a note to one Gutru, which had been sold by Gutru to the First National Bank of Chicago, and that on the 2d day of October, 1928, and at all times thereafter said note was the property of the Chicago bank, and that said bank had transmitted said note to it for collection, and, in accordance with its instructions, the state bank collected said note, and that the state bank in so doing acted merely as the collecting agent for the owner of said note, the First National Bank of Chicago; that the state bank never at any time received any benefit as a result of said transaction; that said transaction out of which intervener's claim arose involved no trust relationship between said claimant and any person whatsoever, admitted the recovery of the judgment against the state bank, and the appeal to this court, but denied that any judgment was entered in said case declaring or impressing a trust upon the assets of said bank.

The reply of the national bank to said answer of the

receiver denied the allegations of the receiver's answer, other than admissions of matters in its petition of intervention, and alleged that the decree and judgment in the action in the district court for Platte county passed upon and determined the issues presented in this action, and that the receiver was estopped to allege, prove or claim anything contrary to the decree and judgment entered in said action.

It is the contention of the receiver that, although there was a finding in the judgment or decree entered in the Platte county case, the money obtained from the national bank and deposited by Knudson in the state bank was a trust fund which that bank held as trustee for the national bank, it was not so adjudicated in the decretal part thereof. It clearly appears from the record and evidence in the Platte county case, and the decision of this court in affirming the judgment, that said issue was necessarily involved in the determination of that action.

In *Wheeler v. Brady*, 126 Neb. 297, the court held: "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." See, also, *School District D v. School District No. 80*, 112 Neb. 867; *Slater v. Skirving*, 51 Neb. 108; *Orcutt v. McGinley*, 96 Neb. 619; *Hanson v. Hanson*, 64 Neb. 506; *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85; *State v. Broatch*, 68 Neb. 687.

The liability of the state bank was dependent upon whether the money deposited therein by Knudson was a trust fund which it held as trustee for the national bank. Therefore the finding for the national bank upon that issue entered into and became a part of the judgment and conclusively adjudicated and settled that issue. That issue having been adjudicated and settled, the receiver

was barred and estopped thereby from relitigating it in this action. It is not material in this action that the judgment in the Platte county case did not, in express terms, impress a lien upon the assets of the state bank. The state bank having failed before the national bank realized upon its judgment, it was entitled in this action to have said judgment adjudged to be a preferred claim. Judgment is

AFFIRMED.

GEORGE E. BOGGS V. STATE OF NEBRASKA.

FILED FEBRUARY 21, 1935. No. 29157.

1. Criminal Law: REVIEW. A theory in defense of a criminal action which is not supported by evidence adduced on the trial of the case will be disregarded in a proceeding to review the action of the trial court.
2. ———: INTENT: REVIEW. When a defendant in a criminal action admits the existence of the intent which is an essential element of the crime of embezzlement, he cannot be heard to deny that intent has been proved.
3. Embezzlement. Shares of stock taken from the owner with the expressed purpose of exchanging the same for other shares and the delivery of such other shares to the owner, but with the undisclosed purpose of converting the same to one's use and ownership, is without the assent of the owner and unlawful and felonious within the meaning of the definition of embezzlement.
4. Evidence examined and found sufficient to support the verdict.
5. Instructions examined and found that the jury were fully and fairly charged on all issues presented on the trial.

ERROR to the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Charles E. Bruckman, for plaintiff in error.

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

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

YEAGER, District Judge.

This is a criminal action wherein, in the district court for Adams county, Nebraska, the plaintiff in error, who will be hereinafter called the defendant, was tried on an information charging that he had embezzled 855 shares of Corporate Trust, Accumulative Series stock, of the value of $2,308.50, the property of James V. Beghtol. He was convicted on this charge and sentenced to serve a term of 22 months in the state penitentiary.

The defendant assigned many errors on the part of the prosecution which require no discussion in this opinion. The only one which requires consideration here is predicated on the proposition that the evidence adduced does not support the charge in the information.

