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REPORTS OF CASES

IN THE

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JANUARY AND SEPTEMBER TERMS, 1935

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HENRY P. STODDART
OFFICIAL REPORTER

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By Henry P. Stoddart, Reporter of the Supreme Court,

For the benefit of the State of Nebraska

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UNITED STATES

CONSTITUTION

Art. IV, sec. 2 441

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1935

ROY H. PRESTON V. STATE OF NEBRASKA.

FILED MAY 10, 1935. No. 29482.

Criminal Law: REVIEW. Where it is apparent from the bill of exceptions that material evidence has been omitted, it will not be considered on appeal in determining an issue of fact or the sufficiency of the evidence to sustain a finding of fact by the trial judge.

ERROR to the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

J. A. Hayward and *Grover Long,* for plaintiff in error.

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

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

PER CURIAM.

Roy H. Preston was convicted of arson and prosecutes error proceedings to this court. The assignments of error relate to the misconduct of the bailiff in the performance of his duties with the jury. The plaintiff in error relied mostly upon affidavits which are not a part of the bill of exceptions and so cannot be considered. *First Trust Co. v.*

Glendale Realty Co., 125 Neb. 283. The state introduced oral testimony which discloses that some material evidence was before the court which is not in the bill of exceptions. Where it is apparent from the bill of exceptions that material evidence has been omitted, it will not be considered on appeal in determining an issue of fact or the sufficiency of the evidence to sustain a finding of fact by the trial judge. *Dawson v. Stockmen's Nat. Bank*, 119 Neb. 115; *Greene v. Greene*, 49 Neb. 546, 34 L. R. A. 110, 59 Am. St. Rep. 560.

The conduct of a bailiff in charge of a jury is a question of fact. It will be presumed, in the absence of a proper bill of exceptions, that the evidence was sufficient to support the finding of the trial judge.

AFFIRMED.

E. H. LUIKART, RECEIVER OF HINDS STATE BANK OF ODELL, APPELLANT, V. BEATRICE NATIONAL BANK ET AL., APPELLEES.

FILED MAY 10, 1935. No. 29259.

Cause reviewed and judgment affirmed.

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

F. C. Radke, Clinton J. Campbell, James L. Brown and *Barlow Nye*, for appellant.

Peterson & Devoe and *Jack & Vette, contra.*

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

GOSS, C. J.

The receiver sued defendants for $5,000 with interest from September 30, 1929, charging them on that date with a conspiracy by which the Hinds State Bank was defrauded in the sum named. From an adverse judgment

favoring both defendants, plaintiff appealed. The cause was tried to the court.

The action grows out of the dealings of Hinds and Hinds State Bank of Odell with Beatrice National Bank, which was correspondent and depositary of the Hinds bank. Hinds was president and managing officer of the Hinds bank. It had $20,000 capital stock, of which Hinds owned $18,500. For years Hinds had borrowed money, both for himself personally and for his bank, from the Beatrice bank. These loans were always secured by collateral regularly furnished by Hinds who was the only person with whom the national bank dealt in any of the matters. Hinds testified that all the money he borrowed from the Beatrice bank was for the aid and benefit of the Hinds bank. It was in fact borrowed to bolster up a depleted cash reserve.

The controlling events center around September 30, 1929. On the morning of that day the Beatrice bank held two notes of Charles N. Hinds for $5,000 each, secured by collateral, and two notes of the Hinds bank for $5,000 each, secured by collateral. Late that day Hinds came to the Beatrice bank with additional collateral from the Hinds bank and borrowed $5,000 more for the Hinds bank. The two Hinds bank notes and one Charles N. Hinds $5,000 note were taken up and three new notes were given by Hinds bank as follows: One for $5,000, another for $5,000 and the third for $10,000; this last also in effect renewing the debt evidenced by the Charles N. Hinds note for $5,000 taken up by mistake. But, in addition to the new collateral furnished on that day to secure the $5,000 fresh loan, the Beatrice bank also attached to the $10,000 note the collateral it had long held on the Charles N. Hinds $5,000 note taken up and merged in this $10,000 new note. These Charles N. Hinds collateral notes amounted to more than $5,000, were later paid by the makers to the Beatrice bank, more than paid the half of the $10,000 note for which Charles N. Hinds was responsible and left an excess which was applied on the $5,000 share of the Hinds bank's

part of its $10,000 note. So the Hinds bank did not pay the Charles N. Hinds note which had been taken up. His collateral, which had secured it, was carried forward as security for the debt and more than paid it. It is stipulated in the evidence that the three collateral notes, specifying them, amounting to $8,000 (but which we find from other evidence had originally totaled $6,100) "have all been paid in cash in full, with interest, the same being collateral to note 72 and the renewal notes of 72." This note number 72 was the original $5,000 Charles N. Hinds note. It was made September 11, 1928. It was renewed on April 26, 1929, as number 1732, and it was this renewal note which was taken up on September 30, 1929, and merged in the $10,000 note. To trace all the notes through the accounts of the banks and the oral testimony would unduly prolong this opinion. No valid controversy can arise from the evidence that the ultimate facts are as we have stated them.

The claim of the receiver against the Beatrice bank may be said to be based upon two of the notes at all times held by the Beatrice bank as collateral to notes number 72, its renewal, number 1732, and, after September 30, 1929, as collateral to number 3003, which was the $10,000 merged note heretofore referred to. These two notes were the Bernadt note of $2,500 and the Goeller & Tatro note for $2,600. It is claimed by the receiver that on July 9, 1929, and July 3, 1929, respectively, they were taken back into the Hinds State Bank, and credit was given to Hinds personally for them, so that on September 30, 1929, the Hinds State Bank owned them (together with the Hiatt note for $1,100) according to the records of the Hinds bank. The above facts were testified to by an auditor for the banking department, who testified, however, that while the Hinds bank records showed that it owned these notes on September 30, 1929, they were at that moment "in the hands of the Beatrice National Bank as collateral to the bills payable of the Hinds bank—what note, I don't know." On cross-examination of the witness it was developed

that the Hinds bank records did not show affirmatively that Hinds was given credit for these collateral notes and that the testimony on that point was speculative. The witness claimed to arrive at the conclusion by deduction, by some process of elimination, which the trial court did not accept, nor do we.

The records of the Hinds bank showed positively that Hinds had purchased and paid that bank for these collateral notes in 1928 and owned them personally when he had put them up as collateral to his first $5,000 note with the Beatrice National Bank. It is a fair inference from the evidence that the Beatrice bank continued to hold them as collateral until they were paid by the makers and the proceeds applied to the debts for which they were held as security. Both Wallace Robertson, president of the Beatrice bank, and Charles N. Hinds so positively testified.

This review is concerned with questions of fact. The evidence seems to us to negative any knowledge or notice brought home to Beatrice National Bank or its officers that Hinds did not have full right to pledge the collateral. The evidence further seems to indicate that Hinds actually owned these collateral notes. The evidence does not sustain the burden on the plaintiff to prove otherwise. There was no evidence of any conspiracy of the two banks or by their officers to defraud the Hinds State Bank by means of the transactions. Particularly as to the acts and conduct of the Beatrice bank the evidence on this subject is clear.

The trial court, who observed and heard the witnesses, found no liability of either defendant to the Hinds State Bank. We are of the opinion the judgment was right. It is

AFFIRMED.

WILLIAM B. HOAGLAND, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED MAY 10, 1935. No. 29219.

1. **Habeas Corpus.** A prisoner confined in the county jail under a commitment conforming to the judicial sentence imposed is not entitled to a discharge from custody on habeas corpus before serving his term, unless the sentence or commitment is void.
2. ———. In habeas corpus, the burden is on petitioner to prove his detention is unlawful.
3. ———. Errors not invalidating the sentence or commitment in a criminal prosecution are unavailing for the discharge of the prisoner on habeas corpus.
4. **Evidence.** The judicial record of the sentence in a criminal prosecution, or a duly certified copy thereof, is the best evidence of the penalty imposed for the offense committed.
5. **Habeas Corpus.** Where each of two commitments directing imprisonment of a convicted offender for 30 days was issued by a municipal judge who subsequently wrote on each of the writs, which were fastened together with staples, "These sentences to run consecutively," the prisoner, on habeas corpus, is not entitled to a discharge from custody after serving 30 days, without competent proof that both sentences did not require imprisonment for 60 days.

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

Johnsen, Gross & Crawford, for appellant.

William H. Wright, Attorney General, Milton C. Murphy and *D. E. O'Brien, contra.*

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

ROSE, J.

William B. Hoagland petitioned for a writ of habeas corpus and for an order releasing him from the Douglas county jail on the alleged ground that he was therein unlawfully deprived of his liberty. The writ was issued and petitioner was taken before the district court, where there was a hearing upon the petition, the sheriff's return, the evidence adduced and the arguments of counsel. The dis-

trict court found that petitioner was not unlawfully deprived of his liberty and remanded him to the custody of the sheriff. From that judgment he appealed.

The sheriff detained petitioner under two commitments fastened together with staples. The commitments were issued by Lester Palmer, judge of the municipal court of Omaha, January 16, 1934. Each on its face bore this entry: "These sentences to run consecutively and not concurrently. Lester Palmer." Each of the entries was made by Lester Palmer in the office of the county jail January 17, 1934. Both commitments directed the sheriff to receive and keep Hoagland until discharged by due course of law. One of the commitments stated that Hoagland had been charged with having unlawful possession of intoxicating liquor, that he had been found guilty and that he had been sentenced to serve a term of 30 days in the county jail. The other commitment was the same, with the exception that the charge was operating a motor vehicle while under the influence of intoxicating liquor. After imprisonment of 30 days, Hoagland claimed the sentences ran concurrently; that he had served his full term under both commitments; that the entries, "These sentences to run consecutively," were void; that further detention was unlawful and that he was entitled to his liberty. The law has been stated as follows:

"A prisoner held under a process in due form issued upon a judgment cannot obtain his discharge by habeas corpus, unless the judgment is void, and not merely voidable." *In re Application of Walker,* 61 Neb. 803.

"In an original application for a writ of habeas corpus whereby the plaintiff seeks his discharge from the custody of an officer holding a warrant or commitment regular on its face, it devolves upon the plaintiff to show that his detention is unlawful. Failing to do so, the application will be dismissed and the plaintiff remanded to the custody of the officer holding the authority for his detention." *In re Page,* 89 Neb. 299.

"On habeas corpus the inquiry is confined to matters

which are jurisdictional, mere irregularities or errors, however gross, which do not render the proceedings a nullity, not being considered." *Keller v. Davis,* 69 Neb. 494.

If the sentences or judgments required Hoagland to serve two terms of 30 days each, one term to follow the other, both terms were not served. If such were the judgments, the entries quoted from the commitments and the commitments themselves were not at variance with the sentences pronounced by the judge of the municipal court. The burden was on Hoagland to prove he was sentenced to imprisonment for 30 days only for both offenses. The judicial record of the sentences in the criminal prosecution or a duly certified copy thereof is the best evidence of the penalties imposed for the offenses committed. *Myers v. Fenton,* 121 Neb. 56. A judicial record or copy of formal judgments was not produced or offered. There was, however, a stipulation to the effect that Hoagland was arrested January 14, 1934; that he was charged with the two offenses already stated; that he appeared with his attorney in the municipal court at Omaha January 16, 1934; that evidence was adduced by the state, accused making no defense; that he was sentenced on both charges at the same time, the first sentence being 30 days in the county jail for having unlawful possession of intoxicating liquor and the second being 30 days in the county jail for operating a motor vehicle while under the influence of intoxicating liquor; that a sentence was written, "Thirty days in the county jail," across the back of each complaint by Lester Palmer; that the complaints were the bases of the commitments.

The evidence does not prove that the sentence, "Thirty days in the county jail," written across the back of each complaint, was the only judicial record of the sentences. The stipulated assertion that the complaints were the bases of the commitments was an erroneous conclusion of law. The commitments were based on the sentences or judgments after complaints, trial and conviction. There was

no competent evidence that either sentence or either commitment was void, or that the entry on both commitments, "These sentences to run consecutively," as made by the municipal judge who imposed the sentences and issued the commitments, did not conform to the sentences actually pronounced. The entries in connection with the commitments imported imprisonment for 60 days. The conclusion is that the record fails to show petitioner was unlawfully deprived of his liberty.

AFFIRMED.

EDITH C. ROGERS, APPELLANT, V. FLOSSIE J. BROWN, APPELLEE.

FILED MAY 10, 1935. No. 29261.

1. **Automobiles:** LIABILITY TO GUESTS: GROSS NEGLIGENCE. "In the law providing that an unintoxicated motorist shall not be liable in damages to a guest except for 'gross negligence,' that term means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Gilbert v. Bryant*, 125 Neb. 731.
2. ———: ———: REMEDY. The remedy of a motorist's guest for negligence resulting in personal injuries, as protected by the constitutional provision that "every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law," was not taken away by the guest law. Const. art. I, sec. 13; Comp. St. Supp. 1933, sec. 39-1129.
3. **Appeal:** PEREMPTORY INSTRUCTION. "In reviewing a peremptory instruction in favor of defendant, issuable facts, which the evidence in favor of plaintiff tends to prove, will be regarded as established." *Gilbert v. Bryant*, 125 Neb. 731.
4. **Automobiles:** DUTY OF MOTORIST. The duty of a motorist at a congested intersection in public streets is commensurate with the danger to himself and others.
5. ———: ———. It is the duty of the driver of a motor vehicle in a congested area in public streets to keep a lookout for traffic signals and to comply with traffic regulations adopted by statute and ordinance.
6. ———: TRAFFIC SIGNALS. Traffic signals at congested public

street crossings call attention of motorists to danger, law and duty.

7. ———: GROSS NEGLIGENCE: PROOF. A series of proved acts committed by a motorist who, near and in a congested intersection in public streets, violated a traffic signal, disobeyed traffic regulations adopted by statute and ordinance and drove her automobile against another car, *held* evidence of gross negligence.

8. ———: DUTY OF GUEST. "Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented." *Lewis v. Rapid Transit Lines*, 126 Neb. 158.

9. **Negligence.** Where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for resulting damages, though one of them alone might not have caused the injury.

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

Frank S. Howell and *George M. Tunison*, for appellant.

Ziegler & Dunn and *William Stalmaster, contra.*

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

ROSE, J.

Edith C. Rogers, plaintiff, while a gratuitous guest in an automobile owned and operated by Flossie J. Brown, defendant, was injured when it collided with another car at the intersection of Farnam street and Turner boulevard in the city of Omaha, February 27, 1932, and brought this action to recover resulting damages in the sum of $8,300, charging defendant with gross negligence causing the collision.

The petition contains two causes of action, one for personal injuries to plaintiff and the other for expenses and liabilities incurred by her husband for her medical and hospital care, the claim therefor having been assigned to her. The charges of gross negligence are elaborately pleaded in the petition, but may be outlined as follows:

Violation by defendant of statute and city ordinances in so operating her car, without regard to the condition of traffic, as to endanger life and limb of other persons; in passing in a congested intersection other vehicles going in the same direction; in driving faster than 12 miles an hour while attempting to cross an intersection in a congested district; in disregarding the traffic signal "slow" near an intersection congested with traffic; in failing to signal other motorists of her intention to pass in the intersection cars going in the same direction; in neglecting to apply brakes or to change defendant's course in the presence of danger in order to prevent a collision. The defenses interposed by defendant are summarized by her as follows:

"Defendant's answer to said petition is a general denial, together with a further allegation that the plaintiff at no time, up until the occurrence of the accident, made any complaint, protest or objection to the defendant with reference to the manner or speed at which defendant was driving the car, and did not direct defendant's attention to any approaching car until possibly one or two seconds before the accident actually occurred."

The reply to the answer was a general denial. After plaintiff introduced her evidence and rested, defendant moved for a directed verdict in her favor on the ground that gross negligence of the latter as the cause of the collision was not proved. This motion was sustained and from a resulting dismissal of the action plaintiff appealed.

The question presented by the appeal is the sufficiency of the evidence to make a *prima facie* case in favor of plaintiff for the consideration of the jury, notwithstanding the statute providing that an unintoxicated owner or operator of a motor vehicle shall not be liable in damages to a gratuitous guest except for gross negligence. Comp. St. Supp. 1933, sec. 39-1129. The term "gross negligence" as thus used has been defined to mean "negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Morris v. Erskine,* 124 Neb. 754; *Gilbert v. Bryant,* 125 Neb. 731; *Swengil v. Martin,* 125

Neb. 745; *McDonald v. Wright,* 125 Neb. 871; *Sheehy v. Abboud,* 126 Neb. 554; *Thurston v. Carrigan,* 127 Neb. 625. The remedy of a motorist's guest for negligence resulting in personal injuries, as protected by the constitutional provision, that "every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law," was not taken away by the guest law. Const. art. I, sec. 13; Comp. St. Supp. 1933, sec. 39-1129. The legislature merely changed the degree of proof essential to a recovery for damages. "In reviewing a peremptory instruction in favor of defendant, issuable facts, which the evidence in favor of plaintiff tends to prove, will be regarded as established." *Gilbert v. Bryant,* 125 Neb. 731. Proper inferences from such facts may be considered also. With these rules of law in mind, the testimony on the issue of gross negligence requires judicial scrutiny.

The evidence adduced by plaintiff tends to prove the following facts: Farnam street, Omaha, runs east and west and is 100 feet wide between curbs, with two street car tracks extending lengthwise near the center. Turner boulevard, 66 feet wide between curbs, runs nearly north and south and crosses Farnam street almost at right angles. Both are main public thoroughfares carrying heavy traffic. On the evening of February 27, 1932, Edith C. Rogers, plaintiff, and her husband, dined with Flossie J. Brown, defendant, and her husband. After dinner, defendant, in a five-passenger Dodge sedan owned and operated by her, with her husband and with plaintiff and the latter's husband as gratuitous guests, started with them for their home. The men occupied the rear seat. Plaintiff sat in the front seat beside defendant. The latter drove into Farnam street from the south and turned west on the north side. Not far from the center of the intersection of Farnam street and Turner boulevard, close to the north rail of the north street car track, the Dodge sedan collided with a car operated by Harry Hodge who had driven east on the south side of Farnam street and had made a left

turn across the street car tracks, intending to go from the intersection north on Turner boulevard. As a result of the collision plaintiff suffered personal injuries and pecuniary damages. The streets were dry. Darkness had come on, but there were street lights at the crossing and there were headlights on each of the colliding cars.

As defendant approached the intersection cars were coming towards it from north, south, east and west. When within perhaps 200 feet of the crossing, defendant was following three or four other cars going west on the north side of Farnam street in the same line of travel. When approximately 100 feet east of Turner boulevard, defendant said the slow drivers made her tired. She turned south, still on Farnam street, out of her line of travel, passed some of the cars in front of her at a speed of 18 or 20 miles an hour, while one of the cars at least was in the intersection, and swerved slightly to the northwest from the street car tracks toward the line of travel she had left. The right front corner of defendant's sedan struck the right side of Hodge's car. In turning to pass the line of cars ahead, defendant increased her speed to 18 or 20 miles an hour. She exceeded the speed limit of 12 miles an hour at the crossing; failed to sound her horn while passing the cars in front, without knowing which way they would go from the intersection; did not apply brakes or change her course to avoid a collision; operated her car at a speed greater than was reasonable and proper in view of the traffic.

Defendant violated the traffic signal, "slow," and traffic regulations adopted by statute and proved ordinances. Hodge's car, with headlights, coming east on the south side of Farnam street into the intersection and turning north, was in plain view of defendant. Nevertheless she said at the scene of the collision, referring to Hodge, "I didn't see that fellow. Where did he come from?" An impact from a car under control in the rear of defendant's sedan after the collision was averted by prompt application of brakes on the former.

The evidential facts narrated are considered established for the purpose of testing the sufficiency of the evidence to make a *prima facie* case in favor of plaintiff for the consideration of the jury on the issue of gross negligence.

A congested intersection in public streets is a place of danger, if traffic signals and regulations adopted by statute and ordinance are violated. The duty of a motorist at such a place is commensurate with the danger to himself and others. It is the duty of the driver of an automobile in a congested area to keep a lookout for traffic signals and to comply with traffic regulations adopted by statute and ordinance. The traffic signal, "slow," on Farnam street east of the intersection near Turner boulevard called attention of motorists to danger, law and duty. From facts which the evidence tends to prove, it may fairly be inferred that the accident would not have happened, except for defendant's negligent violations of a traffic signal, of traffic regulations and of her own duty. Her impatience with law-respecting motorists in front of her, with their cars under control, when approaching a danger zone of which there was warning, and her subsequent negligence implied a willingness to disregard the traffic signal, traffic regulations and duty. The negligent acts of defendant in the series established for the purposes of review, under the circumstances disclosed by the record, evidenced the absence of even slight care in the performance of duty, and "gross negligence."

The defense that the guest negligently violated her duty to warn the driver of danger and to complain of the manner in which the car was being operated does not, as a matter of law, defeat plaintiff's claim for damages. The following rule was recently adopted:

"Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented." *Lewis v. Rapid Transit Lines,* 126 Neb. 158.

Imminent danger from defendant's negligence arose

when Hodge attempted to make a left turn at the intersection. To his approaching car plaintiff called the attention of defendant, who did not change her course or apply the brakes to prevent a collision. There was little time, however, for either warning or for avoiding the accident after Hodge turned northward in the intersection in which defendant was exceeding the speed limit and passing other cars going in the same direction. The issues of warning and complaint raised, at most, questions for the jury and did not justify the nonsuit.

The evidence does not show as a matter of law that what Hodge did at the time was the sole cause of the collision. He testified in effect that, before turning to the north, he indicated his purpose to do so by opening the door on that side of his car and extending his left arm. If he was guilty of negligence, it concurred with that of defendant to produce the collision and cause the resulting damages. It is well-settled law that, where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury. *Schweppe v. Uhl,* 97 Neb. 328; *Robertson v. Chicago, B. & Q. R. Co.,* 108 Neb. 569; *Koehn v. City of Hastings,* 114 Neb. 106; *O'Neill v. Rovatsos,* 114 Neb. 142; *Olson v. Hansen,* 122 Neb. 492; *Zielinski v. Dolan,* 127 Neb. 153.

Though the ruling of the trial court in directing a verdict in favor of defendant was ably and confidently defended in argument as sound, the better view of the evidence and the law seems to be that plaintiff made a *prima facie* case for the consideration of the jury. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ETOILY COOK, APPELLEE, V. SAMUEL M. PATTERSON, APPELLANT.

FILED MAY 10, 1935. No. 29184.

Jury. "Jurors may not state to fellow jurors, while considering their verdict, facts relative to issues in the case within their own personal knowledge, but not of the evidence introduced. They should make the same known during the trial, and, if desired, testify as witnesses." *Ewing v. Hoffine*, 55 Neb. 131.

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

Clarence A. Davis, Wilber Aten and *John F. Fults,* for appellant.

Stevens & Stevens, contra.

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

EBERLY, J.

This was an action brought by the appellee (plaintiff) against the defendant (appellant) in the district court for Furnas county, Nebraska, for damages for personal injuries arising out of an automobile accident alleged to have been caused by the negligent operation of the automobile of the defendant.

A trial to a jury resulted in a verdict and judgment for plaintiff. From the order of the trial court overruling his motion for a new trial, the defendant appeals.

The appellant's brief presents two questions for our consideration. But one of these, misconduct of the jurors, needs to be considered. Filed in support of a motion for a new trial is an affidavit of one of the jurors, which is, in part, as follows:

"Calvin Beedle, being first duly sworn, deposes and says that on the 14th day of November, 1933, he was duly chosen as a juror in the above entitled case, and sat throughout the said trial and took part in reaching the jury verdict thereafter rendered.

"That about July, 1931, he was working near Edison, Nebraska, and that in the course of his employment, he received a bad fall, striking the ground and injuring his head and among other things fracturing his skull and injuring his head at about the same place Mrs. Cook's head was hurt; that he suffered severe pain from this accident for several months after it happened; that he has never completely recovered from the accident; that his head is still sore and painful and he cannot now touch the place where the fracture occurred without pain; that he was paid compensation and he finally settled for these injuries, although they still cause him trouble; that the doctor who took care of him was Dr. Miller at Arapahoe, Nebraska, and that the doctor says that at sometime in the future he may still have trouble with his head injury and some day may have to have an operation.

"That some of the jurors knew that he had had this injury and asked him about it in the jury room and he told them all of the foregoing things and told them that in his opinion it was too soon to tell how much Mrs. Cook was hurt, that nobody could tell about such an injury for a year or two; that it would be better to adjourn the trial a year and wait and see how much she was hurt; that in arriving at a verdict he considered his personal experience and the knowledge of his own injury and the seriousness of a skull fracture as he knew it from his own case; that some of the other jurors whose names affiant does not know said in the jury room that they knew Mrs. Cook and knew about her condition and she had been different ever since the accident, and that they did not think she ever had been 'quite right' since the accident, and that they didn't think she was now, and that these statements were discussed by the jury in the course of arriving at a verdict."

Supporting affidavits are contained in the bill of exceptions, and there is no opposing proof.

"Under modern conditions, however, a verdict must be based solely on the evidence introduced in the case and the

personal knowledge of the jurors as to the matters and facts involved will not be allowed to enter into their deliberations upon the verdict, whether such knowledge be the knowledge of one or of all the jurors. If a juror knows any fact relevant to the case he should be sworn and give his testimony in open court. * * * This general rule is based on the principles that the relevancy and competency of all evidence should be passed on by the court before being submitted to the jury; that testimony can only be legally given under oath, and with the right to have it sifted by cross-examination by the adverse party, and met by countervailing proof; and that the court and parties have the right to know upon what evidence the verdict was rendered." 17 Standard Ency. of Procedure, 537-539.

These general principles were approved, and the limits of the doctrine were laid down by Reese, C. J., in *Harris v. State*, 24 Neb. 803.

In *Ewing v. Hoffine*, 55 Neb. 131, this court announced the rule applicable to the facts then before it in the following form:

"Jurors may not state to fellow jurors, while considering their verdict, facts relative to issues in the case within their own personal knowledge, but not of the evidence introduced. They should make the same known during the trial, and, if desired, testify as witnesses. *Wood River Bank v. Dodge*, 36 Neb. 708; *Richards v. State*, 36 Neb. 17, followed."

See, also, *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889; *Falls City v. Sperry*, 68 Neb. 420; *Kelley v. Adams County*, 113 Neb. 377; *Meyer v. Omaha & C. B. Street R. Co.*, 125 Neb. 712.

In the instant case, with the distinct and undisputed showing that this juror not only had this prior experience and knowledge, and based his approval of the verdict returned at least partly thereon, but that it was likewise used to influence his fellow jurors in arriving at their verdict, we are driven to the conclusion that, consistent

with the principles announced in the cases referred to, the verdict and judgment must be set aside.

The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings according to law.

REVERSED.

STATE BANK OF EDGAR, APPELLEE, V. MERRILL P. JORDAN, APPELLANT.

FILED MAY 10, 1935. No. 29278.

1. **Bills and Notes:** ALTERATION: RATIFICATION. "A material alteration, already made, may be ratified and adopted subsequently; and in such case the instrument, as altered, will be binding." *State v. Paxton*, 65 Neb. 110.
2. ———: ———: ———: PLEADING. Where holder of note that has been materially altered without maker's consent relies on ratification of such alteration, it must be pleaded.
3. **Evidence** insufficient to support a pleading of ratification of a material alteration of a note and mortgage.

APPEAL from the district court for Clay county: FRANK J. MUNDAY, JUDGE. *Reversed.*

John M. Paul, Stiner & Boslaugh and *L. R. Stiner*, for appellant.

F. C. Radke, C. L. Stewart, John S. Logan and *L. T. Fleetwood, contra.*

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

DAY, J.

The State Bank of Edgar filed a suit against Merrill P. Jordan and C. H. Jordan to foreclose a mortgage given as security for a note. The defendants filed an answer in which they alleged that the note was executed for $2,514.81, and that after the making, execution, and delivery, the same was altered by the plaintiff in that the amount was changed to $2,614.81, which material al-

teration was made without the consent, authority, or knowledge of the defendants. The defendants further allege that the sheriff has in his custody the proceeds of the sale of the personal property of Merrill P. Jordan in the sum of $264, which money is his property, and he asked that the same be paid to him. The plaintiff filed a reply to the answer of the defendants and, in addition to denying the allegations, alleged that, upon the specific agreement and understanding with Merrill P. Jordan, the plaintiff was given the right to and did change the figures in the note. The property secured by the mortgage was converted into cash and is in the hands of a trustee appointed by the court, and it was stipulated that if the plaintiff was entitled to a foreclosure the money should be ordered paid to him, otherwise paid to the defendant Merrill P. Jordan. The court found in favor of C. H. Jordan, although he had no interest in the chattels covered by the mortgage, and the only relief sought was an application of the proceeds to the indebtedness represented by the note. The trial court found in favor of plaintiff and ordered the money ($264) in the hands of the sheriff turned over to it as per stipulation. The defendant Merrill P. Jordan appears here as appellant and, for convenience, reference hereafter to the defendant refers to Merrill P. Jordan, as there is no issue in this court between the plaintiff and defendant C. H. Jordan.

The question for our determination here is whether under the pleadings and the evidence the plaintiff was entitled to a foreclosure of its chattel mortgage. The plaintiff admits that the alteration of the amount of a promissory note and a mortgage securing it is a material alteration. Comp. St. 1929, sec. 62-807; *Foxworthy v. Colby*, 64 Neb. 216. But it is insisted that a material alteration may be ratified to the effect that the whole contract is binding. "A material alteration, already made, may be ratified and adopted subsequently; and in such case the instrument, as altered, will be binding." *State v. Paxton*, 65 Neb. 110.

Ratification of a material alteration already made must be pleaded in order to be available to the plaintiff. In *Erickson v. First Nat. Bank of Oakland,* 44 Neb. 622, it was held: "Where a promissory note has been materially altered without the knowledge or consent of the maker, and the holder relies upon a subsequent ratification of the instrument by the maker, such ratification must be pleaded in order to be of any avail."

The language of the plaintiff's reply is as follows: "Plaintiff alleges that upon the specific agreement and understanding with Merrill P. Jordan, * * * the plaintiff was given the right to and did change the figures set forth in the note, * * * and at said time the defendant Merrill P. Jordan said that he would tell his father, C. H. Jordan, of said alteration of said note, and if he disagreed or did not approve of said alteration, then in that event the said Merrill P. Jordan would come in the company of said C. H. Jordan to the bank, * * * and there make out the note in the proper amount and execute the same and deliver it to said bank."

The reply pleads an authorization by defendant to make the alteration. There is no evidence to support this allegation. It was also alleged that defendant would see his father, C. H. Jordan, and if the father did not approve of the alteration, they would come to the bank and execute a new note for a proper amount. There is no evidence that C. H. Jordan, who called at the bank afterwards, ever ratified the alteration. This does not allege a ratification of the alteration by defendant. While we are of the opinion that the reply does not plead a ratification, the question is not important in this case, since the evidence would not support such a pleading. True, the cashier and the president of the bank testify that Merrill P. Jordan admitted that there was an error of $100, and that he never questioned the amount of the note, and that the first objection made was after the note was due. Cashier Martin had the conversation with defendant Merrill P. Jordan. President Warren testified that he overheard the

conversation and testified that Merrill P. Jordan agreed to the change and raised no objection to it. The defendant Merrill P. Jordan denied that he agreed to the change and testified that he did object. It is argued that, although the burden of proof is upon the plaintiff to establish ratification, the evidence preponderates in its favor. But certain testimony of the cashier and president of the bank corroborates the defendant so strongly that we are constrained to hold that the evidence does not support a finding of ratification. The cashier, Martin, testified that he notified Merrill P. Jordan several times and he came in and talked to him on several occasions about the amount of the note. He testified that he called Merrill P. Jordan into the bank at his first opportunity, two or three weeks after the execution of the note and mortgage, and called his attention to the fact that he had changed the note to correspond to the old note; that at the time defendant looked in his pockets and did not have the old note, and he told him to bring in the old note. If defendant ratified the alteration, what occasion could there be to look for the old note, and what reason could there be for the cashier to call the defendant in on several occasions to talk about the amount of the mortgage and the note? It would seem that the witness, Martin, was mistaken in his testimony that the defendant ratified the alteration. The president, Warren, never discussed the matter with the defendant. He testified as to conclusions he reached from overhearing his conversation with the cashier, Martin, that he agreed to the change. This witness could not remember the substance of the conversation, and in view of the other evidence we conclude that he was mistaken. In view of these conclusions, the judgment of the trial court must be reversed and remanded for new trial.

REVERSED.

WARD MCDOWELL, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.*

FILED MAY 10, 1935. No. 29238.

Courts: ESTOPPEL. It is a settled principle of law that, if a defendant contests a suit on one ground in a municipal court, he cannot in the district court set up a different defense. He is estopped from mending his hold.

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

Beghtol, Foe & Rankin, for appellant.

Clinton J. Campbell and *John J. Wilson, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

PAINE, J.

This is a suit brought to recover for permanent disabilities under an accident policy. The jury returned a verdict for the plaintiff in the sum of $642.18, and judgment was entered thereon, together with an attorney fee in the sum of $150.

Ward McDowell took out an accident insurance policy, which went into effect on January 22, 1926, which provided for a payment of $5,000 in case of death from accident within 90 days, and for $25 weekly indemnity against total disability because of accidental injury. He paid the semiannual premiums on said policy, in the sum of $9.90, until he was injured, Sunday, April 5, 1931. This occurred while he was driving his automobile down Eleventh street for recreation; another car came out of the alley and struck his car at about 8:15 in the evening. His kneecap was broken in several places, there was a cut across his nose, his ankle and leg were also injured, and he remained in a cast for eight weeks immediately after the accident. Certain veins swelled above the cast and other complications arose, and phlebitis attacked his limbs, and he suffered great pain. He never recovered from these permanent injuries, and died June 18, 1934. He had be-

*Opinion vacated. See p. 764, *post.*

gun this action before he died, and it has been revived in the name of his wife as administratrix. The defendant company continued payments under the insurance policy of $25 a week until March 19, 1933, and then discontinued all payments, and urged the insured to change to partial disability payments, which would pay only half the amount of total disability; the policy providing that, when the insured went on partial disability, such payments would terminate at the end of 26 weeks, which was what the company desired.

This action was first brought by the plaintiff in the municipal court in Lincoln, and from a judgment in that court an appeal was taken to the district court, and there for the first time the defendant company set up as one of its defenses that the insured had changed his occupation, and that a premium that he was paying would have purchased an indemnity of about $20.84 under the occupation which he was following at the time of his injury.

In the reply filed in the district court, paragraph 2 reads: "Further replying plaintiff alleges that the defendant has waived its right and also is estopped by its acts to set up its pretended defense that plaintiff has changed his occupation to a more hazardous one and that such change has reduced the amount of indemnity to which plaintiff is entitled, as set out in paragraph 2 of its answer, for the reason that defendant pleaded no such defense in the lower court from which this case comes on appeal; and for the further reason that defendant, with full knowledge of the character of the plaintiff's occupation, recognized its liability to him in the amount of $25 per week for his total disability and made payment of said amount to this plaintiff to the 19th day of March, 1933, and also collected and retained premiums from this plaintiff on the basis of such indemnity liability, and that defendant cannot now avail itself of the contention that plaintiff at the time of the accident had changed his occupation and thereby reduced the indemnity due him under his policy."

In the evidence it is shown that the defendant insurance company regularly paid the weekly indemnity of $25 a week from April 5, 1931, to March 19, 1933, and at no time made any point of any change in deceased plaintiff's occupation. The company then offered partial disability.

The plaintiff insists that defendant is estopped from interposing in the district court, for the first time, the defense of change of occupation. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen,* 103 Neb. 791. See, also, *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841; *First State Bank of Overton v. Stephens Bros.,* 74 Neb. 616; *Continental Ins. Co. v. Waugh,* 60 Neb. 348.

"If a person before suit refuses to satisfy a demand for particular reasons stated by him to the plaintiff, he will not be permitted after litigation has commenced to change his ground and defend upon entirely different considerations." *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285.

In the old case of *Ballou v. Sherwood,* 32 Neb. 666, Chief Justice Cobb, in a 47-page opinion, suggests that the change in that case was a mere afterthought, suggested by the pressure and exigencies of the case, and that a party is estopped from changing his ground by a settled principle of law.

The defendant insists that estoppel cannot avail unless it can be shown that the defendant knew all the facts in regard to plaintiff's claim at the time it filed its answer in the municipal court. Without admitting this claim to be true, we are satisfied that the evidence does disclose that defendant was acquainted with the facts at that time.

The shift in position of the defendant in the case at bar is one that cannot be allowed, for after litigation has begun a defendant is not permitted to base his defense upon

a different state of facts; in other words, he is not permitted to mend his hold.

This being our holding, it is not necessary to consider the other errors set out in the new and additional grounds of defense. There being no prejudicial error, the judgment of the district court is affirmed, and as an attorney fee of $150 was allowed in the district court we will allow an additional attorney fee in this court of $75.

AFFIRMED.

LINCOLN SAVINGS & LOAN ASSOCIATION, APPELLANT, V. LOUIS MANN ET AL., APPELLEES.

FILED MAY 10, 1935. No. 29298.

1. **Fraudulent Conveyances:** BURDEN OF PROOF. A deed by a husband and wife to the sister of the wife is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and the parties to the conveyance on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence.
2. ———: CREDITORS' SUIT: PLEADING. In a creditor's suit attacking a voluntary conveyance of realty by a judgment debtor to his wife's sister, the petition may be sufficient without charging an intent to hinder and delay creditors in literal terms where the facts pleaded are sufficient to show such an intent.
3. ———: "EXISTING CREDITOR." In a suit to cancel a deed from a judgment debtor to his wife's sister and to subject the land to the payment of a deficiency judgment on the ground that the deed was fraudulent or made to hinder and delay creditors, evidence that when it was executed the judgment debtor owed the plaintiff a debt partially secured by an unsatisfied mortgage on other land may be sufficient to show that plaintiff was then a creditor.
4. **Evidence** examined on a trial *de novo* and the conveyance of land from a judgment debtor to his wife's sister *held* void as to an existing creditor.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

Paul Martin, I. D. Beynon and *Willis R. Hecht,* for appellant.

E. L. Hyde, contra.

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

CARTER, J.

This is a suit in the nature of a creditor's bill brought by the Lincoln Savings & Loan Association, appellant, to set aside a deed to half of two lots in Sidney, Nebraska, and to subject it to execution on a judgment in its favor against Louis Mann, the grantor, on the ground that the deed was fraudulent as to creditors. The parties named as defendants consisted of Louis Mann and Blanche Mann, grantors, and the grantee, Carrie M. Martin, who is a sister of Blanche Mann. In a former suit to foreclose a mortgage on the other half of the two lots involved in this action, the appellant had previously recovered a deficiency judgment for $2,730.65, upon which execution had been issued and returned unsatisfied. The purpose of the suit at bar was to cancel the deed given by Louis Mann and his wife, Blanche Mann, and to subject the property covered thereby to the payment of the indebtedness evidenced by the deficiency judgment.

The defenses set up were as follows: That there was an absence of fraud or a purpose to delay creditors, and that the deed was given as payment for previous cash loans made by Carrie M. Martin. On a trial of the case, the trial court found generally for the defendants and plaintiff appeals.

It is the well-settled law of this state that conveyances between close relatives are presumptively fraudulent as to an existing creditor, and that, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on them to establish the good faith of the transaction by a preponderance of the evidence. *Lincoln Trust Co. v. Sweeney,* 124 Neb. 686; *Christensen v. Smith,* 123 Neb. 388.

That a sister-in-law is a relative within the meaning of the above rule cannot be questioned. In *Marcus v. Leake,* 4 Neb. (Unof.) 354, this court held: "The contention of plaintiff in error seems to be that a brother-in-law is not

a relative within the meaning of the rule referred to. We are unable to accept this view. There can be no doubt that a brother-in-law comes within the recognized and well-settled meaning of the word 'relative.' "

The appellees contend that the petition of the appellant does not plead that the alleged fraudulent conveyance was made to "hinder and delay" the creditors of the appellees, but only pleads that said conveyance was made to "defraud" such creditor, and that, if such conveyance was made as security for a debt, it would not "defraud," but would "hinder and delay" only. It is necessary for us to examine the facts pleaded rather than the conclusions of the pleader to determine the sufficiency of the petition in this respect. The reasoning contained in the case of *Peterson v. Wahlquist,* 125 Neb. 247, is very much in point, viz.: "To justify the dismissal of the cause, defendants argue that the petition is fatally defective in failing to plead in direct terms active fraud, fraudulent intent and an absolute liability of the stockholder when he parted with title to his real estate. This position does not seem to be tenable. * * * The petition, in literal terms, does not charge fraud or fraudulent intent on the part of the grantor. It does charge that, without consideration, the husband voluntarily conveyed his realty to his wife at a time when he had existing creditors whose claims were subsequently reduced to judgment, execution issued and returned unsatisfied for the want of property whereon to levy. * * * We think the petition, when liberally construed, states a cause of action, because it states facts which would entitle plaintiff to recover, unless defendants establish the *bona fides* of the transaction by a preponderance of the evidence." In *Rhoads v. Columbia Fire Underwriters Agency,* 128 Neb. 710, this court has held: "To maintain a civil action under our Code, it is not essential that the action be denominated either an action at law or in equity, nor that it be given any particular name. If the litigant pleads facts, and they constitute a cause of action or defense, the courts are bound to award the relief due."