The state contends and the defendant admits that, on or about the 6th day of October, 1932, Beghtol delivered over to the defendant the shares hereinbefore described. The state further contends that at that time the defendant unlawfully and feloniously converted the said shares to his own use. The testimony of the state shows that Beghtol delivered the shares to the defendant for the purpose of having the defendant surrender them in return for other shares which were to be delivered to Beghtol. In his brief the defendant agrees with the position and theory of the state. He argues that with this agreement in mind he in good faith received the shares, made the contemplated transfer, and thereafter, being in straitened circumstances, converted the new shares or the proceeds thereof which he had received, and that by reason of the conversion of the new shares or their proceeds he was improperly convicted, since he was convicted of embezzlement of the old shares. The contention, tainted as it is with admitted fraud, is not appealing. However, from an examination of the bill of exceptions, it does not become necessary to pass upon this question.

This argument of defendant is not supported by the evidence of the defendant at all. The defendant tried this case on the theory, and he testified without equivocation,

that when he received the original shares from Beghtol he received them as his own, and with the intention that they should and did become his property. Intent is an essential element of the crime of embezzlement, and where the verdict of the jury responds to the intent expressed by the defendant in his evidence, the defendant cannot be heard to complain.

It was the intent of the defendant to convert the shares delivered to him, as is shown by the evidence. Then, did the evidence justify the jury in finding that the conversion was without the assent of Beghtol and hence unlawful and felonious? We think this question must be answered in the affirmative. The evidence of the state conclusively shows that Beghtol never at any time intended to pass title to the shares in question to the defendant, and, moreover, the defendant himself testified that Beghtol turned over to him the old shares for the purpose of having them exchanged for new ones. Nowhere has he stated that he told or informed Beghtol that he, the defendant, expected to or was taking title to the shares.

The evidence was clearly sufficient to convince the jury beyond a reasonable doubt that the defendant was guilty of the crime charged in the information.

An examination of the instructions given indicates that the jury were fully and fairly instructed on all issues presented on the trial.

It therefore follows that the conviction of the defendant should be sustained and the action of the district court affirmed in all particulars.

AFFIRMED.

C. C. GALLOWAY V. STATE OF NEBRASKA.

FILED FEBRUARY 21, 1935. No. 29160.

1. **Libel and Slander: INFORMATION.** An information which charges that a libel was published in a newspaper of "general circulation" in a particular county charges a misdemeanor and not a felony.

2. **Information.** The full and complete text of an information must be considered and taken in its ordinary sense to determine what, if any, crime has been charged.
3. **Evidence** examined and found not to support the charge contained in the information.

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

Thomas & Thomas, for plaintiff in error.

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

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

YEAGER, District Judge.

The above entitled action is one which was instituted by the county attorney of Douglas county, Nebraska, charging the plaintiff in error, C. C. Galloway, who will be hereinafter referred to as the defendant, with libel. The defendant was convicted and sentenced to serve a term of three months in the county jail of that county. From the conviction the defendant prosecutes error to this court.

In his brief the defendant sets forth five separate assignments of error. In his first assignment defendant claims that the information does not charge a crime. An examination of the information discloses that it, to a certain point, in appropriate language charges the crime of libel. The appropriate language is followed by the following language: "And had a general circulation in Douglas county, Nebraska." The evidence does not indicate a circulation outside Douglas county. The first point made by defendant is that the information sought to charge a felony, whereas by the terms of the language above quoted it did not charge a felony and was therefore defective; and, further, that it was not a charge of a misdemeanor. The point of determination between a libel which is a misdemeanor and one which is a felony is the question of general circulation or no general circulation. This court

has held that a newspaper circulated in a single county is not a newspaper of a general circulation. *Koen v. State,* 35 Neb. 676. Of necessity it follows that the information does not charge a felony, because it specifically limits its circulation to Douglas county. Does, then, the word "general" in the quoted language destroy it as a misdemeanor charge? We think not. The language is certain and specific to the degree that there can be no mistake as to the limit of the circulation of the Omaha Guide. The full and complete text of an information must be considered and taken in its ordinary sense to determine what, if any, crime has been charged. We must therefore conclude that the information charges a misdemeanor.