The contention is also made that, as the appellant held a mortgage on other real estate to secure the debt, it was not an existing creditor within the meaning of the rule. In *Christensen v. Smith, supra,* it was held: "The plea that grantor was not a creditor of plaintiff when the deed was executed and that he was therefore at liberty to transfer to his children the title to his land was not established as a defense. As early as 1920 grantor owed plaintiff approximately $21,000, a debt partially secured by an unsatisfied mortgage on a tract of land other than the farm involved herein. The deed was executed June 17, 1929. At that time grantor was under obligation to pay the mortgage indebtedness in full but never did so. Under the circumstances the better view is that grantor was a debtor and plaintiff a creditor when the deed was executed." We therefore hold that appellees were debtors and appellant a creditor when the conveyance in question was made.

Upon a trial *de novo,* does equity require the setting aside of the deed as to the appellant? To determine this, it will be necessary to determine the circumstances surrounding the giving of the deed and the evidence in connection therewith.

The record discloses that Louis Mann, the appellee, obtained title to the north half of lots 7 and 8, block 19, original town of Sidney, Nebraska, on February 5, 1920. On the same day he and his wife executed and delivered to the Lincoln Savings & Loan Association, the appellant, a mortgage in the sum of $4,500, covering the above described property. On October 12, 1921, appellee obtained title to the south half of lots 7 and 8, block 19, original town of Sidney. On April 6, 1928, the appellee and his wife executed and delivered a mortgage on all of lots 7 and 8, block 19, original town of Sidney, to the American Bank of Sidney in the sum of $5,500. On October 24, 1928, the appellee applied in writing to the appellant for a loan of $6,750 on the whole of lots 7 and 8, hereinbefore fully described, and the same was approved. On November 5, 1928, appellee and his wife executed and delivered a note

and mortgage to the appellant, Lincoln Savings & Loan Association, in the sum of $6,750, which through error covered the north half only of lots 7 and 8, block 19, original town of Sidney, the proceeds being used to pay the balance due on the original $4,500 loan and all of the $5,500 mortgage owing the American Bank of Sidney.

The appellant, Lincoln Savings & Loan Association, commenced a foreclosure action on its mortgage of $6,750 on November 15, 1930, obtained a decree on January 23, 1931, in the sum of $7,092.44, which was adjudged to be a first lien on the north half of lots 7 and 8, as previously described, and the property sold at judicial sale to appellant for $5,000, which sale was confirmed by the court on November 30, 1931. A deficiency judgment was entered on September 10, 1932, in the sum of $2,730.65. On July 15, 1931, while the suit was pending, the appellee filed for record in Cheyenne county a deed to the south half of said lots 7 and 8, signed by himself and wife in favor of Carrie M. Martin, the deed being dated as of March 1, 1931. An execution was issued out of the district court for Cheyenne county against the appellee on the deficiency judgment on March 6, 1933, and the same was returned wholly unsatisfied.

The evidence on behalf of appellees shows that, for some time prior to March 1, 1931, Louis Mann had been in a bad physical and mental condition that necessitated much medical and hospital expense; that his wife, Blanche Mann, had difficulty in paying these expenses, and that she had borrowed considerable sums from her sister, Carrie M. Martin, of Denver, Colorado; that she had received the money in cash and had given no receipts for it; that the money had been furnished to Carrie M. Martin by her daughters who were working in Denver; that the total of said amounts was about $1,000; and that the deed in question had been given in consideration of this amount.

The evidence of the appellant shows that Carrie M. Martin lived in Denver, Colorado; that her husband was a farmer in Kansas, and that he had lost his farm by fore-

closure during the times herein mentioned; that the said Carrie M. Martin was dependent upon her daughters and son for support, and that she admitted over her signature that the transfer of the real estate was made to her for the convenience of Louis Mann and Blanche Mann and because Mann had some judgments against him, and that Mann was still the real owner of the property. Carrie M. Martin was not called as a witness. The evidence further shows that Mann and his wife were trying to sell or rent the property after the deed to Carrie M. Martin had been placed of record. The record further shows that the deed was recorded by Louis Mann or Blanche Mann and fails to show that Carrie M. Martin ever had the deed in her possession prior to the recording thereof.

Upon a consideration of the whole evidence, we are convinced that the good faith of this conveyance has not been shown by the degree of proof required by the law. The burden of proof is upon the appellees to show the good faith of the transaction. This they have failed to do. After a consideration of all the evidence, we conclude that the decree of the trial court was wrong. The judgment below is reversed and a decree will be entered in this court canceling the deed as to this appellant given by Louis Mann and Blanche Mann to Carrie M. Martin, making the judgment for $2,730.65 and interest a lien on the property described in said deed, and remanding the cause and directing the district court to carry into effect the decree of this court.

REVERSED.

SECURITIES INVESTMENT CORPORATION, APPELLANT, V. INDIANA TRUCK CORPORATION, APPELLEE.

FILED MAY 14, 1935. No. 29269.

1. **Action.** In a suit in Nebraska when the transactions occurred in Iowa and are so pleaded and proved, the Iowa law rules the decision.

2. **Statutes.** Remedial statutes are liberally construed to carry out the intent of the legislature.
3. ———. A law is entitled to be considered remedial whether it remedies a defect of the common law or of a preexisting statute.
4. **Sales:** CONTRACT: RECORD: NOTICE. An acknowledgment of a conditional sales contract taken under section 10103 of the Iowa Code as amended (in chapter 6, Extra Session of 1928, approved March 12, 1928) makes the contract subject to record and to impart constructive notice, when the certificate is preceded by the venue, "State of Iowa, County of Webster, ss," when the notary signs "W. F. Rich, Notary Public," and impresses his seal on which are the words "Notary Public, Iowa," even though otherwise, in the certificate or in connection therewith, the notary does not set out his official title.

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

Francis P. Matthews and *William P. Kelley,* for appellant.

H. E. Kuppinger, contra.

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

GOSS, C. J.

This is an action for the conversion of a truck. After trial on a stipulation of facts, the court entered judgment for defendant, dismissing the action of plaintiff with prejudice. Plaintiff appealed.

Though the facts were all stipulated, the parties reserved the right to make legal objection to the admission in evidence of some of the facts.

The plaintiff, a Nebraska corporation with its principal place of business in Omaha, was engaged in the business of purchasing notes, mortgages and other securities given to retail dealers in connection with the retail sale of automobiles and trucks. The Indiana Truck Corporation was manufacturer of trucks, of Marion, Indiana. Reece Sales Company was a trade-name used by J. H. Reece of Ft. Dodge, Webster county, Iowa, a retail dealer in automo-

biles and trucks. David Long, a resident of Greene county, Iowa, was engaged in farming.

June 24, 1929, Indiana Truck Corporation sold a particular 1929 Indiana truck to Reece under a conditional sales contract, which was recorded in Webster county, Iowa, July 19, 1929. Under the contract the seller retained title until the purchaser should pay the $1,113.03 balance of the purchase price, due September 24, 1929. The registry laws of Iowa required the instrument to be acknowledged by the purchaser. The certificate of acknowledgment was in the following form:

"State of Iowa, County of Webster, ss: On this 5th day of July, 1929, before me personally appeared J. H. Reece, trading as Reece Sales Company, to me known to be the person described in, and who executed the within and foregoing instrument and acknowledged that he executed the same as his free act and deed.

"In testimony whereof, I have hereunto set my notarial seal at Ft. Dodge, Iowa, the day and year last above written.

"Notarial seal. W. F. Rich,
"My term will expire July 4, 1930. Notary Public."

The parties expressly stipulated "That said instrument was acknowledged July 5, 1929, at Ft. Dodge, in Webster county, Iowa, before W. F. Rich, a duly appointed, qualified and acting notary public in and for Webster county, Iowa; that said W. F. Rich imprinted his notarial seal to said acknowledgment which imprint bears his name with the words 'Notary Public, Iowa.' "

The foregoing certificate of acknowledgment furnishes the main controversy, plaintiff claiming that it was defective and did not give to the recorded contract the quality of imparting to subsequent purchasers constructive notice that the title to the truck was in Indiana Truck Corporation. The stipulation reserved to plaintiff the right to object to the sufficiency of the certificate of acknowledgment, which it did on the trial. The court overruled the objection and admitted the contract in evidence.

Subject to objections, it was stipulated that David Long, if present, would testify that he purchased the truck in question from Reece Sales Company on or about November 26, 1929, without actual knowledge or notice of the existence of the conditional sales contract and without making any search of the records of Webster county, Iowa. Long paid some cash, turned in a truck in the trade and gave a note for $1,257.51, secured by a chattel mortgage, for the balance of the purchase price of the truck.

On November 27, 1929, Reece Sales Company duly sold said note and mortgage to plaintiff for $1,100 and evidenced the sale by proper indorsements and assignments. The mortgage was filed for record in Greene county, Iowa, on December 7, 1929. Plaintiff had no actual notice or knowledge of the existence of the conditional sales contract, made no investigation of the records of Webster county, Iowa, and the note and chattel mortgage were sold and delivered to plaintiff without the knowledge, authority, notice or consent of the defendant.

Indiana Truck Corporation demanded possession of the truck from Long and on December 18, 1929, he surrendered it to defendant without knowledge or consent of plaintiff. Before suit plaintiff demanded of defendant possession of the truck and the demand was refused. On December 18, 1929, the truck was worth $1,075.

The transactions took place in Iowa. The Iowa laws were duly pleaded and were stipulated in evidence. In these circumstances the Iowa law rules the decision here.

Section 10101 of the Iowa Code requires the person taking the acknowledgment to indorse upon such instrument a certificate setting forth "the title of the person before whom the acknowledgment was taken."

Plaintiff cites the leading case of *Willard v. Cramer* (1872) 36 Ia. 22, which holds that the recording of an instrument having a defective acknowledgment does not impart constructive notice, and that the requirement of the statute that the title of the officer be set out in the certificate is not satisfied by setting it out in the seal, because the

seal is no part of the certificate. It is to be noted that the certificate there failed to give the county, for the court said: "The certificate to the instrument in question, in omitting to give the county, utterly fails to comply with this requirement." The supreme court of Iowa in other cases followed the principle laid down in *Willard v. Cramer, supra.* They developed the rule, for example, that even the caption, "State of Iowa, County of Marion, ss," would not cure the defect unless there was some reference in the certificate itself to "said county." *Reeves & Co. v. Columbia Savings Bank,* 166 Ia. 411. Iowa cases cited down to 1929 continue to follow the same rule. Such is the situation here, as reference to the entire certificate, including the caption and seal, will show. Under the Iowa statutes and decisions, prior to the amendment hereinafter referred to, the acknowledgment here was too defective to impart constructive notice of the recording of the instrument.

Evidently to cure the effect on property rights of the strict interpretation of the acknowledgment statutes by the court, the legislature of Iowa, at its extra session in 1928, undertook to provide a remedy by the passage of the act, approved March 12, 1928, found in chapter 6, page 12, Extra Session. The following shows the law as it existed in section 10103 of the 1927 Code, the section as it then existed appearing in plain print, and the section as it was amended in 1928, the amending words being those italicized:

"10103. Forms of acknowledgment. The following forms of acknowledgment shall be sufficient in the cases to which they are respectively applicable. In each case where one of these forms is used, the name of the state and county where the acknowledgment is taken shall precede the *body of the* certificate, and the signature and official title of the officer shall follow it as indicated in the first form *and shall constitute a part of the certificate,* and the seal of the officer shall be attached when necessary under the provision of this chapter. *No certificate of acknowledg-*

ment shall be held to be defective on account of the failure to show the official title of the officer making the certificate if such title appears either in the body of such certificate or in connection therewith, or with the signature thereto."

Neither diligence of counsel nor our own search through the indexes has disclosed any case in which the Iowa court has passed upon the section as amended. So this case apparently must be one of first impression on the point. It will have to be determined in the light of the legal history of the original section, which we already have sufficiently sketched, of the remedy the legislature of Iowa sought by the amendment, and of the application of recognized legal principles to the language used by the legislature in the act.

It may fairly be assumed in the argument that the legislature felt that the interpretation of the existing law, though dictated by the wording thereof and compelled by legal logic, often wrought a real injustice; and that the legislature sought a remedy, by amending the section, that would relax the strict rule that had theretofore bound the courts in their interpretation. The purpose to require everything to be considered from the venue to the end of the part of the instrument executed by the officer, including the impression of his seal and the words therein, was undoubtedly accomplished. The question is whether the whole certificate can be interpreted as satisfying section 10094 of the 1927 Iowa Code which requires the certificate to show "the title of the court or person before whom the acknowledgment was made."

Black, Interpretation of Laws (2d ed.) 487, sec. 140, in discussing remedial statutes, says: "Remedial statutes are to be liberally construed with a view to effectuate the purposes of the legislature; and if there be any doubt or ambiguity, that construction should be adopted which will best advance the remedy provided and help to suppress the mischief against which it was aimed. It is 'an old and unshaken rule in the construction of statutes that the

intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression shall be deemed general,' " quoting from *Brown v. Pendergast,* 7 Allen (Mass.) 427.

On page 489, Black states: "It should be added that a law is equally entitled to be considered a remedial statute whether it remedies a defect of the common law or of the preexisting body of statute law."

At page 492, he further says: "Acts providing for the recording of conveyances, making such records constructive notice, and relieving subsequent purchasers and encumbrancers in good faith from the effect of unrecorded conveyances, are remedial and to be construed liberally."

It is very apparent that it was the intent of the legislature to enlarge the scope of what had formerly been very strictly held to be the "certificate" of the officer taking an acknowledgment and to include "everything in connection therewith, or with the signature thereto," as stated in the amending act. With this enlarged scope we get aid from decisions of the Iowa supreme court made prior to the amendment.

In *Stoddard v. Sloan,* 65 Ia. 680, the notary signed as "C. B. Steadman, Notary Public." There was nothing in the body of the certificate to show that he was a notary public for Woodbury county where the certificate purported to be made, but the signature was attested by an impressed "seal." The court took judicial notice and assumed that it was the proper seal for a notary public of Iowa, and said: "Can we go further, and take notice that he was a notary public for Woodbury county? It appears to us that we can. His appointment for a particular county was necessarily involved in the appointment itself. The same public record which shows his appointment must show for what county he was appointed." The same rule was followed in *Rowland v. Brown,* 75 Ia. 679; *Black v. Minneapolis & St. L. R. Co.,* 122 Ia. 32; *Milligan v. Zeller,* (1924) 197 Ia. 79.

We conclude that the district court was right in admitting the conditional sales contract to be received in evidence, and in deciding that the acknowledgment made it eligible for record. Its record made it constructive notice to the plaintiff.

Plaintiff contends that it should recover on the ground that the truck was put in the stock of the retailer, Reece, and exposed for resale to the public, that Long was a good faith purchaser from the dealer without actual notice, and that defendant's rights must give way to those of plaintiff. We fail to find in the stipulation any facts showing that the truck was put in stock and exposed generally for resale to the public. It is just as inferable from the evidence that the truck was purchased with the specific intention of reselling it to Long. The evidence shows neither point except that it was sold to Long who did not examine the record to ascertain the seller's title, was by Long mortgaged, and the mortgage was purchased by the plaintiff, who likewise failed to examine the title. The cases cited on this point of resale of chattels are not applicable to the facts here.

The judgment of the district court is

AFFIRMED.

FIDELIA CORLEY, APPELLANT, V. SARAH A. HUBBARD, APPELLEE.

FILED MAY 14, 1935. No. 29271.

1. **Master and Servant:** INJURY TO EMPLOYEE: ASSUMPTION OF RISKS. Where a housekeeper and her employer have equal knowledge of the dangerous propensity of the latter's dog to trip persons and the former thereafter voluntarily retains her position without any inducement by her employer and is injured by such a prank of the dog, she may be precluded as a matter of law, by assumption of risk, on undisputed evidence, from recovering damages for her injury.
2. ———: ———: ———. "'An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so

plainly observable that he must be presumed to know them and to appreciate the danger.' *Atchison, T. & S. F. R. Co. v. Wyer*, 8 Fed. (2d) 30." *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499.

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

Woods, Woods & Aitken, for appellant.

John J. Ledwith and *Hall, Cline & Williams, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $25,000 for personal injuries suffered by Fidelia Corley, plaintiff, as the result of a fall caused by a dog which Sarah A. Hubbard, defendant, owned and harbored in and about her home at 1909 F street, Lincoln, Nebraska. Plaintiff was defendant's housekeeper, nurse and companion. On the morning of October 3, 1933, when plaintiff was on a rear porch where there was no railing, the dog ran between her feet and tripped her. While unbalanced, she fell three feet from the open porch floor onto the ground or a concrete driveway and was severely and permanently injured. The plea of negligence and resulting damages contained allegations that the dog had a dangerous propensity to trip persons by running into and between their legs, that the propensity was fully known to defendant and that the dog indulged the propensity and thus caused the injury to plaintiff without any fault on her part. Negligence and resulting liability for damages, as alleged by plaintiff, were put in issue by formal pleadings. One of the defenses interposed was assumption of risk. After plaintiff introduced her evidence and rested, the trial court directed a verdict against her. From a dismissal of the action plaintiff appealed.

The question presented by the appeal is the sufficiency of the evidence to make a *prima facie* case in favor of plaintiff for the consideration of the jury. In this review,

issuable facts which the evidence in favor of plaintiff tends to prove will be regarded as established. The testimony of plaintiff is uncontradicted and binds both parties for the purposes of the appeal. It tends to prove the following facts:

As housekeeper, plaintiff was employed by defendant July 12, 1930, knowing the latter owned the dog. His care was the task of the owner, not of plaintiff. At first the Hubbard household consisted of plaintiff, defendant, a son of the latter, and the dog. Defendant was then 76 years of age and had owned the dog several years. He was a pug-nosed bull dog, weighing 15 pounds, and his name was "Rags." He was not vicious but friendly; was his owner's pet and her greatest interest in life. From January, 1933, until the date of the accident, October 3, 1933, the only persons occupying the Hubbard home were plaintiff and defendant. In the meantime, February 3, 1933, a guardian of defendant was appointed on account of mental incompetency. Plaintiff, under changed conditions, assumed duties not imposed by her original contract of employment and helped to bathe and dress defendant who arose from her bed late in the morning and required only two meals a day, which plaintiff prepared as formerly.

To prove that defendant had knowledge of the dog's dangerous propensity to run between the legs of persons and trip them, plaintiff testified to two occasions on which Rags tripped defendant herself and threw her to the ground. One instance was in the fall of 1932 and the other in September, 1933. Promptly after defendant was first tripped plaintiff said to her, "We will have to get rid of the dog" and was told, "The dog should stay in preference to everybody else." Practically the same colloquy followed the other incident. Plaintiff declined to testify to any other similar indulgence of the dog's propensity to trip persons, except the instance resulting in her own injury. The evidence is that defendant, when tripped, was frail and easily unbalanced. There is no proof that Rags ever by prank or bite showed a vicious disposition toward

any person. On the contrary, the testimony is that he was kind and affectionate to his owner whom he had tripped. She did not store up any wrath against her pet on account of his pranks in tripping her.

Counsel for defendant argue that knowledge of the two instances in which the dog in a playful spirit tripped his own mistress was not knowledge that he had a dangerous propensity to trip others. Opposing counsel take a different view and contend that a single instance of the violent tripping of defendant charged her with knowledge which required her to anticipate the same danger to others, whether the dog was vicious or playful. The courts of the country seem to be divided on the same question, as indicated by judicial decisions.