A determination of the first assignment of error disposes in part of the second and third assignments. The second and third assignments deal, in part, with the failure of the court to explain and differentiate between criminal libel which is felonious and that which is not. Since the information charges only a misdemeanor, and since the instructions were so predicated, it follows that there is no merit in this contention.

In defendant's third assignment of error, he urges that the court erred in refusing to give instruction No. 3 requested by the defendant. From an examination of the information, the bill of exceptions and the instructions given by the court, it is unnecessary to examine into the merits of this contention. The information alleges that the defendant is the proprietor and editor of the Omaha Guide. Instruction No. 5 informs the jury that they must so find before they will be permitted to return a verdict of guilty. The evidence conclusively shows that the defendant was neither the proprietor nor editor of the Omaha Guide. The nearest approach is that he was acting editor when the editor was absent. There is no direct evidence that he knew about the article in question. The only direct evidence is that he knew nothing about the article in question. The only direct evidence is that he knew nothing about the publication until the paper was in cir-

culation. We are constrained to conclude that the evidence of the state does not respond to the material allegations of the information and the judgment should therefore be reversed, and since there is no indication that any new evidence could be secured, we feel that the conviction should be reversed and the case dismissed.

REVERSED AND DISMISSED.

THOMAS F. HAYES, APPELLEE, V. HAROLD S. MCMULLEN, APPELLANT.

FILED FEBRUARY 21, 1935. NO. 29240.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY. The evidence examined and was found to support the finding that the plaintiff was injured in the course of his employment.
2. ———: ———: CONSTRUCTION. The workmen's compensation act will be interpreted and construed liberally, and technical refinement will not be allowed to defeat its purposes.
3. ———: ———. The legislature, in the enactment of the workmen's compensation act, among other things, had in mind the protection of persons gainfully employed who had received injuries in the course of their employment, but who could not recover under common-law rules, and the placing of the burden of such injuries on the particular industries involved, rather than the public.
4. ———: ———: "ACCIDENT." The word "accident" shall be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of injury.
5. ———: ———: "INJURY." The term "injury" and "personal injuries" shall mean only violence to physical structures of the body and such disease or infection as naturally results therefrom.
6. ———: ———: "ACCIDENT." A case of "snow blindness," which is a condition that requires several hours to manifest itself and is an unusual occurrence in this climate, and which, as in this case, did manifest itself by visible irritations during the day of exposure, is an accident, unexpected, unforeseen, happening suddenly and violently, and producing objective

symptoms of injury to physical structures, within the meaning of the workmen's compensation law of Nebraska.

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

Story & Thomas, for appellant.

W. M. Hopewell and *W. K. Hopewell, contra.*

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

YEAGER, District Judge.

This is an action tried in the district court for Burt county, Nebraska, wherein Thomas F. Hayes, plaintiff and appellee, recovered a judgment against the defendant and appellant, under the workmen's compensation law of this state, for injuries claimed to have been sustained by him while he was employed by the defendant as the operator of a blade machine in the removal of snow from a public highway in Burt county. From the judgment the defendant has appealed to this court. The amount or size of the award is not in question in the errors complained of.

Appellant has made four assignments of error in his brief. It will be necessary to discuss only the first two, since a determination of the question of whether or not the plaintiff met with an accident as claimed, which is the first assignment, and whether or not the disability of plaintiff arose out of and in the course of his employment, which is the second assignment, will be determinative of the other two.

Without taking up the space necessary to refer specifically to particular evidence, it very definitely appears that on March 23, 1933, the plaintiff was in the employ of the defendant and was operating a blade machine, the purpose of which was to remove snow from the public highway. He was required to keep his eyes constantly upon the snow as it was being removed. On the day in question it was quite warm for that time of the

year and the sun shone brightly and he worked for about twelve hours. At the end of the day he was burned, as if sunburned, about the face and his eyes were inflamed. The condition of his eyes got steadily worse until the 28th of March, when he called upon Dr. Heacock of Lyons, Nebraska, who prescribed for him and ordered him to remain in a dark room. Two days later he was sent to an eye specialist at Sioux City, Iowa. He was confined in a hospital at Sioux City for a period of four days, when he returned to his home and the care of Dr. Heacock. He returned later to Sioux City and the hospital, where he remained for more than three weeks, after which he returned home and remained there, except for a period of one week some time later, which week he spent in the hospital. His eyesight has been seriously and permanently impaired and without question the progress of the condition leading to the impairment of vision entailed large expense and much suffering.

The progress of the condition was about as follows: In the afternoon of March 23, 1933, plaintiff noticed that his eyes and face were irritated and later in the week the face peeled. The eyes got worse. During the week an ulcer developed in the right eye. An ulcer developed in the left eye on or about May 18, 1933. There was a severe infection and ulceration on the conjunctiva and the cornea of both eyes, which was throwing off pus. There is little or no difference of opinion in the evidence either as to the progress of plaintiff's condition or the seriousness of its consequences.

A full and careful examination of the record discloses without dispute that plaintiff's condition of disability came about, either directly or indirectly, as a result of exposure to the sun's rays as outlined earlier in this opinion. The contention of defendant that the position of the plaintiff in this regard is speculative is not borne out by the evidence. The plaintiff has given the history of the case. The doctors called by plaintiff, one of

whom was a specialist in the treatment of eyes, had that history coupled with their own examinations and observation. Using this history and their own examination and observation as a basis, these witnesses have given it as their opinion that the plaintiff's condition was directly resultant from the burns received on March 23, 1933. The defense has introduced no evidence contradicting this position. The only claim made by the defendant is that the infection found was secondary, rather than primary, which is followed by the assertion that in a secondary infection the infection must be introduced from the outside unless it is present in a bad tear sac or something of that sort. The same undisputed evidence therefore shows that plaintiff was injured in the manner claimed by him and that such injuries arose out of his employment.

It is the declared policy of this court that the workmen's compensation act will be construed liberally, and technical refinement will not be allowed to defeat its purpose. *Esau v. Smith Bros.*, 124 Neb. 217.

It can hardly be doubted that the legislature had in mind, among other things, the protection of persons gainfully and honorably employed and who had received injuries in the course of their employment through no fault of their own, but could receive no compensation under common-law rules and who would be in danger of becoming public charges. They had in mind the placing of the burden upon the particular industry involved, rather than upon the public. Do, then, the evident purpose of the legislature and the declared policy of this court permit us to define the situation before us as an "accident?" The legislature has defined "accident" as follows:

"The word 'accident' * * * shall * * * be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Comp. St. 1929, sec. 48-152.

The same section defines "injury," within the meaning of the workmen's compensation law, as follows:

"The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom."

The evidence in this case indicates that the condition of plaintiff was produced by "snow blindness" or "snow opththalmia," which is rare in this climate, and therefore we conclude that it was unexpected and unforeseen. There is no dispute upon the question of there being a burning in snow blindness, so therefore the attack upon the eyes of plaintiff was violent and the violence was to the physical structures of plaintiff's body. Was the injury brought about suddenly? If by "sudden" is meant instantaneous or practically so, then it was not suddenly produced. The condition complained of was the reflection of ultra violet rays of sunlight off of bright snow, which condition would have to continue for several hours before it would manifest itself or become known to the person exposed. The condition of plaintiff manifested itself the same day. Therefore, it would appear that the reasoning applied in *Taylor v. Evarts,* 261 Mich. 558, and *Dove v. Alpena Hide & Leather Co.,* 198 Mich. 132, should be made to apply herein in the interpretation of the word "suddenly."