Assuming, without deciding, that defendant was chargeable with knowledge of her dog's dangerous propensity to trip persons, it becomes necessary to determine whether plaintiff, by her own testimony, proved that she assumed the risk of such danger as a matter of law. Plaintiff was in the continuous employment of defendant in the capacity of housekeeper, nurse or companion from July 12, 1930, until the date of the injury, October 3, 1933. Plaintiff and the dog were occupants of the Hubbard home during all that time. She had a part in selecting a chair in the dining-room as a place for the dog. Rags was in that chair when she passed him in going through the dining-room onto the porch from which she fell. As she passed him she said: "Rags, stay right there. It is too chilly for you, you will want right back in." She did not latch the door as she left the dining-room and stepped onto the porch and the dog came out and ran between her feet and tripped her. Though she said she did not take care of the dog, she admitted she sometimes gave him something to eat and did in fact order him what to do just before she was tripped. She then temporarily, at least, assumed charge of him. Defendant, under guardianship at the time, was in bed. Plaintiff knew Rags had once pulled defendant down with a chain; was familiar with the details of the two incidents

when the dog tripped his mistress; knew of no other pranks of a similar nature; was not afraid of the dog; appealed to her employer on the latter's own account to get rid of him, not on behalf of plaintiff who never made any protest on her own account; had been emphatically told the dog would remain in the Hubbard home. There is no proof that defendant promised to confine the dog or to get rid of him. All the evidence on that point is to the contrary. The only reasonable deduction from the facts outlined is that plaintiff had the same knowledge as defendant respecting the dog's disposition, propensities and evidential pranks prior to October 3, 1933. If defendant was chargeable with knowledge of the dog's dangerous propensities to trip persons, the same knowledge was likewise imputable to plaintiff, who voluntarily remained in the service of defendant without any inducement by the latter. The evidence will not admit of any other interpretation. Under the circumstances and facts to which plaintiff herself testified, her injury was a risk of her employment as a matter of law. The evidence would not sustain a judgment in her favor and the peremptory instruction was, therefore, free from error, without regard to the reason given by the district court for the decision below. The law applicable has recently been stated as follows:

"'An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger.' *Atchison, T. & S. F. R. Co. v. Wyer,* 8 Fed. (2d) 30." *Campbell v. Chicago, R. I. & P. R. Co.,* 120 Neb. 499. See, also, *Moriarty v. Miller,* 99 Neb. 614.

The cases cited by plaintiff in support of her argument in favor of the proposition that assumption of risk was a question for the jury do not necessarily control the decision in view of the established facts.

Plaintiff's distressing, permanent injury and her long suffering, both physical and mental, as evidenced by the testimony of physicians, make a pathetic appeal to hu-

man sympathy, but neither emotion nor sentiment can supply evidence or law for a *prima facie* case.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SOUTH OMAHA STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: JOHN C. BARRETT, INTERVENER, APPELLEE.

FILED MAY 14, 1935. No. 29279.

1. **Banks and Banking:** DEPOSIT OF DRAFT FOR COLLECTION: AGENCY. Bank receiving for deposit to account of payee a draft drawn on a bank in another city, which has been duly indorsed in blank by payee, accepts it for collection and becomes the agent of payee until the draft is finally paid and the proceeds reach the bank of deposit.
2. ———: ———: DEBTOR AND CREDITOR. Relation of debtor and creditor is created where payee of draft indorses it in blank and delivers it to another bank for credit to his account, after such draft has been paid and the proceeds thereof have reached the bank of deposit. That relation is not changed by the fact that the draft is owned by payee as guardian, which fact is disclosed to bank of deposit.
3. ———: INSOLVENCY: TRUST FUNDS. "Before money in an insolvent bank may be recovered on the trust fund theory, claimant must show facts to prove that it was not simply a general deposit." *State v. Citizens Bank*, 124 Neb. 717.

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

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

John C. Barrett, pro se.

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

GOOD, J.

In a proceeding for winding up the business affairs of the South Omaha State Bank, insolvent, John C. Barrett, as guardian of an incompetent, intervened and obtained an

order allowing a claim with the status of, and preference as, a trust fund. From such order the receiver has appealed.

August 4, 1931, intervener received for his ward a draft for $2,942.60, drawn on a New York bank and payable to himself as guardian of the incompetent. He immediately indorsed the draft as such guardian and delivered it to his wife, with instructions to take it to the bank (in which he had a personal checking account), inform its officers that the draft did not belong to him individually but represented funds of his ward; that it would be a separate account; that the county judge had ordered the disbursement of a part of the fund. Mrs. Barrett took the draft to the bank, gave this information to a receiving teller, and informed him that it was necessary for Mr. Barrett to have some of the funds immediately for payment of his ward's obligations; that he was leaving the next morning to take his ward to Ohio and would require traveler's checks for expense of the trip. The teller informed Mrs. Barrett that the traveler's checks could not be issued to Mr. Barrett until he personally came to the bank and signed them, and advised that it would be better to place the draft to the credit of Mr. Barrett in his personal account, on which he could draw for the claims ordered by the county judge. Thereupon the teller took the draft, filled out a deposit slip and placed the draft to the credit of Mr. Barrett in his personal account. The next day Mr. Barrett appeared at the bank and obtained traveler's checks for the expense of the trip with his ward to Ohio. The checks drawn against this account for the ward's debts and traveler's check were seven in number and aggregated $640.43. At least one of these checks was not drawn until August 6, 1931. All of these checks were signed by Mr. Barrett in his personal capacity, from which it appears that Mr. Barrett was fully advised that the draft had been deposited to his personal account in the bank. The bank failed and was closed on August 14, 1931. Mr. Barrett did not return from Ohio until after the bank had closed.

Mr. Barrett, as guardian, filed with the receiver a claim for the difference between the amount of the draft and the checks that had been drawn for the ward's account, and asked that it be given the status of, and preference as, a trust fund. It was classified by the receiver as a general deposit. Thereupon this proceeding was instituted.

Under our collection statute (Comp. St. 1929, sec. 62-1802), the bank was acting as agent for the collection of the draft until it was actually paid and the proceeds received by the bank. The precise date when the proceeds of the draft reached the South Omaha State Bank is not disclosed. An officer of the bank testified that the ordinary time to receive returns from a draft on New York was four or five days. In the instant case nine days had elapsed before the failure of the bank. Both parties to this action treated the matter as though the draft had been paid to the bank in the usual and ordinary course of business. For the purpose of this appeal, we must assume that the proceeds of the draft had been received by the bank prior to its failure. When the proceeds of the draft reached the South Omaha State Bank it ceased to be acting as a collection agent and held the money as a general deposit, and the relation of debtor and creditor existed between the bank and Barrett, unless there were special circumstances which would make it a special deposit or one for a specific purpose. *Montsdoca v. Highlands Bank & Trust Co.*, 85 Fla. 158; *Farmers Exchange Bank v. Farm & Home Savings & Loan Ass'n*, 332 Mo. 1041.

Mrs. Barrett testified: "I presented this draft to him (Felix Melonis, a receiving teller) and he read it over three or four times, about John C. Barrett, Guardian, and Minerva May McConnell, Incompetent; and I said, 'Remember, Felix, this is not our own money, it shall be in a separate account, then when we return from our trip John (Mr. Barrett) is to take it up with Judge Crawford and see where to put the money.' "

We think from this testimony it is clear that it was Barrett's intention to have the draft deposited in the bank

to a separate account from his personal account. There is nothing in the evidence from which we can infer that the draft was left with the bank solely for the purpose of collection; nor that it was left as a special deposit or a deposit for a specific purpose.

Intervener seems to contend that because the money was held by him in trust, as guardian, it was likewise held by the bank, as trustee, but this does not follow. An administrator, executor or guardian occupies a fiduciary relationship, but such persons are permitted to deposit trust funds in a bank, and, when they are so deposited, the guardian or administrator is liable as a trustee. It does not follow, however, that the bank is acting as trustee for the guardian. The guardian or administrator is liable for funds lost when deposited in a bank only where he has been guilty of negligence in selecting the depository bank. *Bank of Crab Orchard v. Myers,* 120 Neb. 84; *Officer v. Officer,* 120 Ia. 389. In the latter case it was held:

"Where an executor deposits trust funds with a bank, which are subject to check, there being no agreement to return the identical deposit or to apply the same to any specific purpose, the deposit is a general one.

"Where an executor makes a general deposit of trust funds in a solvent bank, neither he nor the *cestui que trust,* in case of a failure of the bank, has any preference over other creditors, though the bank knew the character of the deposit."

In *State v. South Omaha State Bank,* 126 Neb. 46, it was held that the burden of proof, by fair and satisfactory evidence, that money in the bank is a trust fund rests on the person asserting the trust. In *State v. Citizens Bank,* 124 Neb. 717, it was held: "Before money in an insolvent bank may be recovered on the trust fund theory, claimant must show facts to prove that it was not simply a general deposit." In *Price v. Herreid,* 210 Wis. 422, it was held: "A deposit made in a bank is presumptively a general deposit."

We find nothing in the record that would warrant the

court in holding that the deposit of the draft was other than a general deposit. There is nothing to show that it was a special deposit, or that it was made for a specific purpose.

Intervener cites and relies upon the following cases: *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786; *State v. Bank of Commerce,* 61 Neb. 181; *Anheuser-Busch Brewing Ass'n v. Morris,* 36 Neb. 31; *State v. State Bank of Touhy,* 122 Neb. 582. We think that a careful analysis of the opinions in these cases discloses that they are not in point.

In *Capital Nat. Bank v. Coldwater Nat. Bank, supra,* the bank received a note for collection which the makers paid. The bank failed to remit to the owners. On the bank's failure, it was held, the bank, being merely a collection agent, held the fund in trust. In *State v. Bank of Commerce, supra,* a draft was delivered to the bank for collection only. Without the knowledge of the owner, the bank opened up an account and placed the draft to the credit of the owner. It was held in that case that, on failure of the bank, the owner was entitled to claim it as a trust. *Anheuser-Busch Brewing Ass'n v. Morris, supra,* presents a similar situation. In *State v. State Bank of Touhy, supra,* the bank received a check, the proceeds to be remitted to a particular person to pay a specified obligation. The bank failed to perform its duty. It was held that the check was received for a specific purpose and that the bank had no authority to treat it as a deposit. A like ruling was made in *State v. Farmers State Bank,* 121 Neb. 532.

Intervener also cites and relies on *State v. American State Bank,* 126 Neb. 34. In that case the cashier of the bank was appointed by the district court as a trustee, and the court ordered the trustee to deposit money in the bank, of which he was cashier, for a specific purpose, to be paid out in instalments at certain specified times. It was therein held that the deposit was made for a specific purpose; that the bank accepted it, and, on its failure, the fund could be claimed as a trust. We are of the opinion that the court went to the extreme limit in that case in sustain-

ing the claim of the deposit as a trust fund. While the cashier was, no doubt, liable as a trustee, we are now inclined to the view that it is very doubtful whether the court did not exceed the limits of propriety in holding that the bank was also a trustee. But we find nothing in the record in the instant case that would warrant the court in holding that the South Omaha State Bank held the fund, representing the proceeds of the draft, as a trust after it had performed the duty of acting as a collection agent. This transaction clearly indicates that it was the intention of the parties to create a deposit, and the relation of debtor and creditor existed as soon as the proceeds of the draft had been collected and received by the South Omaha State Bank.

We think the trial court erred in holding that intervener was entitled to a preference as a trustee. His claim was entitled to the status of a general deposit and the preference that the statute accords to unsecured deposits.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

STATE, EX REL. HAMILTON LACKEY, RELATOR, APPELLANT, v. GERING & FT. LARAMIE IRRIGATION DISTRICT ET AL., RESPONDENTS, APPELLEES.

FILED MAY 14, 1935. No. 29498.

1. Waters: IRRIGATION: MANDAMUS. A landowner in an irrigation district may not by mandamus compel the district to supply his land with water when there exists no valid appropriation of water for such land for irrigation purposes.

2. Mandamus: IRRIGATION. Mandamus will not lie to compel an irrigation district to supply water to land in the district, where its only supply of water for irrigation purposes is from irrigation works, owned by the United States government and operated by the district under contract with the government, and where the entire appropriation of water for the district has been previously allocated to other lands in the district entitled thereto.

3. ———: FINDINGS: REVIEW. Finding of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless it is clearly wrong.

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

Raymond & Raymond, for appellant.

Mothersead & York, contra.

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

GOOD, J.

This is a mandamus proceeding in which relator seeks to compel respondents to construct laterals, headgates and other structures, and to deliver to relator water for the irrigation of 58.1 acres of alleged irrigable land. A trial of the issues raised by the alternative writ and return thereto resulted in judgment for respondents. Relator has appealed.

Respondents are Gering & Ft. Laramie Irrigation District and the members of its board of directors. For convenience, the respondent corporation will be referred to as the district.

In the alternative writ it is substantially recited that relator is the owner of 80 acres of land within and a part of the district, of which 70 acres are susceptible of irrigation; that the district for many years has supplied, and is now supplying, water for the irrigation of 11.9 acres of said 80-acre tract; that it is the duty of the respondents to provide laterals and necessary structures for the delivery of water to 58.1 additional acres of relator's irrigable land; that respondents had been requested and had refused to perform this duty.

In their return respondents allege that the district has no appropriation of water for any lands; that it owns no irrigation or diversion works; that the United States government owns the irrigation system by means of which irrigable lands within the district are supplied with water;

that the district operates such government system under contract with the United States; that the latter has designated what portion of the lands within the district is irrigable and has designated that only 11.9 acres of relator's tract are irrigable; that respondents are without authority to make any change in the system of irrigation works or in the extent of the lands to be irrigated; that the irrigation works, owned by the government and operated by the district, are not of sufficient capacity to carry water to other than the lands designated by the United States as irrigable; that the water allocated to relator's land is for only 11.9 acres.

The United States government, in an amended application to the state board of irrigation for the appropriation of water, stated that there would be 120,000 acres to be served under the canal; 30,000 acres lying under other canals. The application also stated that 20 per cent. of lands were thought to be nonirrigable. The application was allowed in January, 1905, with priority dating from September 19, 1904. The record does not disclose whether appropriate steps were taken to complete the appropriation. In surveys made by the United States reclamation service at a later date, it was, in fact, determined that only 107,000 acres, both in Wyoming and Nebraska, of which approximately one-half was in Nebraska, were subject to irrigation, and for this acreage only were the irrigation works constructed by the federal government. In this survey by the reclamation service it was determined that 11.9 acres of the land now owned by relator were irrigable, and such area was so designated on the plat of the government. Until a few days before commencement of this action the legal title to the land now owned by relator was in the United States government.

In 1920 the district entered into a contract with the United States government whereby the district became the fiscal agent of the government for the collection of the revenues of the irrigation project. Pursuant to subsequent legislation by congress, another contract was entered into whereby the district took over the care, oper-

ation and maintenance of all or any part of the project works, meaning thereby the irrigation works, but such taking over was subject to such rules and regulations as the secretary of the interior might prescribe. This contract provides that no title to any of the works shall pass to the district until the United States government has been fully reimbursed for the cost of construction, and further provides that no substantial change in any of the transferred works shall be made by the district without first obtaining written consent of the secretary of the interior. The United States has not been fully reimbursed for cost of construction of the works, and such works are being operated by the district. For the purpose of determining what part of the land within the district was subject to taxation for water and the amount which should be assessed against each tract of land, the United States government furnished the district with farm unit plats, showing the amount of irrigable land in each tract. One of these plats shows the tract now owned by relator and shows that 11.9 acres of the tract are irrigable. Taxes for construction and operation were levied against relator's tract of land for 11.9 acres only. This fact was known to relator when he traded for the homestead entry. He then knew that water was furnished for the irrigation of only 11.9 acres.

An entryman for a reclamation homestead is required to reclaim at least one-half of the irrigable area of the land entered. 43 U. S. C. A. secs. 439, 440. To obtain patent to his land, relator was required to show that he had reclaimed one-half of the irrigable area of the tract. He made this proof and stated under oath that his entry embraced 11.9 acres of irrigable land, and that all of this irrigable area had been cleared, leveled, sufficient lateral constructed and put in proper condition, the lands watered, cultivated, and that nine average crops had been raised thereon under irrigation. Within two weeks after receiving his patent, relator commenced this action.

Relator contends that the United States government was granted an appropriation of waters by the state of Ne-

braska for all the land within the district. This contention cannot be sustained. In order to constitute an appropriation of public waters, it is necessary that there should be an application of water to some useful and beneficial purpose. Filing an application for an appropriation may be a necessary step to obtain the appropriation, but the appropriation is not completed until the water is actually applied to some useful purpose. 67 C. J. 990.

In *Commonwealth Power Co. v. State Board of Irrigation*, 94 Neb. 613, it was said (p. 616): "Much of appellant's argument is devoted to establishing a proposition which needs no argument, namely, that, in cases arising under that portion of the irrigation act of 1895 which deals with water rights to be acquired thereafter, an appropriation is not perfect and complete until the works are completed and the water is applied to a beneficial use."

In *Farmers Canal Co. v. Frank*, 72 Neb. 136, it was said (p. 154): "All applicants for a new appropriation made after the passage of the act under the regulations laid down therein must comply with this rule, and complete the appropriation by applying the water to the land before their appropriation is complete, their right is vested, and they are entitled to a certificate." In the instant case, the United States government constructed the irrigation works; water was applied to certain lands which were deemed irrigable, and only 11.9 acres of the land owned by relator were supplied with water. It follows that there has been no appropriation by the government for any part of the lands owned by relator other than 11.9 acres.

In *Kersenbrock v. Boyes*, 95 Neb. 407, this rule is announced: That an applicant for an appropriation of water has no more than ten years in which to comply with the statutory condition for acquiring such an appropriation. In the instant case more than ten years has elapsed since the United States government made its application. It has acquired an appropriation for only 11.9 acres of land in the tract now owned by relator. A landowner in an irrigation district may not by mandamus compel the district to supply his land with water when there exists

no valid appropriation of water for such land for irrigation purposes.

Relator appears to contend that all the land within the boundaries of the district is subject to irrigation, and that, therefore, he is entitled to have his entire tract irrigated. His contention that only 70 acres of his 80-acre tract are irrigable refutes the proposition. There are approximately 71,000 acres of land within the boundaries of the district. It is conceded that a considerable percentage thereof is not irrigable as a practicable proposition. In fact, only about 55,000 acres within the district have been irrigated. It may be said that any of the land is irrigable by pumping the water to a higher level, but such is not the usual meaning of the term "irrigable."

The petition for the formation of the district, embracing about 71,000 acres, after stating the boundaries thereof, contains this recital: "It being the intention to include within the said district all lands lying within the state of Nebraska above the Mitchell and Gering canals and below the Fort Laramie canal of the reclamation service as the same may be finally located and constructed." In the notice of election, given to the people voting in the district, it is stated: "Said descriptions and the boundary lines of said district also include those lands which are not susceptible of irrigation, either because of their high situation or from their low, wet and otherwise nonirrigable character and are not affected by this organization." For practical purposes, only such lands as were irrigable were considered a part of the district, although other lands not irrigable may have been included within the boundaries of the district. As above stated, the government constructed its irrigation works with a view and of a capacity to irrigate only approximately 55,000 acres, being the total acreage within the district deemed by the government to be irrigable. No appropriation of water has been finally made by the government for any greater area.

The evidence discloses that, in the operation of the works, the district has at its command a supply of water for only 55,000 acres, which it is now irrigating, and has

not a sufficient appropriation of water to apply to other lands, within the boundaries of the district, than those to which water has been applied. Since the district does not have at its command for distribution a water supply greater than it obtained by taking over and operating the government works, it cannot be compelled to furnish water to any greater area of land.

Mandamus will not lie to compel an irrigation district to supply water to land in the district, where its only supply of water for irrigation purposes is from irrigation works, owned by the United States government and operated by the district under contract with the government, and where the entire appropriation of water for the district has been previously allocated to other lands in the district entitled thereto.

Evidence on behalf of relator tends to prove that, in addition to 11.9 acres irrigated, there are about 35 additional acres that might be irrigated. The evidence upon this question is in conflict. Mandamus is classed as a law action. There was a general finding by the court for respondents. It is a rule that a finding of the trial court in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong.

Under the pleadings and facts in this case, relator was not entitled to a peremptory writ of mandamus. The judgment of the district court denying the writ is

AFFIRMED.

MARY V. ONSTOTT, APPELLANT, V. AIRDALE RANCH AND CATTLE COMPANY ET AL., APPELLEES.

FILED MAY 14, 1935. No. 29381.

1. **Easements.** An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, exclusive and adverse.
2. ———. To establish an easement by prescription, the evidence must establish the extent of the adverse use for a period of ten years.

3. ———. An easement acquired by prescription is limited in extent to adverse use during the ten-year period.
4. ———. Temporary washouts of a dam which backs water upstream on land of another do not necessarily affect an easement by adverse user.
5. ———: INJUNCTION. Where a prescriptive easement exists, the evidence must establish an extension of the use made within the period to justify the issuance of an injunction.

APPEAL from the district court for Banner county: J. LEONARD TEWELL, JUDGE. *Reversed.*

Raymond & Raymond, for appellant.

Neighbors & Coulter, contra.

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

DAY, J.

This is a suit in equity begun March 13, 1933, the purpose of which is to enjoin the defendant from backing up water and overflowing plaintiff's land. The plaintiff's petition alleges that either in 1929 or 1930 the defendant constructed a dam across Pumpkin creek on its land adjoining plaintiff's land, backed up and impounded the waters of said creek, flooding plaintiff's land; that, as a result of backing up the water, hay and grass growing on the land covered by the water have been destroyed, and plaintiff was prevented from using her land during the years 1930, 1931, and 1932; that the defendant, by impounding the waters, has trespassed upon plaintiff's land, forcibly and in violation of her rights, over her protest, and threatens to continue to so trespass unless restrained.

The defendant's answer admits the construction of a dam on its own land which backs up water and floods plaintiff's land. It alleges affirmatively that the dam was constructed in 1911 and has been in continuous operation since, except when temporarily washed out. It charges plaintiff with knowledge of existence of the dam and overflow on land at the time of her purchase. It alleges a suit between predecessors in title of both plaintiff and defend-

ant and a subsequent compromise settlement for overflowing plaintiff's land. It is further alleged that the dam reservoir and irrigation works are now operated as they have been for more than twenty years, openly, notoriously, and adversely, except at such times as the dam was temporarily washed out.

The trial court found that, since the construction of the dam in 1911, the defendant had obtained a prescriptive right by adverse use to flood a part of the land of plaintiff; that the defendant does not have a right to increase the area of land flooded; that in 1929 defendant built a new headgate and outlet ditch, the bottom of which was 2.4 feet higher in elevation than that of the old gate, and in its use backed up the water to a greater extent than its right by prescription permitted. The defendant was enjoined from backing up water to any greater extent than will permit and secure a reasonable flow of water through the old headgate. The only question actually presented by this appeal is the prescriptive right of the defendant to flood the plaintiff's land.

The defendant, and by this term we include also its predecessor in title, constructed in 1911 a dam on its own land about thirty rods downstream from plaintiff's line. The defendant claims its adverse possession of plaintiff's land for backing up and storing water began at that time. It appears that there was an argument between defendant and plaintiff, which term also includes her predecessor in title, about backing up and flooding plaintiff's land, with the filing of a suit. The flooding of the land between 1911 and 1916 is evidenced only by the allegations in a petition filed in the district court for Banner county by plaintiff's grantor in 1914 and the answer filed in 1916. This petition alleges the flooding of the land in suit by backing up the water one quarter of a mile which covers four or five acres of this land and rendered certain other land useless because inaccessible. The defendant's answer alleges that by agreement, in consideration of $75, he had a right to operate said dam. There is some testimony that the damages were settled for that amount. However vague, un-

certain, and unsatisfactory the testimony may be in respect to this matter, it is fairly evident that the defendant continued to operate the dam and to flood plaintiff's land continuously until an unprecedented flood in 1916 or 1917 washed out the dam. There is testimony that the plaintiff's land was flooded less between 1913 to 1917 than it is now. The dam was repaired in 1917 and again in 1919, but it was again washed out. In 1919 it backed the water up about a quarter of a mile and covered about five acres of plaintiff's land for four months. It was not replaced until 1927, which replacement lasted only until the water reached the new fill of the dam. In 1929, however, the dam was rebuilt as it now exists with a concrete facing, and seems to be permanent, and during the years 1930, 1931, and 1932, just prior to the commencement of this suit, flooded the plaintiff's land to the extent of 9.3 acres, or, deducting the bed of the stream, a net of 3.64 acres. This statement of fact is based upon testimony from witnesses who are uncertain about many things. For example, it is impossible to ascertain from the record the increased acreage now flooded as compared to the period between 1913 and 1917. This much, however, is certain, that the defendant continually asserted the right to flood plaintiff's land to some extent whenever it was able to keep the dam in operation. An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, and adverse. *Omaha & R. V. R. Co. v. Rickards,* 38 Neb. 847.

To establish an easement by prescription, the evidence must establish the extent of the adverse use for a period of ten years. It would seem that the defendant could have presented more satisfactory evidence as to the operation of this dam and reservoir and the extent of the flooding during the years. It was operating the irrigation works. In many ways, this is an unsatisfactory record. The briefs in this court do not join issues. We appreciate the difficulty of the trial court in reaching a conclusion. The trial court rightly found from the evidence that the defendant had acquired a prescriptive right to flood the

lands of plaintiff, and that, by the construction of the new dam in 1929 and raising the elevation of the headgate, more water was impounded than before; that the defendant did not have a right to flood plaintiff's land to a greater extent than its right formerly acquired. One who has acquired an easement as an adverse user cannot enlarge the use beyond that of the ten-year period. *Dunn v. Thomas,* 69 Neb. 683.

There was no way from the record to determine the extent to which the land flooded was increased. We have searched the testimony of the engineers in a vain effort to determine the matter. The only testimony that has the slightest bearing is that of Drake, who testified that when he made a survey he found the old headgate to be 2.4 feet lower than the one he planned. He never examined the work after construction to see that it conformed to his plans. The amount of water impounded and the area flooded depend upon the height the water is raised by the dam. The testimony of the engineers does not state the difference in the water level in the dam before and after the new construction. The decree of the trial court enjoins the defendant from backing up on plaintiff's land water to any greater extent than will permit a reasonable flow of water through the old headgate and the old ditch as it existed prior to 1929. Temporary washouts of a dam which backs water upstream on land of another do not necessarily affect an easement by adverse user. *Moll v. Hagerbaumer,* 98 Neb. 555.

Where a prescriptive easement exists, the evidence must establish an extension of the use made within the period to justify the issuance of an injunction. It would require further litigation to determine the level to which the water could be dammed which would depend upon the height formerly maintained. This question can be and should be settled in this case. It cannot be done now in this court for the reasons stated, and the case should be remanded for a new trial.

Other questions argued are mentioned here that they may not seem to be overlooked. An individual does not

have the right of eminent domain for the use and benefit of himself or his estate under sections 46-601, 46-602, and 46-603, Comp. St. 1929, for the irrigation of his own land. Section 21, art. I of the Constitution, limits this right. *Welton v. Dickson,* 38 Neb. 767; *Jenal v. Green Island Draining Co.,* 12 Neb. 163. New Mexico and Utah have held that the works for the irrigation of an individual's land was a public use. But this court declined to adopt such a theory (*Vetter v. Broadhurst,* 100 Neb. 356), so that the plaintiff is not limited in this case to an action for damages.

The plaintiff is not compelled to submit to a flooding of her lands here, unless the defendant has acquired a right by prescription. That it would be convenient for it and of little damage or inconvenience to plaintiff is not a reason to deny the injunction, if otherwise proper.

For the reasons stated in the opinion, the judgment is reversed and the cause remanded for new trial.

REVERSED.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT, V. RUBY M. DIEFENBAUGH ET AL., APPELLEES.

FILED MAY 14, 1935. No. 29282.

Mortgages. Defect of parties defendant is not a ground for refusing confirmation of a judicial sale.

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

R. H. Mathew, Clinton B. Nasby, Stanley Cheff and *Quintard Joyner,* for appellant.

Lamont L. Stephens, contra.

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

PAINE, J.

This was a foreclosure of a first mortgage on 160 acres

of land in Sherman county, Nebraska. Objections were made to the confirmation by Walter Bode for the reason that the property did not sell for its fair value, and that at a subsequent sale a greater amount would be realized, and for the reason that the said Walter Bode, who has a homestead interest in said property, is a married man and the head of a family, and that his wife is a necessary party to the foreclosure action, and has never been served with summons. Thereupon, the court sustained the objections, set aside the sale, and ordered a new sale, to all of which the plaintiff excepted, and filed an appeal bond in the sum of $100.

The plaintiff sets up as errors for reversal the sustaining of the objections to the confirmation, and setting aside sale, and ordering new sale, as contrary to law and contrary to the evidence.

The record discloses that Ira Moler and wife borrowed $5,000 from plaintiff and gave plaintiff a first mortgage upon the northwest quarter of section 22, township 13, range 16, in Sherman county. In October, 1927, said Moler died, and the heirs executed agreement and coupons for an extension of the mortgage. Foreclosure was brought because payments due under the extension coupons were in default. A decree of foreclosure was rendered November 28, 1932, in the amount of $5,435.92. In the foreclosure petition they had made Walter Bode a defendant, as he had received a deed from the record owners; he had filed a demurrer, which was overruled, and then filed an answer, but had been defaulted at the time the decree was entered. A nine months' stay was taken, and the mortgaged premises were sold in January, 1934, to plaintiff on its bid of the entire amount due. In March Walter Bode appeared and filed objections to the confirmation of the sale, setting up, among other things, that he was the head of a family, and that his wife had never been made a party defendant, and that this fact may have deterred bidders from bidding on the property at the sale.

The record discloses that Bode acquired title to the

premises in 1931, and within a few weeks thereafter he moved to this farm and lived there during 1931 and 1932, and in 1933 leased the farm to his brother-in-law; Bode and his wife living with his father-in-law in 1933 and 1934. In cross-examination Bode admitted that he did not consider the premises worth the amount of the encumbrance against them, and unless there was a scale-down in the amount of the debt he would not attempt to make a "go" of the farm again.

Plaintiff insists that it was not necessary for the trial court to decide whether the premises were the homestead of Bode, or whether his wife was a necessary party, and insists that a defect of parties could only be brought to the attention of the court by demurrer or by answer, and that when Bode's default was taken after answer and he failed to take an appeal from that ruling and the decree, it has now become final, and that it is too late to bring it up on a question of the confirmation of the sale.

Plaintiff insists that section 20-1531, Comp. St. 1929, provides that if the property was sold for fair value under the circumstances, or that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale and direct that the officer make a deed to the purchaser.

The plaintiff insists that the evidence of Bode himself is that the premises are not worth the amount plaintiff has bid, nor is there any evidence to show that a subsequent sale would realize a greater amount, and insists that, as there are no statutory grounds for setting the sale aside, the court should have confirmed the sale upon the demand of plaintiff, who was the bidder and purchaser.

Plaintiff insists that the court does not guarantee that the purchaser shall get a good title at a foreclosure sale. In *Schribar v. Platt,* 19 Neb. 625, it was said in the text that the question of the title is not settled in the proceedings for the confirmation, and the only thing adjudicated by the order of confirmation is the record in reference to the proceedings of the sheriff in making the sale. This

would certainly imply that matters relating to the title cannot be taken up on confirmation of the sale, but must be taken up before the decree is rendered. To the same effect is *Wollmer v. Wood,* 119 Neb. 248, in which it was held that the homestead right is not a proper subject for consideration upon proceedings for the confirmation of the sale. In *Kummer v. Kummer,* 112 Neb. 220, it was held: "A defect of title which will warrant the release of a purchaser at a judicial sale must be of a substantial character; and where it is one which may be and is removed within a reasonable time, a court of equity may require the purchaser to comply with his bid if the ends of justice will thereby be accomplished."

In *Kaley v. Eselin,* 108 Neb. 544, it is said that a homestead right of exemption of real property is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution. The motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is the homestead of the judgment debtor, citing *Best v. Zutavern,* 53 Neb. 619. The homestead claimant can bring an action in equity to cancel the sheriff's deed, but the court said: "A motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is the homestead of the judgment debtor; and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed." *Best v. Grist,* 1 Neb. (Unof.) 812.

These cases are cited with approval in 2 Freeman, Executions (3d ed.) sec. 311, wherein the author said: "We think the better opinion is, that the right of exemption, where claimed, should be left for determination in some subsequent action to recover the property sold, and * * * hence, that the confirmation of the sale of real property does not estop its owner from contending, in a subsequent action, that it constituted a homestead."

Quigley v. McEvony, 41 Neb. 73, was a suit in equity to enjoin the sale of the plaintiff's homestead on attachment. In discussing this case in 3 Neb. Law Bulletin, 429, it is said: "If the sheriff has had no notice of a homestead

claim, or having such notice disregards it, and proceeds with the sale, it is now well settled that a motion to confirm the sale cannot be resisted or a motion to set aside the sale cannot be supported on the ground that the land sold is the homestead of the judgment debtor. * * * These motions raise questions of very limited scope, such as the regularity of the proceedings of the sheriff and those acting under and with him."

"In a suit to foreclose a deed of trust, if defendant's wife was a proper party because of her dower interest, defendant should have raised the question by answer or demurrer, and, failing to do so, waived the defect, if any, from her nonjoinder, and could not complain that the selling price of the land was affected by reason of her nonjoinder." *Sidwell v. Kaster,* 232 S. W. 1005 (289 Mo. 174).

"It is urged that Bert Kaster, the wife of the defendant, should have been a party defendant. If there were defects of parties plaintiff or defendants, such should have been raised either by demurrer or answer; otherwise, the question is waived, and cannot be urged in this court. The question was nowhere raised below. It is an afterthought in this court." *Sanders v. Kaster,* 222 S. W. (Mo.) 133. See, also, *Wollmer v. Wood,* 119 Neb. 248.

In *Norton v. Nebraska Loan & Trust Co.,* 35 Neb. 466, 18 L. R. A. 88, 37 Am. St. Rep. 441, purchaser was compelled to take a defective title on the well-settled rule that *caveat emptor* applies to all judicial sales. In the case at bar the purchaser insists on being allowed to take a defective title. Why not give him what he wants? Many cases will be found cited in the long annotation in *Quinn Plumbing Co. v. New Miami Shores Corporation,* 100 Fla. 413, 73 A. L. R. 600.

If it is admitted that the wife of Walter Bode should be made a party, even then the action of the trial court in ordering a new sale will not in any way cure the defect.

We frankly admit that if we were in the position of the plaintiff, which is the purchaser, we would not have pursued the course it did, but under the law we feel that it is

entitled to the confirmation which it insists upon, and the order of the trial court, directing a new sale, is hereby reversed, and the trial court is directed to confirm the sale.

REVERSED.

ESTHER J. ERWIN, SPECIAL ADMINISTRATRIX, APPELLEE, V. WATSON BROTHERS TRANSFER COMPANY, APPELLANT.

FILED MAY 14, 1935. No. 29235.

1. **New Trial:** NEWLY DISCOVERED EVIDENCE. Whether a new trial should be granted upon the ground of newly discovered evidence depends upon the facts and circumstances in each particular case.
2. ———: ———. "To make a sufficient showing on such a ground, the proof should show that neither litigant nor his counsel could have discovered the evidence by exercise of due diligence; that the new facts are not only competent, relevant, material and contradictory, but that they render clear and positive that which was before equivocal and uncertain, and are of such a trustworthy character as will probably bring about a different result in case a new trial is granted." *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766.
3. ———. On the facts and circumstances shown by the evidence in this case, *held*, that reasonable diligence was exercised in the circumstances disclosed, and that the newly discovered evidence is of such a controlling character as to warrant a new trial.

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

Crossman, Munger & Barton, Story & Thomas, and *Crawford & Nye,* for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

Heard before GOSS, C. J., GOOD, PAINE, DAY and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

HASTINGS, District Judge.

This case arises out of a collision occurring near Hiawatha, Kansas, between a passenger bus, owned and operated by the Interstate Transit Lines, and a truck and trailer, owned by the appellant, Watson Brothers Transfer

Company. William T. Erwin, the driver and operator of the passenger bus at the time of the collision, died on December 22, 1931, as a result of injuries received therein. At the time of his death he was a resident of Omaha, Nebraska.

On January 11, 1932, Esther J. Erwin, claiming to be his widow, applied for and obtained her appointment (without notice) as special administratrix of his estate. Deceased and Esther J. Erwin had no children. Deceased left surviving him, his mother. On January 16, 1932, Esther J. Erwin, as special administratrix, brought this action to recover damages for the wrongful death of William T. Erwin, from the Watson Brothers Transfer Company, defendant and appellant herein. The employer, Interstate Transit Lines, was joined as defendant, pursuant to section 48-118, Comp. St. 1929.

The case was tried twice; on the first trial the jury disagreed, and the second trial resulted in a verdict in favor of the appellee. Judgment was entered on the verdict. Appellant filed a motion for a new trial, one of the grounds being newly discovered evidence. The motion was overruled. Thereafter, during the same term of court, by stipulation of the parties in open court, the order overruling the motion for a new trial was set aside and vacated. Afterwards, the cause was heard upon appellant's motion to vacate the judgment and grant a new trial on the ground of newly discovered evidence. A hearing was had, during which a large amount of testimony was taken in the way of affidavits and orally in support of appellant's motion for a new trial, and on the part of the appellee in opposition thereto. The trial court overruled the motion for a new trial and reinstated the order vacating the previous ruling denying a new trial and the vacation of the judgment. The sole question presented by this appeal is, did the court err in overruling appellant's motion and application for a new trial on the ground of newly discovered evidence?

In the seventh subdivision of section 20-1142, Comp. St. 1929, it is provided as a ground for a new trial: "Newly

discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

Construing this part of that section, we have held: "To make a sufficient showing on such a ground, the proof should show that neither litigant nor his counsel could have discovered the evidence by exercise of due diligence; that the new facts are not only competent, relevant, material and contradictory, but that they render clear and positive that which was before equivocal and uncertain, and are of such a trustworthy character as will probably bring about a different result in case a new trial is granted." *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766.

Whether a new trial should be granted upon the ground of newly discovered evidence depends upon the facts and circumstances in each particular case.

One of the issues raised by the pleadings in this case was whether Esther J. Erwin, the special administratrix, was lawfully married to the deceased, William T. Erwin, at the time of his death. At both of the trials, to prove the marriage of appellee to the deceased, Esther J. Erwin testified she was married to William T. Erwin in Kansas City, Missouri, on October 20, 1927, and that during their married life they had lived mostly in Omaha; and on being asked if they had lived in any other places, testified that they had lived in Kansas City and through the east. No other evidence was introduced by plaintiff in relation to her marriage to deceased in either trial. In neither trial did appellant cross-examine her upon this subject. In support of the motion for a new trial, appellant introduced in evidence the affidavit and oral testimony of one Zoe Herney, a friend and acquaintance of appellee. Her oral testimony, which is substantially the same as that contained in her affidavit, related to a conversation that the witness had with appellee shortly before the second trial. In regard to the conversation she testified as follows: "Q. That conversation was what? A. Shortly before the trial she was nervous and she said she was very

nervous, and I said, 'What are you nervous about?' And she said, 'Over that trial', and I said, 'Well, what are you going to say when they ask you where you were married,' and she said she was going to say that she was married in 1927 in Kansas City, Missouri, and I said, 'Where,' and she said, 'Kansas City, Missouri,' and I said, 'Suppose they ask you for proof?' You want me to keep on telling it? Q. Yes. A. So I said, 'Suppose they ask you for your proof?' And she said that she would say that she lost it or that it was destroyed by a fire. Q. What? A. I said, 'Suppose they keep asking you?' Q. I mean what was destroyed? A. Her certificate or proof of her marriage, and she said, 'Well, I will just tell them that Bill told me so; I will just tell them that Bill told me that we were married, and that is all I know about it.' "

Appellee in her affidavit and her oral testimony admits she had such a conversation or one similar to it with the witness at the time testified. She admits that no ceremonial marriage was ever performed, that her marriage to deceased in the state of Missouri was under a verbal contract to live together as husband and wife.

Affidavits of appellant and its attorneys are in evidence to the effect that they believed, from the testimony of the appellee given in both trials as to her marriage, that such marriage was ceremonial until shortly after the overruling of the motion for a new trial the first time, when they learned, accidentally, that it was not.

It is contended by counsel for appellee that, if appellant and its counsel had exercised reasonable diligence, it could have ascertained the facts in regard to the alleged marriage. It is urged that, if its counsel had cross-examined plaintiff on this issue, while a witness at either of the trials, it would have been disclosed she had not been married to deceased by a ceremonial marriage in Missouri or elsewhere, and that the failure to inquire showed a lack of reasonable diligence.

In this case the evidence discloses that the appellee by her testimony in both trials intended to convey the impression that she was married to deceased by a cere-

monial marriage. The plain import of her testimony is to that effect. There is nothing in the pleadings nor in her testimony given in either trial to suggest or cause appellant or its counsel to suspect that her alleged marriage to the deceased was other than ceremonial. If she had been cross-examined upon the subject, she had intended to falsely state that the certificate of marriage had been lost or destroyed.

In support of the contention that appellant was negligent, we are cited to the case of *Fitzgerald v. Brandt,* 36 Neb. 683, and the case of *Parkins v. Missouri P. R. Co.,* 79 Neb. 788, where it was held that the failure to cross-examine a witness to elicit facts afterwards claimed to be newly discovered evidence was a failure to exercise reasonable diligence. On the facts in this case those cases are not applicable.