We are therefore of the opinion that in a case of "snow blindness," which is a condition that requires several hours to manifest itself and is an unusual occurrence in this climate, and which, as in this case, did manifest itself by visible irritations during the day of exposure, is an accident, unexpected, unforeseen, happening suddenly and violently, and producing objective symptoms of injury to physical structures, within the meaning of the workmen's compensation law of Nebraska. In the light of this conclusion, it necessarily follows that the decision and judgment of the district court should be, and it accordingly is,

AFFIRMED.

CHARLES W. TAYLOR, SUPERINTENDENT OF PUBLIC INSTRUCTION, APPELLEE, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN, APPELLANT: SCHOOL DISTRICT NO. 1, SARPY COUNTY, ET AL., INTERVENERS, APPELLANTS.

FILED FEBRUARY 26, 1935. NO. 29230.

Schools and School Districts: TUITION: CONSTITUTIONAL LAW. Chapter 144, Laws 1933, in so far as it provides for payment out of the state school fund of tuition of children whose parent is engaged in the service of the United States army, navy or marine corps, while stationed in Nebraska, is violative of section 7, art. VII of the Constitution.

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

Paul F. Good, Attorney General, Daniel Stubbs, R. O. Williams, G. E. Price, Frank H. Woodland and *J. E. Porter,* for appellants.

Peterson & Devoe, contra.

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

GOOD, J.

State superintendent of public instruction brought this action, seeking a declaratory judgment determining the constitutionality of several provisions of chapter 144, Laws 1933. By this action plaintiff seeks to be advised as to his duties in the apportionment and distribution of school funds. Four school districts intervened and joined defendant in urging the constitutionality of said chapter 144. The trial court determined that several provisions of said chapter are violative of different provisions of the state Constitution, and that the act is, therefore, invalid in part. Defendant and interveners have appealed.

Chapter 144, Laws 1933, directs the payment out of state school funds of the tuition of children attending school in this state, whose parent is engaged in the service of the United States army, navy or marine corps, while

stationed in this state. So far as we are advised, defendant and interveners are the only school districts, out of more than 6,000 in the state, that would be beneficially affected by said chapter, if valid.

Plaintiff contends that said chapter 144, Laws 1933, violates several provisions of the state Constitution. Section 4, art. VII of the Constitution, provides that the rental and income from school lands and permanent school funds "shall be exclusively applied to the support and maintenance of common schools in each school district in the state." Section 7, art. VII of the Constitution, reads: "Provision shall be made by general law for equitable distribution of the income of the fund set apart for the support of the common schools among the several school districts of the state." Section 9, art. VII of the Constitution, *inter alia,* provides: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state. * * * And such funds with the interest and income thereof, are hereby solemnly pledged to the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses."

In 1931 the legislature enacted chapter 150, Laws 1931, which required the state of Nebraska to pay the tuition of children attending school in this state, where the parent of such child or children is engaged in the service of the United States army, navy or marine corps stationed in this state. It was also sought, by section 3 of that act, to pay the tuition out of the school fund. That act never became operative and effective, first, because no appropriation was made by the state for payment out of the general fund, and, second, because the act, in the opinion of the attorney general, was in conflict with another section of the statute directing the state superintendent in the distribution of state school funds. Apparently, the opinion of the attorney general was acquiesced in, and chapter 144, Laws 1933, was enacted, which sought to amend section 79-520, Comp. St. Supp. 1931, being section 3 of

chapter 150, Laws 1931, and to amend sections 79-1609 and 79-2002, Comp. St. 1929. It may be remarked that if section 79-520, Comp. St. Supp. 1931, is unconstitutional, as held by the attorney general, then it would not be the subject of amendment, and any attempt to amend a void act would, in itself, be a nullity. However, we think it unnecessary to pass upon the question of whether section 79-520, Comp. St. Supp. 1931, is unconstitutional.