While counsel for appellant had the opportunity to inquire on cross-examination as to what were the facts in regard to the alleged marriage, there was nothing in the evidence of appellee suggesting the propriety of making such inquiry. Under the circumstances disclosed by the evidence, the contention that reasonable diligence was not exercised in uncovering the deceit practiced is not well taken.

At the time that appellee claims to have entered into a common-law marriage with the deceased in Missouri, there was a statute making common-law marriages null and void. Rev. St. Mo. 1929, sec. 2977. Since the enactment of that statute the supreme court of that state has construed it, holding that common-law marriages contracted after the passage of the statute were null and void. *State v. Hare,* 331 Mo. 707.

The newly discovered evidence, under the issues, was material. On the record made at the trial it would have been sufficient to have changed the result. In opposition to the motion for a new trial appellee introduced evidence tending to show that a common-law marriage might have been entered into either in the states of Colorado or Iowa, where common-law marriages are recognized as valid.

We are asked to determine whether such evidence shows a valid common-law marriage. From the view that we take of the case, it is not necessary nor proper for us to consider and determine whether such evidence is sufficient to show a common-law marriage in some state other than the state of Missouri. The question before the trial court on the motion for a new trial was whether a valid marriage had been entered into in the state of Missouri. This marriage, by the newly discovered evidence, is shown not to have been a legal marriage.

A verdict and judgment obtained, as the one in this case was, should not be allowed to stand. Whether the appellee and deceased entered into a legal common-law marriage in some state other than Missouri will be an issue to be tried and determined upon a new trial of this cause.

The judgment is reversed, with directions to set aside the order denying a new trial, and to grant appellant a new trial.

REVERSED.

PAINE, J., dissents.

EDWIN NEWCOMB V. STATE OF NEBRASKA.

FILED MAY 17, 1935. No. 29427.

1. **Criminal Law**: NEW TRIAL. Ordinarily, in a criminal action, the only method to secure a new trial is by motion filed at the same term and within three days after the verdict.
2. ———: CORAM NOBIS. The writ of error *coram nobis* exists in Nebraska. The argument thereon in *Carlsen v. State*, p. 84, *post*, adopted in this decision and made a part hereof by reference.
3. ———: ———. Proceedings to obtain a writ of error *coram nobis* are essentially civil in character, and are governed as to time of commencement by the Nebraska Code of Civil Procedure.
4. ———: ———: LIMITATIONS. Under sections 20-2001 and 20-2008, Comp. St. 1929, one seeking by writ of error *coram nobis* to vacate or modify a judgment against him on the ground that he was of unsound mind must begin proceedings for the writ within two years after the disability was removed.

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

John S. Bishop and *Frank F. Aplan,* for plaintiff in error.

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

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

GOSS, C. J.

On July 13, 1925, Edwin Newcomb (called defendant) administered strychnine to his wife, and she soon thereafter died. On July 28, 1925, he was duly charged with murder in the first degree, pleaded guilty to murder in the second degree, and was sentenced by the late Judge Westover to life imprisonment in the penitentiary, where he is still serving that maximum sentence for murder in the second degree.

This proceeding was begun February 6, 1934, by a motion filed in the same district court in which the original proceedings were had, asking the court to set aside and annul the sentence of July 28, 1925, on the following grounds:

(1) The defendant was insane and incapable of pleading, and the court was, therefore, without jurisdiction to sentence him.

(2) There was no investigation of the sanity of the defendant.

(3) There was no investigation by the court before pronouncing sentence in regard to the facts of the case.

The issue on the motion was raised by the state's motion to dismiss on the grounds that the court had no jurisdiction of the subject-matter; that action on the motion was barred by the statute of limitations; that the judgment showed that, when defendant entered his plea and was sentenced, he was represented by a named, able attorney; that the affidavits filed in support of the motion were in-

adequate to sustain it, even if the court had jurisdiction; and that the defendant is guilty of laches.

Before passing on the motion, the court heard the matter on the motion, considering nine affidavits offered by defendant, ten affidavits offered by the state, and the testimony of Alden C. Plantz, produced by the state, who was appointed by Judge Westover and represented defendant at the time of his plea and sentence. Upon a consideration of the evidence, the trial court overruled the motion of defendant, and he came to this court on proceedings in error, asking that the sentence of July 28, 1925, be declared null and void, that the plea of guilty be quashed, and for such "further and different relief as justice may require." While there are eight assignments of error, they are comprehended within the two points that the judgment is contrary to the law and the evidence.

The affidavit of William T. Fenton, then warden of the state penitentiary, shows that when Sheriff Bruce brought Newcomb to the penitentiary he observed and talked with Newcomb a short time, and, being convinced he was demented, asked why the man was brought there instead of to the asylum. To this the sheriff answered that he was carrying out the order committing the prisoner. The warden ordered the prisoner to the hospital to be examined by the prison physician who had charge. Soon thereafter the penitentiary medical board duly certified that the defendant was insane, and he was removed to the Lincoln state hospital for the insane, all in conformity with section 83-750, Comp. St. 1929. The affidavit of D. G. Kavanaugh, then deputy warden, is to the same general effect. It further states that Newcomb was kept at the state hospital until September, 1930, when he was discharged and returned to the penitentiary to continue serving his life sentence. The affidavit of Newcomb states that in September, 1930, he was discharged from the state hospital and returned as cured, and since then has been in his right mind and permanently cured.

The record fairly shows that the patient was insane at and from the time of his incarceration for a period of

about five years. After the first three and a half years he began to show marked improvement. In September, 1930, Dr. D. G. Griffiths, superintendent of the Lincoln state hospital, under authority of section 83-751, Comp. St. 1929, duly certified that Newcomb was restored to sanity, and he was returned to the penitentiary.

In their affidavits, Dr. Griffiths, superintendent, and Dr. R. H. Spradling, assistant superintendent of the Lincoln state hospital, express the opinion that Newcomb was insane when he poisoned his wife. Dr. Samuel E. Overmass, a physician at Gordon, Nebraska, was called to attend Newcomb on July 13, 1925, and Dr. Quincy Elmore, a physician of the same town, was called to attend Newcomb on the same day. Both swear that he was then insane to the extent that he did not know right from wrong.

Alden C. Plantz, who was appointed to represent Newcomb, had served on the insanity board about ten years, and thus had experience with insane persons. He had two conversations with Newcomb and thought he was sane. If he had thought him insane he would have presented that as a plea to the court.

The state introduced affidavits of several witnesses who knew defendant and saw him on the day he was arrested. They are of the opinion he was sane. In rebuttal Dr. William H. Crawford, by affidavit, states that he was called to the jail twice in July, 1925, to attend the prisoner. He was of the opinion Newcomb was suffering from a mental psychosis, and questioned whether it was permanent or self-limited.

It is elementary that one is presumed to intend the natural and probable consequences of his acts, and therefore is presumed to be sane until the issue of his sanity is raised. In this case it was never raised on the trial, nor until years after the court had lost jurisdiction over defendant because the defendant had been undergoing the sentence imposed by the court. No motion for a new trial was ever filed; no proceedings in error were attempted.

Ordinarily, in a criminal action, the only method to secure a new trial is by motion filed at the same term and

within three days after the verdict. No statute has in any way been violated, except it is claimed that the court violated section 29-2027, Comp. St. 1929, by not examining witnesses in open court to determine the degree of crime, upon receiving defendant's confession. We find no evidence in the record supporting that statement, and besides, in the absence of proceedings in error carried on within the statutory time after final judgment, we could not find that the omission, if existing, was prejudicial.

As a matter of fact, there was, and defendant knows there was, no error committed by the trial court that can be reviewed here by any ordinary statutory methods. And what defendant here seeks is a recognition and application of the writ of error *coram nobis,* so that he may hereby obtain a remedy and try out, as if in the original case, a question of fact—that of his then insane condition.

That the writ of error *coram nobis* exists under the Nebraska Constitution and laws has been demonstrated in the recently adopted opinion in *Carlsen v. State,* p. 84, *post,* written by Judge Day. We adopt the argument of that opinion showing that the writ exists, and will be used, in a cause to which it applies, without needlessly repeating or abstracting the argument here. Our duty is to determine and decide whether the writ is applicable to the instant case.

There is no statute of limitations under the Criminal Code of Procedure under which plaintiff in error might bring this action so late as it was begun. But, while he seeks an adjudication of the fact that he was insane at the time he pleaded guilty in a criminal action, the procedure to adjudicate his right to another trial, a trial of that fact and not of any error of law, is essentially a civil action. Though he raised the question by motion, which was proper, it is in all essentials the same as a petition in equity for an opportunity to establish in another criminal trial a fact which he was incapable, by reason of insanity at the time, from producing when he pleaded guilty. His application was heard by a judge sitting in equity. It is a civil proceeding, and, so far as this particular proceeding

is concerned, is governed by the Civil Code as to the statute of limitations.

Section 20-2001, Comp. St. 1929, gives a district court power to vacate or modify its judgments after the term at which they were rendered: "Fifth. For erroneous proceedings against an infant or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Section 20-2008, Comp. St. 1929, provides that proceedings to vacate or modify a judgment or order for the cause mentioned in subdivision five of section 20-2001 "must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or person of unsound mind, and then within two years after removal of such disability."

It is conceded that Newcomb's disability was removed in September, 1930. This proceeding to vacate his sentence was February 6, 1934. No excuse for his laches appears. The proceeding was therefore barred by the statute of limitations.

The judgment of the district court is

AFFIRMED.

ED A. WEIDEMAN, APPELLEE, V. ESTATE OF NEILS P. PETERSON, APPELLANT.

FILED MAY 17, 1935. No. 29200.

1. **Appeal.** An order overruling a motion to strike a petition, or to strike from a petition, will be reviewed on appeal, even though not assigned as error in the motion for a new trial.
2. **Cases Overruled.** First paragraph of syllabus in *Caproon v. Mitchell*, 77 Neb. 562, and also first paragraph of syllabus in *Barker v. Davies*, 47 Neb. 78, overruled.
3. **Rule Abrogated.** The rule announced in *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb. 97, that, "on appeal to the district court from an order of the county court allowing or rejecting a claim against an estate, pleadings need not be filed unless directed by the court," *held* abrogated by statutory

changes of legislative enactment on which such rule was based.

4. **Pleading:** MOTION TO STRIKE. "A motion may properly be overruled which cannot be allowed in substantially the same terms as requested." *Fox, Canfield & Co. v. Graves*, 46 Neb. 812.

5. **Appeal:** ISSUES. "A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in a petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient." *Jacob North & Co. v. Angelo*, 75 Neb. 381.

6. **Limitation of Actions.** An oral promise to compensate one for past services, which do not appear to have been performed as a gratuity, and as to which the obligations created thereby are then not barred by the statute of limitations, as well as for future services, out of the promisor's estate, and that a legacy therefor shall be provided for the promisee, where, by the latter, such promise is thereafter accepted and performed, is an independent and substitutionary contract to which the statute requiring a new promise to be in writing does not apply.

7. **New Trial.** Record examined, and *held* that the order of the district court denying motion for new trial on the ground of newly discovered evidence was erroneous.

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

Courtright, Sidner, Lee & Gunderson and *William A. Robertson*, for appellant.

Dwyer & Dwyer, contra.

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

EBERLY, J.

This action arises out of a claim against the estate of Neils P. Peterson, deceased, which, at the time of the hearing thereon in the county court, was in the following form (verification omitted):

"Estate of Neils P. Peterson, Deceased.
In Account With

		Dr	Cr
1922-3	Trip to Blair	16	
"	2 Trips to Fremont	24	
"	3 Trips to Kennard, Neb.	45	
1923	Cleaning House—Greenwood	10	
"	Nursing—Taking care of N. P. 3 wks	150	
1931	Trip to Fremont	12	
		257	

That said deceased promised and agreed with claimant that he would pay said claim by providing for its payment in his will which he failed to do."

To this claim the amended objections of the administrator, with the will annexed, challenged the sufficiency of the same; pleaded the four-year statute of limitations to all items thereof except the "1931 Trip to Fremont;" pleaded as an offset a note dated September 20, 1924, for the sum of $355.25, with interest at 5 per cent. due and payable "six months after date." As to which note it was alleged, "No part of which has been paid." These objections of the administrator closed with the prayer "that said claim * * * be disallowed by the court or in the alternative if the said claim be allowed in any amount to be allowed as a credit on the note hereinabove set out."

In the county court the claim was disallowed and claimant prosecuted an appeal to the district court. In that court on April 8, 1933, the claimant filed a formal petition based on the same items of services set forth in the original claim, alleging that such services were rendered at the request of deceased; and "that all of said services were performed by claimant with the expectation and under the express agreement of compensation therefor; that said deceased when called on to pay said claim stated that he did not have the money with which to pay same and promised plaintiff that he would make provision for the payment thereof in his will; that subsequently thereto he stated to

plaintiff in the year 1923 that he had made a will in which he had provided for the payment and compensation of plaintiff; that he would still need the assistance and advice of plaintiff in the future and plaintiff rendered services to him thereafter in reliance upon such statement; and plaintiff alleges that the said deceased did make a later will in which he provided for the compensation of plaintiff, but that said will was either lost or destroyed subsequent to the death of deceased. Plaintiff further states that the services rendered for and on behalf of said deceased were of the reasonable value of $257, no part of which has been paid."

To this pleading defendant filed a motion, in the alternative, that said petition be entirely stricken, or in the alternative that said petition be stricken as to certain portions designated in the motion. The overruling of this motion *in toto* by the trial court is the first error presented for our consideration.

The motion for a new trial does not specifically set out this ruling of the court as a specific ground of error, and appellee insists that this court is committed to the doctrine: "The motion for new trial must give the trial court an opportunity to correct all errors complained of. No alleged error can be considered in this court as ground for reversal unless so brought to the attention of the trial court." *Waxham v. Fink;* 86 Neb. 180.

The error presented to this court in the *Waxham* case was the refusal of the trial court to direct a verdict for the defendant on the ground of the insufficiency of the evidence. The assignments of the motion for a new trial in that case included, "the verdict is not sustained by sufficient evidence," or "the verdict is contrary to law," and were held ample to challenge the attention of the trial court to its ruling in refusing to direct a verdict for the defendant. On this ground the judgment of the trial court was reversed. However, such *Waxham* case is not an authority on the question here presented.

Section 20-1142, Comp. St. 1929, declares: "A 'new trial' is a reexamination in the same court of an issue of

fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party." This section then enumerates eight distinctive grounds for motions for new trial. Sections 20-1143 and 20-1144, Comp. St. 1929, provide when and how such application for new trial shall be made.

In *Caproon v. Mitchell,* 77 Neb. 562, this court, in an opinion by Duffie, C., announced the principle: "An order overruling a motion to strike from a petition will not be reviewed on appeal when not assigned as error in the motion for a new trial."

The case of *Barker v. Davies,* 47 Neb. 78, is cited in the *Caproon* case as an authority in support of the rule thus stated. However, in a later case, that of *Anderson v. Union Stock Yards Co.,* 84 Neb. 305, a contrary doctrine is announced. The question there involved was the action of the trial court in striking from the petition that part thereof which contained a charge of negligence by the Union Stock Yards Company in not equipping its cars with automatic couplings. The defendant insisted that this assignment of error could not be considered as it was not assigned as one of the grounds of plaintiff's motion for a new trial. This court, in an opinion by Duffie, C., evidently concurred in by Judge Good, then Commissioner but now of this court, and unanimously approved by this court, denied this contention, and held that, notwithstanding the trial court's attention was not challenged to this question in the motion for a new trial, the question was properly before this court for its consideration. On this subject, Commissioner Duffie says in part:

"There are several cases in our reports indicating, if not directly holding, that an order of the trial court in sustaining or overruling a demurrer, a motion to strike or to make more specific, or other order made relating to the pleadings must, in order to be considered by this court, be included in the motion made to the district court for a new

trial of the case. An examination of our statute relating to new trials and the constructions heretofore placed thereon in numerous cases establishes beyond any doubt the rule that orders of the district court which do not pertain to the trial of the case, such as rulings upon demurrer, motions addressed to the pleadings, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial to make them available on appeal taken to this court. *O'Donohue v. Hendrix,* 13 Neb. 255; *Farris v. State,* 46 Neb. 857; *Claflin v. American Nat. Bank,* 46 Neb. 884; *Scarborough v. Myrick,* 47 Neb. 794; *Deere, Wells & Co. v. Eagle Mfg. Co.,* 49 Neb. 385; *Hans v. State,* 50 Neb. 150; *Horton v. State,* 60 Neb. 701; *Slobodisky v. Curtis,* 58 Neb. 211, where our previous decisions are collated by Mr. Justice Norval. The latest expression of this court upon the question is found in *Walker v. Burtless,* 82 Neb. 214. The syllabus is as follows: 'If the consideration of a record of the district court does not require the examination of any issue of fact or error occurring at the trial, which could only be preserved by a bill of exceptions, a motion for a new trial is not a condition precedent to a review of that record in this court.' "

As the last authoritative pronouncement of this tribunal, we accept the foregoing statement of law as binding and controlling in the instant case. Accordingly, the rule announced in the first syllabus in *Barker v. Davies,* 47 Neb. 78, and in the first syllabus in *Caproon v. Mitchell,* 77 Neb. 562, is expressly overruled.

On the merits of the motion to strike, it may be said that in *Estate of Fitzgerald v. Union Savings Bank,* 65 Neb. 97, cited by defendant, it was noted that the then controlling statute provided only that the claimant present or exhibit his claim or demand to the (county) court, and accordingly the following rule was announced in that case: "Creditors of an estate are not required to present their claims to the county court or to the commissioners appointed to examine claims by formal pleadings; a statement of the nature and amount of the claim in the ordinary form of an account or claim bill is sufficient."

While the rule is also announced in that case that, "on appeal to the district court from an order of the county court allowing or rejecting a claim against an estate, pleadings need not be filed unless directed by the court," this was based upon the provisions of section 238 of chapter 23 of the Compiled Statutes then held to be in force, and which originally constitutes section 238 of chapter 17 of the General Statutes of Nebraska for 1873. In 1881 there was adopted an act providing for appeal from decisions of the county court in certain matters. Laws 1881, ch. 47. Section 6 of the act of 1881 now appears as section 30-1606, Comp. St. 1929.

In *Bazzo v. Wallace,* 16 Neb. 293, in reference to the effect of this act of 1881, Maxwell, J., says in part: "The act of 1881 is a complete act in itself for the regulation of appeals in all matters of probate jurisdiction, and all that is necessary to perfect an appeal in such cases is to comply with the provisions of that act." See, also, *Drexel v. Reed,* 65 Neb. 231.

These cases at least suggest that this act of 1881 operated to repeal by implication "section 238 of chapter 23." Whether this be true or not, it is to be noticed that the 1913 revision of the laws of Nebraska omits "section 238 of chapter 23." The question, therefore, now to be determined is the proper construction of sections 30-1606, 27-540, 21-1305, and 21-1306, Comp. St. 1929. Under our practice, therefore, new pleadings are filed on appeal. *Moline, Milburn & Stoddard Co. v. Hamilton,* 56 Neb. 132.

The rule stated in *Estate of Fitzgerald v. Union Savings Bank,* 65 Neb. 97, viz., "On appeal to the district court from an order of the county court allowing or rejecting a claim against an estate, pleadings need not be filed unless directed by the court," has by virtue of statutory changes been abrogated and is now not in force. Obviously the filing of a petition in the district court, now a requirement on appeal, is for the purpose of securing such amplification and elaboration of the brief and informal statement of facts permitted in the county court as will conform the pleadings to the Code provisions applicable in the district

court in cases therein commenced, without, however, departing from the rule that in an appeal substantial identity of issues must be preserved. Basically the pleading here attacked includes no more than the services set forth in the itemized account originally filed in the county court as a claim, amplified by additional allegations pertaining thereto. The scope of the motion to strike in the case now before us is such, therefore, that it cannot be sustained as an entirety. It is too broad. The rule appears to be: "A motion may properly be overruled which cannot be allowed in substantially the same terms as requested." *Fox, Canfield & Co. v. Graves,* 46 Neb. 812. See, also, *McDuffie v. Bentley,* 27 Neb. 380.

But, apart from this reason, the principles applicable to the present situation appear to be: "A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in a petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient." *Jacob North & Co. v. Angelo,* 75 Neb. 381. See, also, *Swenson Bros. Co. v. Commercial State Bank,* 98 Neb. 702; *Burke v. Northrup,* 98 Neb. 849.

It is thought that the overruling of the defendant's motion to strike finds ample justification in the record.

Appellant's second contention is that, excepting as to services alleged to have been performed for decedent in 1931, claimant's cause of action was barred within four years after the cause of action accrued (Comp. St. 1929, sec. 20-206), and that section 20-216, Comp. St. 1929, provides the only manner in which such cause of action may be tolled, viz., by a written acknowledgment of an existing liability, debt or claim. The distinction between the present case and those within the purview of our statute of limitations is that in the instant case the effect of the oral agreement alleged herein is that the latter is a separate, distinct and independent contract into which the obligations of the original undertaking become only an element of its consideration. There is evidence in the record to

the effect that on September 20, 1924, deceased asked claimant to execute a note covering the amounts due the deceased by claimant. Claimant asked that the value of his services to Peterson be credited on this demand, to which the deceased replied, "I have made a will and provided for you better, because I need you in my services longer." And that claimant thereupon acceded to the proposition thus made, and in return for the agreement waived his right of present offset and executed a promissory note for $355.25. In other words, under the circumstances of this case, if the above be established by proper proof, "An oral promise to compensate one for past services by giving him a legacy is an independent and substitutionary contract to which the statute requiring a new promise to be in writing does not apply." 37 C. J. 1124. See, also, *Murtha v. Donohoo,* 149 Wis. 481, and note under same case in 41 L. R. A. n. s. 246; *Devine v. Murphy,* 168 Mass. 249; *Davis v. Teachout's Estate,* 126 Mich. 135.

The oral promise of Peterson, the oral acceptance thereof and compliance therewith by claimant, was, in principle, determined in *Davis v. Teachout's Estate, supra,* to have constituted a binding undertaking. The language of the opinion in such *Davis* case is: "Miles (later deceased) told claimant that he had a good deal of property, and not an heir in the world, and that, if he (claimant) would wait until final disposition of his property, he (Miles) would see that he was well paid, and well paid for waiting."

In *Bennett v. Lutz,* 93 N. W. 288 (119 Ia. 215) it was held: "A promise of a father that past services of his daughter, which do not appear to have been performed as a gratuity, as well as future services, shall be paid out of his estate, has sufficient consideration, so as to prevent the running of the statute (of limitations) till his death."

The authorities above referred to sustain the conclusion that the claimant's recovery is not barred by the statute of limitations, provided, of course, that the oral contract on which he relies is finally determined to be established by the evidence. It is not to be regarded as a new promise within the meaning of that statute, but rather as a valid

"independent and substitutionary contract" and enforceable as such.

Defendant cites, in opposition to this conclusion, *Mortenson v. Knudson,* 189 Ia. 379, and *Zuhn v. Horst,* 100 Wash. 359. In the *Mortenson* case the supreme court of Iowa in no manner refers to the case of *Bennett v. Lutz, supra,* and does not overrule or qualify the doctrine therein announced. In both cases cited, in addition to other important differences as to facts, the oral contracts relied upon to support recovery were made long after the original claims to which they related had been admittedly barred by the statute of limitations. In the light of these facts it is thought that the doctrines announced in these two cases are inapplicable to the facts presented in the case now before us.

We are quite of the opinion that, in view of all the evidence surrounding the questioned transactions, direct as well as circumstantial, proper questions arise for the determination of the jury, viz.: (1) As to whether the oral contract between Peterson and claimant was made as by the latter alleged? and (2) whether the $355.25 note was actually discharged as the evidence in behalf of claimant tended to establish?

The question presented by the motion for new trial on the ground of newly discovered evidence is serious. The nature of the claim made, and the necessary limitation of proof occasioned by death leaving sealed the lips of Peterson, deceased, have necessarily increased the evidential importance of the circumstances surrounding the transactions involved. So, too, the source of the moneys by which it is claimed the promissory note of $355.25 was paid by claimant becomes important, and the facts discovered in reference to the claimed "loan," after the conclusion of the trial in the district court, are likewise important. In view of the fact that the person who approved the use of certain checks, the proceeds of which claimant claims to have been the funds which discharged the $355.25 note, was dead at the time of the trial in the district court, defendant is entitled to know the names of the makers of the

checks so used. These names were not divulged in the showing made by claimant in resistance to the motion for a new trial. The record discloses a request in writing for this information, by defendant in the trial court, and this request was not complied with by plaintiff. Neither party claims that similar testimony as to the source of these facts was given in the county court at the first trial of the case, and we infer from the record before us that the peculiar question here considered was first developed at the trial in the district court, and defendant is not properly chargeable with negligence or lack of diligence in failing to previously investigate. In short, it is thought that the showing in support of the motion for a new trial brings the case squarely within the principles announced in *Nelson v. State,* 121 Neb. 658, as follows: "If newly discovered evidence presents a material and important fact, germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, then a new trial should be granted, if diligence to secure the same has been shown." It follows that, in the denial of defendant's motion for a new trial based on newly discovered evidence, the district court erred.

The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

CARL C. CARLSEN V. STATE OF NEBRASKA.

FILED MAY 17, 1935. No. 29439.

1. **Criminal Law:** CORAM NOBIS. The common-law writ of error *coram nobis* has not been expressly abolished by statute.
2. ———. In a case for the protection of a right or prevention of a wrong for which the Code does not provide, the former practice may be adopted so far as necessary to prevent a failure of justice.
3. ———: NEW TRIAL. The only method provided by statute for securing a new trial in a criminal case is by motion filed at the term and within three days after the verdict.

4. ———: ———. No statute provides a corrective judicial process to remedy the wrong when newly discovered evidence casts doubt on the correctness of the verdict or establishes defendant's innocence.

5. ———: ———. The statute authorizing a new trial in civil actions at a subsequent term on the ground of newly discovered evidence is not available in a criminal case.

6. ———: ———: EQUITY. Equity will not interfere for the purpose of granting a new trial in a criminal case on the ground of newly discovered evidence.

7. ———: ———. The district court possesses no inherent or common-law power to grant new trials in criminal cases on the ground of newly discovered evidence at a term subsequent to that at which the verdict of guilty is found.

8. **Habeas corpus** is not a proper remedy to secure one's release from prison on the ground that an error of fact resulted in a wrongful conviction.

9. **Courts.** Expressions in opinions must be interpreted with reference to the facts and issues determined therein.

10. **Criminal Law.** The right to apply for a pardon to an administrative board does not meet the requirement of the constitutional provision guaranteeing a remedy for an injury by due process of law.

11. **Pardon.** The pardoning power is not a corrective judicial process to remedy a wrong.

12. **Criminal Law:** CORAM NOBIS. The common-law writ of error *coram nobis* to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment, exists in this state under section 49-101, Comp. St. 1929.

13. **Constitutional Law.** Every person for any injury done him in his lands, goods, person or reputation shall have a remedy by due course of law.

14. **Coram nobis** does not lie to bring into the record facts known to the petitioner before judgment.

15. **Information.** A general demurrer admits facts well pleaded, but not the conclusions of the pleader.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Frank A. Peterson, Walter D. James and *Perry, Van Pelt & Marti,* for plaintiff in error.

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

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

DAY, J.

This is an appeal from an order of the Lancaster county court denying an application for a writ of error *coram nobis.* Carlsen was tried before and convicted by a jury in the district court of the crime of forgery. A motion for a new trial was overruled, and he was sentenced to the penitentiary and to pay a fine. He prosecuted a proceeding in error to this court, the result of which was an affirmance of the judgment. *Carlsen v. State,* 127 Neb. 11. He then applied to the supreme court of the United States for a writ of certiorari, which was denied. Thereafter he made application to the trial court for an ancient common-law writ of error *coram nobis.* The trial court sustained the state's demurrer to the petition for that it did not state facts sufficient to justify the issuance of the writ of error *coram nobis.* Our statutes do not provide for such a writ, and there is no provision expressly abolishing the common-law writ.

In 1855 the first legislature of the territory of Nebraska adopted as a Civil and Criminal Code parts of the Code of Iowa. This Code provided for a writ of error *coram nobis.* Section 540 provided: "Any person aggrieved by the judgment of the district court by reason of any material error in fact may within one year after the rendition thereof obtain from the clerk of the court which rendered the judgment a writ of error *coram nobis* returnable at the next term of said court." Laws 1855, p. 108. This would appear to be a part of the Civil Code applicable to civil actions. This section was recently discussed in *Boyd v. Smyth,* 200 Ia. 687. It was there said in an opinion written by Albert, J.: "The provisions of this chapter are broad enough to cover all cases arising which seek to vacate or modify a judgment, but this is, and always has been, a chapter in the Code of Civil Procedure, and has

afforded a remedy in all instances where a judgment could be vacated or modified."

In this connection, section 524 of the Criminal Code, Laws 1855, p. 292, provides: "The only mode of reviewing a judgment or order in a criminal action is by a writ of error as prescribed in this chapter." Then follow specific provisions as to writs of error, and a writ of error *coram nobis* is not a prescribed remedy. This would seem to be an expression of legislative intent to abolish the writ as to criminal cases.

However, in 1857, the territorial legislature repealed the entire Civil and Criminal Code previously adopted from Iowa by the following act:

"Section 1. Be it enacted by the council and house of representatives of the Territory of Nebraska, That an act entitled 'An act adopting certain parts of the Code of Iowa,' approved March 16, 1855, and also an act entitled 'An act relative to criminal laws,' approved March 15, 1855, be and the same are hereby repealed.

"Section 2. This act to take effect and be in force from and after its passage." This act passed the house by two-thirds vote over the governor's veto, 24 to 2, and passed the council by a vote of 12 to 1 over the governor's veto. See Laws 1857, p. 137. While the date of the passage of this repealing act is not given, on page 295, Laws 1857, appears this joint resolution: "Resolved, by the council and house of representatives of the Territory of Nebraska, that all laws passed at the present session of the general assembly shall take effect on the first day of June next, unless otherwise provided in the acts passed. Approved February 13, 1857."

The supreme court of Iowa in *Boyd v. Smyth, supra,* held that in a statutory revision the parts of the original omitted are to be considered annulled. Since the Iowa legislature in the adoption of revised statutes omitted the chapter relating to the writ of error *coram nobis,* it was determined that the remedy had been abolished.

But the legislative history in Nebraska is not like that of Iowa. As stated, the entire Code, both Civil and

Criminal, was abolished in 1857. The statute was not revised. It was not until November 1, 1858, that a new Code was approved. This new Code did not provide for writ of error *coram nobis* in either civil or criminal cases. It did not specifically abolish the writ, but was silent as to it. It did not provide, as the former Code, that the only mode of reviewing a judgment or order in a criminal case was as provided by the Code. It did not provide for a review of criminal cases by a writ of error. There is nothing in this Code which can be said to abolish the writ of error *coram nobis*. The Code of 1858 was superseded by the Revised Statutes of 1866 which were effective when Nebraska was admitted as a state to the Union in 1867. The chapter entitled Schedule, section 1, Constitution of 1866, provided: "That no inconvenience may arise from the change of territorial government to a state government, it is declared that all rights, suits, actions, prosecutions, judgments, recognizances, claims, and contracts, both as respects persons and bodies corporate shall continue and be enforced, as if no change had taken place, and all laws now in force shall remain in force until altered, amended, or repealed by the legislature."

Thus it is evident not only that the common-law writ of error *coram nobis* was not expressly abolished by statute, that the statutes negative any such legislative intent. The Revised Statutes of 1866, ch. 7, sec. 1, provided: "So much of the common law of England as is applicable, and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory." This statute has never been repealed and is now section 49-101, Comp. St. 1929. The legislature by the adoption of the Revised Statutes of 1866 made a further declaration, as follows: "If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." Rev.

St. 1866, tit. 29, ch. 6, sec. 901. This has never been amended or repealed and is now section 20-2225, Comp. St. 1929. These territorial statutes by the adoption of the Constitution of 1866 became the law of the state. The new Constitution provided: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay." Const. 1866, art. I, sec. 9. This section now appears as section 13, art. I, Const. 1920. These statutory and constitutional provisions indicate a continuing determination to provide a remedy for every wrong. In *Engles v. Morgenstern,* 85 Neb. 51, it was held that the foregoing statutes and the constitutional provision established the right to review final orders of justices of the peace and other inferior tribunals notwithstanding the repeal of the statute authorizing such review. A similar constitutional provision has been held to require a remedy as a part of the "due course of law" guaranteed by the Constitution. *State v. Killigrew,* 202 Ind. 397, 74 A. L. R. 631. It has been effectually used where no other form of judicial relief existed. *State v. Calhoun,* 50 Kan. 523.

But these provisions of the Constitution and the statutes do not apply where another remedy is provided by statute (*Genau v. Abbott,* 68 Neb. 117), or where the statutory remedy is lost by laches (*Flint v. Chaloupka,* 81 Neb. 87). Consequently, it is argued by the state that our statutory Code of Procedure is so comprehensive as to displace the common-law writ of error *coram nobis.* Does the statute provide an adequate remedy to correct an error of fact when the judgment has become final? Sections 29-2101, 29-2102, and 29-2103, Comp. St. 1929, provide for a motion for new trial as follow:

Section 29-2101: "A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following reasons affecting materially his substantial rights: First. Irregularity in the proceedings of the court, or the prosecuting attorney, or the

witnesses for the state, or any orders of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial; Second. Misconduct of the jury or the prosecuting attorney or of the witnesses for the state; Third. Accident or surprise which ordinary prudence could not have guarded against; Fourth. That the verdict is not sustained by sufficient evidence or is contrary to law; Fifth. Newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial; Sixth. Error of law occurring at the trial."

Section 29-2102: "The causes enumerated in subdivisions two, three and five of the next preceding section must be sustained by affidavits showing their truth, and may be controverted by affidavits."

Section 29-2103: "The application for a new trial shall be by motion upon written grounds, filed at the term the verdict is rendered, and shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be within three days after the verdict was rendered, unless unavoidably prevented. In assigning the grounds of such motion, it shall be sufficient to assign the same in the language of the statute, and without further or other particularity."

The statutory provisions for the vacation or modification of judgments in civil actions are much more numerous than in criminal cases. Comp. St. 1929, secs. 20-2001 to 20-2009. These provisions are so extensive and liberal that the argument of the state would be persuasive in a civil case that the provisions of the Code have in fact abolished the writ of error *coram nobis,* because a remedy is provided for every wrong. It is interesting to note, although of little importance here, that the only provision for a writ of error *coram nobis* in our state was contained in the Civil Code, and when it ceased to be a part of the Code, it was replaced by statutory remedies to serve substantially the same purpose. But the provisions of the

Code for vacating judgments after term are only of incidental interest here. They are not applicable to a criminal case.

In *Bradshaw v. State* (1886) 19 Neb. 644, Bradshaw was found guilty of murder and sentenced to life imprisonment. Upon a review by this court, the judgment was affirmed. Later a motion for new trial was filed in the district court upon the ground of newly discovered evidence and many affidavits were filed which, if true, at least cast a doubt on the correctness of the verdict. It was held that the grounds upon which a new trial might be granted in a criminal case must be filed within three days and at the same term unless unavoidably prevented. It was conceded by attorneys for Bradshaw that the provisions of the Criminal Code did not authorize them to file a motion for new trial after two years, but they claimed relief under the provision of the Civil Code. The court held that the provision of the Civil Code was not applicable. The opinion was written by Maxwell, C. J., who said: "The rule permitting a petition for a new trial to be filed at any time within one year from the rendition of the judgment in civil actions should, where there is newly discovered evidence, the effect of which is to cast doubt on the correctness of the verdict or show the defendant's innocence, be extended to criminal cases. Such a rule, in cases of conviction upon circumstantial evidence, if properly guarded and applied, would throw an additional safeguard around the innocent, and tend to the promotion of justice; but in the absence of legislation to that effect the courts are without authority in the premises." Almost fifty years have passed since this judgment was rendered, and the legislature has not provided a statutory remedy for such a case.

In *Hubbard v. State* (1904) 72 Neb. 62, there had been a conviction for statutory rape. The judgment was affirmed when reviewed by this court. Later Hubbard commenced a suit in equity for the purpose of securing a new trial for that the conviction was secured by means of perjured testimony. We quote extensively from the syllabus to

demonstrate that neither the statute nor equity affords remedy to one wrongfully convicted except a motion for new trial filed within three days and at the same term:

"A court of equity will not interfere for the purpose of granting a new trial in a criminal case on the ground of newly discovered evidence.

"The district court possesses no inherent or common-law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term to that at which a verdict of guilty was rendered."

"The provisions of section 318 of the Code, authorizing the granting of new trials in civil actions at a subsequent term to that at which the judgment was rendered, on the ground of newly discovered evidence, are not applicable to the granting of new trials in criminal cases." (Section 318 is now section 20-1145, Comp. St. 1929.)

Expressions in opinions must be interpreted with reference to the facts and issues determined therein. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790; *Perkins v. Great Central Transport Corporation*, 262 Mich. 616; *Schoeneman Lumber Co. v. Davis*, 200 Ia. 873.

The issues decided by *Hubbard v. State, supra*, are that neither the statutes nor equity afford one a remedy by new trial where newly discovered evidence casts serious doubt on the correctness of the verdict. There is no statutory or equitable remedy in our judicial procedure for one convicted by fraud or mistake except by a motion for new trial, within three days, at the same term of court.

In *Simmons v. State*, 111 Neb. 644, opinion by Good, J., it was held that the district court does not have jurisdiction to grant a new trial in a criminal case on the ground of newly discovered evidence at a subsequent term to that at which the verdict of guilty was returned—citing *Hubbard v. State, supra; Evers v. State*, 87 Neb. 721; *Fouse v. State*, 83 Neb. 258; *Dodge v. People*, 4 Neb. 220; *McCoy v. State*, 110 Neb. 360. It cannot be gainsaid, in view of these authorities, that the Code does not provide a remedy to one wrongfully convicted, and the argument of the state that it does is untenable.

In *Evers v. State, supra,* it was held that a motion for new trial on the ground of newly discovered evidence could not be sustained under section 318 of the Code (now section 20-1145, Comp. St. 1929). It was specifically held that "The district court has no jurisdiction to grant a new trial, in a criminal case, upon application by petition filed after the term of the trial." This decision was based on *Hubbard v. State, supra,* that the statute providing for new trial in civil cases did not apply to criminal cases. Judge Sedgwick, the author of the court's opinion, expressed his disapproval of the fact that the statute did not provide a remedy.

Later, in 1915, Judge Sedgwick wrote the opinion in *Franco v. State,* 98 Neb. 746. In this case, two men had a quarrel and one shot the other. The case was brought to this court on a writ of error, which makes it different from the other cases cited. It appeared, outside of the record, after conviction, when the defense was insanity, that in the altercation the defendant's head had been injured by a blow administered by the man who was killed. The defendant's insanity was noted at once by a physician at the penitentiary, and he was removed to the state hospital where an operation restored him to sanity. The attorney general admitted the fact, in open court, that the defendant was insane at the time of the trial. The court reversed the judgment and reversed the case, because "we cannot affirm a judgment that is conceded to be unjust." No comment is necessary upon this opinion, except that it sustains the proposition that there is no statutory remedy provided for one wrongfully convicted of a crime. It cannot be said to support the contention that the court has held that the writ of error *coram nobis* exists, but it does demonstrate a situation where the old writ would perform a very useful service.

It has been suggested that the defendant has a remedy in the pardoning power existent in this state. This has been suggested in a number of cases, notably *Hubbard v. State, supra,* in which it was said: "The remedy is an appeal to the executive, who is clothed with the pardoning

power." Quoting from Judge Sedgwick in *Evers v. State, supra*: "It is, of course, not intended by the Constitution that the pardoning power should review and correct the decisions of the courts. The fact of the defendant's guilt or innocence of the crime with which he is charged should be finally settled by the courts, where the evidence can be received and weighed under the well-established rules of law, and where it is supposed that the truth can be ascertained with as much certainty as human imperfection will admit." The pardoning power serves the state a different purpose. The pardoning power is not a corrective judicial process to remedy a wrong. *Sanders v. State,* 85 Ind. 318.

In order to complete the process of elimination, it should be noted that the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. Habeas corpus is not a proper remedy to secure release from prison of one sentenced upon a plea of guilty induced by fear. *Darling v. Fenton,* 120 Neb. 829. Habeas corpus is not a proper remedy to release one from prison who has been wrongfully convicted. Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error.