The constitutional provisions above quoted show that the people of Nebraska, in adopting the Constitution, have solemnly declared that the state school fund shall be a trust fund and can be used only for the purposes specified in the constitutional provisions. Section 7, art. VII of the Constitution, requires that the income derived from the funds set apart for the support of the common schools shall be equitably distributed among the several school districts of the state, and that provision therefor shall be made by general law. The question then arises whether the payment out of state school funds of the tuition of children attending school in this state, whose parent is engaged in the service of the United States army, navy or marine corps, while stationed in this state, as directed by chapter 144, Laws 1933, is an equitable distribution among the districts. The term "equitable" is defined in Webster's New International Dictionary as meaning "According to natural right or natural justice; marked by a due consideration for what is fair, unbiased, or impartial; fair; just." The synonyms are given as "Just, fair, reasonable, right, honest, upright."

The tuition to be paid under the provisions of the act in question amounts to $3 per week for pupils in the high school and $1 per week for those in the grades below high school. The usual annual term of school in the several districts is 36 weeks. It is apparent that if the act in question can be upheld, then one of the affected school districts, if one of the designated children whose tuition is to be paid is in the high school, may draw $108 per annum, should the pupil attend the full 36 weeks, and for a

child in a grade below high school $36 per annum may be drawn. As a matter of fact, the combined semiannual distribution of the income of the permanent school fund to the districts averages less than $2 per individual pupil. It is apparent, therefore, that the districts which are furnishing school facilities to the children whose parent is engaged in the service of the United States army, navy or marine corps would receive from $36 to $108 per annum for each of such pupils, while the other districts, not furnishing such facilities, would receive less than $2 per annum for each pupil. It cannot reasonably be said that this provides for an equitable distribution.

There is another reason why the payment of the tuition, as provided, is inequitable. It is a fact that in some instances, and perhaps in most, the very children whose tuition is sought to be paid are enumerated as children residing in the district, and a proportion of the school fund is apportioned to that district for such children, and at the same time the total cost of educating such children is taken from the school fund. It certainly is inequitable for such district to draw an appropriation based on enumeration of such children, and, at the same time, take from the school fund the full cost of the education of such children.

If the legislature may provide for the payment to certain districts for the tuition of children whose parent is engaged in the service of the United States army, navy or marine corps, it could also provide for the payment of tuition of children of state or county officers or state employees who might be stationed at some place other than that of their legal residence, and require such payments to be taken from the school fund. If tuition can be paid because the parent did not pay any taxes, then any school district in which there were indigent parents, having children of school age, might require the tuition of such children to be paid from the school fund. If we are to determine what is fair and equitable by the needs of the district, then, if a school district has constructed an expensive and commodious building, issued bonds therefor

and burdened itself with heavy taxes, special provision might be made for such district; but, in our opinion, that is not the sense in which the word "equitable" is used in the constitutional provision. Heretofore, it has been applied on the basis that the school fund should be distributed to the several districts in proportion to the school children enumerated and living in the district. Such has been the interpretation given the provision for many years. We are satisfied that it was in that sense that the word was used by the framers of the Constitution. The payment out of the school fund to any district for the tuition of children who do not belong in the district is not an equitable distribution of the school fund, within the meaning of the Constitution.

We have no doubt that the state may require school districts to furnish educational facilities to children whose parent is engaged in the service of the United States army, navy or marine corps stationed in Nebraska, and that it may provide for the cost of education of such children out of the funds of the state, but the legislature may not use the school fund of the state for such purpose, because it is forbidden under the constitutional provisions above quoted.

In so far as chapter 144, Laws 1933, provides for payment out of the school fund of tuition of children whose parent is engaged in the service of the United States army, navy or marine corps stationed in Nebraska to the district furnishing such educational facilities, the act is in violation of section 7, art. VII of the Constitution, and inoperative.

The judgment of the district court is right and is

AFFIRMED.