It has been suggested to this court in several recent cases that the common-law writ of error *coram nobis* exists in this state. The first mention of the writ by the court was in a civil case, *Jennings v. Simpson* (1882) 12 Neb. 558, although the relief granted in that case depended "upon the general powers of a court of equity." Later, in 1903, an application for a writ of error *coram nobis* was presented at chambers to J. J. Sullivan, C. J., who called to his assistance Roscoe Pound and John H. Ames, then commissioners of the court. This is reported in an appendix at 64 Neb. 885, by the deputy reporter, who states that the "chief justice, after consultation, said that they were all of the opinion that the petitioner was invoking a power which did not exist in the full bench, and, *a fortiori,* in a judge at chambers." While not entitled to the

dignity of a precedent because of the informal manner in which it was reported and because it was not the judgment of the court, it is nevertheless interesting as an opinion of these distinguished judges.

Then, in *Cole v. State* (1920) 104 Neb. 780, upon an application for a writ of error *coram nobis,* it was not decided if the right existed, but was denied because the petition did not allege specific facts which, if known at the time judgment was rendered, would have prevented its rendition.

Similarly, in *State v. Boyd* (1928) 117 Neb. 320, the court held: "Even if the right to a writ of error *coram nobis* exists in this state, which is not decided, a petition, which as ground for its issuance states only a fact which was known to the party applying before the judgment attacked was rendered, is insufficient." These cases do not determine that the writ exists. The opinions specifically state that the question is not decided, and this court may now determine the question for the first time, unhampered by previous decisions.

The conclusion follows, we think, that there is no corrective judicial procedure prescribed by statute to remedy a wrongful conviction which would not have occurred except for an error of fact upon the trial. Equity does not interfere in a criminal case to vacate such a judgment. Habeas corpus does not serve this purpose, and the pardoning power which is vested in an administrative board is not adequate, and, moreover, is not a judicial process.

Has this state failed to provide a corrective judicial process to remedy such a wrong when discovered by reasonable diligence? We are unanimously of the opinion that it has not. Section 20-2225, Comp. St. 1929, heretofore quoted, says that, if a case arise to prevent a wrong, for which the Code does not provide, the former practice may be adopted to prevent a failure of justice. Section 49-101, Comp. St. 1929, also quoted herein, provides that so much of the common law of England as is applicable and not inconsistent with our Constitution and laws is adopted. At the time of the enactment of these

statutes, *coram nobis* was a recognized writ, the purpose of which was to correct an error of fact. It had fallen into disuse and is said to have thus become obsolete, but it existed nevertheless. It has been effectually resorted to in criminal cases where no other form of judicial relief existed. *Sanders v. State,* 85 Ind. 318; *State v. Calhoun,* 50 Kan. 523; 2 R. C. L. 305, sec. 259. In *In re Ernst,* 179 Wis. 646, it was held that the common-law writ of error *coram nobis* to permit the court in which the action was tried to correct errors of fact not appearing in the record and not reviewable by the ordinary writ of error is in force in that state, under section 13, art. XIV of the Constitution. The constitutional provision mentioned is: "Such parts of the common law as are in force in the territory of Wisconsin, not inconsistent with this Constitution, shall be and continue part of the law of this state until altered or suspended by the Constitution or the legislature." This language is so similar with our statutory provision as to indicate a common ancestor.

The necessity for this state to provide a corrective judicial remedy available to one wrongfully convicted is made imperative by section 13, art. I of the Constitution, which provides that every person for any injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law. The right to apply for a pardon to an administrative board does not meet the requirements of the constitutional provision guaranteeing a remedy for an injury by due process of law.

In a consideration of this case, the recent decision of the supreme court of the United States in *Mooney v. Holohan,* 294 U. S. 103, is of especial interest. Mooney sought to obtain leave to file a petition for an original writ of habeas corpus for that he was unlawfully restrained of his liberty by the state of California. He alleged that he was convicted as a result of perjured testimony knowingly used by the prosecuting officers, who also suppressed evidence which would have impeached and refuted it; that reasonable diligence would not have discovered the evidence which subsequently developed that

the testimony against him was perjured; that the state of California had failed to provide any judicial procedure to remedy the wrong to him. It was held that, where one was convicted by testimony known to the prosecuting officers to be prejured, and was deprived of his liberty thereby, the state's failure to afford a corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

We are not enthusiastic about revivifying an ancient remedy of the common law. It would seem better that the Code should provide a modern process more in keeping with the spirit of progress. Relief is provided in civil cases. But the legislature has not provided such in criminal cases, although several decisions covering a period of fifty years have directed attention to the omission in the statute. But the objection to the ancient lineage of the common-law writ of error *coram nobis* is overcome by the necessity to resort to it as a present remedy for a wrong when no other exists. We are constrained to hold that Nebraska has provided a corrective judicial process in a case of wrongful conviction upon an error of fact. The statutes and the Constitution retain common-law remedies unless the statute provides another one. The writ of error *coram nobis,* to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part which, if known at the time of the trial, would have resulted in a different judgment, exists in this state under section 49-101, Comp. St. 1929.

The common-law writ of error *coram nobis* has been the subject of some discussion by the courts. It was a remedy of the common law, infrequently used, and has been supplanted by statutory remedies in England and many of the states. A review of the cases reveals that the courts generally are doubtful of its existence and uncertain of the scope of its application. This court has upon two occasions declined to determine the existence or the

application of the remedy because unnecessary to a decision of the cases. *State v. Boyd,* 117 Neb. 320, 58 A. L. R. 1283; *Cole v. State,* 104 Neb. 780. Professor Lester B. Orfield has written several articles upon the history, the present existence, the scope and the application of the writ. He has collected and discussed the authorities, including very recent decisions of American courts, in a manner that has been very helpful at times. 20 Virginia Law Review, 423; 10 Neb. Law Bulletin, 314; 11 Neb. Law Bulletin, 421.

In order to decide this case, it is necessary to determine the scope of the writ of error *coram nobis* only so far as applicable herein. It is stated in 2 R. C. L. 307, sec. 262: "The purpose of the writ of *coram nobis* is to bring before the court rendering the judgment matters of fact which if known at the time the judgment was rendered would have prevented its rendition." Upon this broad general principle the application of the applicant, Carlsen, is based.

His petition alleges that he was convicted of forging interest coupons; that the conviction was obtained and affirmed on the theory that the execution of said interest coupons had not been authorized by Mary A. McLoughlin and Thomas J. McLoughlin for the purpose of extending the bonds; that the testimony of the McLoughlins supporting this conclusion of fact was as follows: "Q. Did any one ever ask you for authority to sign your name to that exhibit? A. Not that I remember of. Q. Did any one ask you for authority to use your name on exhibit No. 4? A. No, sir. Q. And who signed exhibit No. 4A? A. I did. Q. And who else? A. My wife. Q. Did any one ever ask for an extension after that date? A. Not that I remember of. Q. Would you remember it if they did? A. I believe so. Q. Did you ever give any one an extension after that date? A. No, sir." That the above and foregoing statement, that the loan was not extended and that said coupons herein were not authorized, was untrue; that the said witness, Thomas J. McLoughlin, will now testify, and his affidavit is attached and made a

part of the petition herein, that he was mistaken at the time of the trial when he testified as above related; that at the time he testified he had in mind and assumed that such extension and such authority to execute said coupons had to be in writing; that Thomas J. McLoughlin did in fact authorize R. G. Sutton and Vern Hicks to secure an extension of the loan on behalf of himself and his wife, Mary A. McLoughlin, and to execute the coupons in question. The affidavit of R. G. Sutton is attached and made a part of the petition by reference in which he states that on behalf of the McLoughlins he authorized Carlsen to extend the loan and execute the coupons.

The petition further alleges that Mary A. McLoughlin and Thomas J. McLoughlin were unfriendly to him prior to and during the trial; that the defendant was never able to secure any information which would permit him or his counsel to disprove the testimony of Mary A. McLoughlin and Thomas J. McLoughlin until October 27, 1934, prior to the filing of the petition herein on November 1, 1934; that the defendant had never been charged with a crime before, and that he was confused and embarrassed to the point where his mind failed to function; that he was not able to recall instances which he now realizes would have been material to his defense.

The petition further alleges that Carlsen "now stands convicted of having committed a crime, when the witness upon whose testimony reliance is placed admits that said testimony was given at a time when the witness did not recall the extension agreement and at a time when he misunderstood the purport of the questions propounded to him; that to permit said judgment of conviction to stand amounts to a fraud upon the rights of the defendant." To this petition, the state filed a demurrer, "for the reason that said petition does not state facts sufficient to justify the issuance for such writ of error *coram nobis*." The petition, the demurrer, and the order of the trial court constitute the entire record before us for review.

Assuming the truth of the allegations of fact well pleaded in the petition that Carlsen was convicted upon

testimony of witnesses who now state that they were mistaken in the import of their testimony in that they had a mistaken notion that the request for an extension and the authority to execute the interest coupons was required to be in writing, Carlsen now attempts to benefit by evidence that he was authorized to execute the coupons. This evidence, if true, was known to him at the time of the trial. A petition for a writ of error *coram nobis* is insufficient which, as a ground for its issuance, alleges only an error of fact which was known to the petitioner before the questioned judgment was rendered. *Coram nobis* does not lie to bring into the record facts known to petitioner before judgment. *State v. Boyd,* 117 Neb. 320. The reasons given in the foregoing case are cogent and persuasive. They are equally applicable to the situation here. If one negligently and intentionally fails to challenge the court's attention to facts within his knowledge, he cannot expect to be relieved of the consequences. 16 C. J. 1327. *Sanders v. State,* 85 Ind. 318, the most widely cited case on this subject, announces this rule at an early date, and lately, *Berry v. State,* 202 Ind. 294, adheres to the rule. See, also, *People v. Ramey,* 135 Cal. App. 573; *Carraway v. State,* 167 Miss. 390; *Keane v. State,* 164 Md. 685.

This petitioner attempts to excuse his failure to bring this fact to the attention of the court by pleading (1) that the witnesses were hostile to him, and (2) that because of the worry of the trial he forgot about the incident. He was on trial for forgery, and the question of authorization, if any, was important. While this application must be determined solely on the petition, the demurrer, and the judgment, an examination of the opinion, a part of which is pleaded here, reveals that it was sought to prove authority to sign the McLoughlin's names to the coupons from the terms of the original instrument. Whether the writ of error *coram nobis* lies as to issues that were litigated at the time is expressly not decided here. The excuse pleaded for failure to produce the evidence is not sufficient. True there are decisions

to the effect that *coram nobis* is a proper remedy for one convicted of a crime while insane. *Hodges v. State,* 111 Ark. 22; *Hawie v. State,* 121 Miss. 197, 10 A. L. R. 205. But an examination of these and other cases recognizing the applicability of *coram nobis* to such a situation reveals that one must be in such a mental condition as to be incapable of appreciating the importance of his trial and unable to properly prepare for it to avail himself of this remedy. If one is so mentally incompetent that he does not comprehend the peril he is in, he ought not to be tried. One who has become insane after the commission of a crime ought not to be tried for the offense during the continuance of the disability. Comp. St. 1929, sec. 29-1821. The allegations that the state's witnesses were hostile to him and that the worry incidental to the trial caused him to forget do not excuse the intentional or negligent omission to offer evidence of facts known to him at the time of the trial. The allegations do not bring the case at bar within the facts of *Franco v. State,* 98 Neb. 746, even if the reasoning of the case were applicable here. Franco was insane. Neither Carlsen nor his attorneys have alleged as a fact that he is insane. Until he does so plead, it is unnecessary for this court to consider the availability of the writ of error *coram nobis* as a remedy in such a case.

Lastly, the petition does not plead facts sufficient to sustain a charge of fraud on the part of the prosecuting officers of the state. The allegation in the petition following a recital of facts heretofore discussed states "that to permit said judgment of conviction to stand amounts to a fraud upon the rights of the defendant." This pleads a legal conclusion which is not admitted by demurrer. The conclusions of the pleader are not admitted by demurrer. *Dodson v. Woolworth Co.,* 118 Neb. 276; *Busboom v. Schmidt,* 94 Neb. 30. No fraud is admitted by the demurrer except that which is established by facts well pleaded. The argument in the reply brief is established by facts well pleaded. The argument in the reply

brief based upon *Mooney v. Holohan,* 294 U. S. 103, is extravagant and not supported by the facts pleaded. A general demurrer admits facts well pleaded. *Wright v. Schram,* 121 Neb. 775.

In conclusion, the writ of error *coram nobis* is rather more limited than formerly as a common-law remedy. It is never used where the Code provides a remedy. It is only available where there is no other remedy for a wrong. It is consequently very limited in scope. It might well be abolished by statute and a remedy provided by the Code. Its purpose is not, and never was, to permit a defendant to retry his case again and again. But, as pointed out heretofore, in certain cases, it provides a corrective judicial process that the Constitution guarantees shall not be denied.

The judgment of the trial court was a proper one and should not be disturbed.

AFFIRMED.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED MAY 17, 1935. No. 29246.

1. **Banks and Banking:** CHECKS. The drawee bank is deemed the place of final settlement of a check, where all prior mistakes, alterations, and forgeries shall be corrected, or noted, and settled once and for all.
2. ———: FORGED CHECK: PAYMENT. A drawee bank which pays a forged check to a *bona fide* holder for value and without fault, and which bank thereupon cancels the check and charges it to the depositor's account, cannot recover payment from said holder.
3. ———: ———: REPAYMENT. Repayment made by an innocent indorser, upon demand of a drawee bank, of the amount of a forged check, under a mistake of fact, believing that payment had been refused by said drawee bank, may be recovered by said indorser upon learning that in truth the drawee bank had paid and canceled said check, and charged it against the depositor's account.

4. **Insurance.** Payment of a forged check by a drawee bank constitutes a loss of said sum for which a bonding company is liable under a banker's blanket forgery and alteration policy.

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

Finlaysen, Burke & McKie, for appellant.

Gaines, McGilton, McLaughlin & Gaines, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

PAINE, J.

The United States Fidelity & Guaranty Company, plaintiff and appellee, brought action to recover $500 from the First National Bank of Omaha, defendant and appellant, on the ground that it had paid to the defendant $500 upon proof of loss under the terms of its bond protecting said defendant bank against loss on payment of forged instruments, whereas it had been fully reimbursed for said loss, which fact it concealed from the plaintiff.

In the petition it is alleged that the plaintiff, a Maryland corporation, is authorized to issue, and did issue, a policy of insurance known as bankers blanket forgery and alteration policy, by the terms of which the plaintiff agreed to indemnify the defendant against direct loss through payment by the defendant of any forged check or draft. That on October 9, 1928, defendant filed written proof of loss with plaintiff for that a forged check, dated October 5, 1928, was drawn upon the account of the Jerpe Commission Company of Omaha, payable at the First National Bank of Omaha, and bearing the forged signatures of its treasurer and president, said check being payable to Joe Fernald, and by him indorsed in blank, and that said proof of loss set out in paragraph 19 that indemnity or reimbursement on account of the forgery has not been received, either wholly or

in part, said proof of loss being duly executed on behalf of the First National Bank of Omaha by A. H. Chisholm, its assistant cashier; and the petition further alleged that on October 19, 1928, said defendant bank was reimbursed in full for all loss thereunder, and had no claim against the plaintiff on account thereof. That plaintiff company made diligent search and inquiry to determine the facts, but not until May 27, 1929, learned that the statements in the proof of loss were false and fraudulent representations and concealment by the defendant bank in that said bank had received the $500 in full and had suffered no loss. That the defendant bank filed its amended answer, admitting that it paid a forged check of the Jerpe Commission Company, purporting to be signed by G. C. Swanson and M. Olander, officers of said company, and gave due notice under the terms of its bond to the plaintiff company, and that plaintiff's agent requested defendant to attempt recovery of the amount paid on said check from the indorser thereon, and that defendant bank sent said check back to the Omaha National Bank, which bank returned it to the First National Bank of Lincoln, and the First National Bank of Lincoln collected $500 from the first indorser, but that said indorser had later demanded a return of the payment made from the First National Bank of Omaha, claiming that he had not known that said bank had actually paid the check, and thereupon the First National Bank of Omaha paid back to said indorser the amount of the check, and defendant bank denies that it was ever reimbursed or indemnified in any other manner, and asks that plaintiff's petition be dismissed.

It is quite necessary that the facts be set out in this opinion before discussing the law. Samuel L. Shostak testified that he had been in the poultry, egg and cream business in Lincoln for over 30 years; that Joe Fernald came into his office in a hurry, saying that he had to go to St. Joseph, Missouri, and asked him to cash this check of $500. He testified that Joe Fernald was the general manager of the Jerpe Commission Company in

Omaha, and had been coming to his office every week or so, representing that company in dealings in cream; that the check was made to this Joe Fernald, who told him that the bank would not cash the check, and thereupon Mr. Shostak indorsed his name under Mr. Fernald's name on the back of said check. It being a Jewish holiday, Mr. Shostak did not have time to go to the bank, as he was ready to go to church, but one of his men went to the First National Bank with Mr. Fernald, which bank thereupon cashed the check that day, to wit, October 6, 1928. Although Mr. Shostak had no knowledge of it at the time, the check was an absolute forgery, and Attorney Gaines, in his argument to this court, put the matter concisely by saying that this was perhaps the last act of Fernald, for he was run down, arrested as a crook, and landed in the penitentiary for this forgery.

The First National Bank of Lincoln sent this check to its correspondent, the Omaha National Bank, which bank gave credit to the Lincoln bank and sent it on through the Omaha clearing house to the First National Bank of Omaha, who received the same on the morning of October 8, and the amount was charged to the First National Bank of Omaha on the books of the Omaha clearing house. It was examined by the bookkeeper of the First National Bank of Omaha and charged to the account of the Jerpe Commission Company on October 8. The check was thereupon perforated with the "Paid" cancelation stamp of the First National Bank of Omaha.

It appears from the evidence that the Jerpe Commission Company is one of those firms against which a large volume of checks come in daily, so that they have their account balanced and get their checks from the First National Bank of Omaha each day, and received this check with many others on the morning of October 9. Shortly thereafter, in going through such checks the forgery was discovered by the Jerpe Commission Company, and the check was immediately returned by a messenger to the First National Bank of Omaha as a forgery; whereupon Mr. Chisholm, its assistant cashier, notified Mr.

Carroll, the claim adjuster of the plaintiff company, who took to said bank the blanks for executing plaintiff's exhibit No. 1, being a forgery proof of loss, which blanks were filled out and signed by Mr. Chisholm for the said First National Bank, the same having attached thereto an affidavit of G. C. Swanson, treasurer of the Jerpe Commission Company, and M. Olander, president of said company, describing the check and swearing that the same was forged. On October 24 the plaintiff company gave the First National Bank of Omaha its draft for $500, drawn on the Merchants National Bank of Baltimore, Maryland, in full payment of the claim, which was duly cashed by said bank. On October 9 the First National Bank of Omaha forwarded the forged check for collection to the Omaha National Bank, but no credit was given on the books of said bank to the First National Bank of Omaha. It was forwarded to the First National Bank of Lincoln by the Omaha National Bank, and exhibits Nos. 5 to 10, inclusive, show correspondence between the First National Bank of Lincoln and the Omaha National Bank, and on October 18 Leo J. Schmittel, junior vice-president, notified the Omaha National Bank that they had succeeded in collecting the $500 from the indorser. Whereupon, cashier's check No. 386877, drawn by the Omaha National Bank to the First National Bank of Omaha on October 9, which had been held pending payment by Shostak, was delivered to the First National Bank of Omaha on October 19, 1928, and on the next day cashed through the clearing house. It appears that Shostak at once took the matter up with his attorney, who made a trip from Lincoln to the First National Bank of Omaha, and demanded that that bank pay Shostak the amount of the forged check, as the bank had cashed it.

There appears in the evidence exhibit 2, attached to the deposition of Leo J. Schmittel, being a letter from A. H. Chisholm, assistant cashier of the First National Bank of Omaha, to Attorney Louis B. Finkelstein, of Lincoln, dated October 22, 1928, and reading as follows:

"With reference to your call at the bank here the

other day in connection with forged check of Jerpe Commission Company, No. 96849 for $500 payable to the order of Joe Fernald.

"We return the check herein, by registered mail, and will ask that you have your client return this check to the First National Bank of Lincoln and ask them to return it to the Omaha National Bank for reimbursement. The Omaha National Bank will, in turn, present the item to us and we will take the same up and make the proper demand for reimbursement from the insurance company.

"This procedure is necessary so as to have our claim in order when presenting to the insurance company for reimbursement.

"Please give this matter attention so that there will be no unnecessary delay in the matter."

The First National Bank of Lincoln, in accordance with this letter, paid Samuel L. Shostak $500 on October 25, and the First National Bank of Omaha, when the same reached that bank in due course, paid back the $500 and received the forged check. The defendant bank claims that it had thereby paid the forged check in question as fully and completely as if it had handed cash over the counter, and that it had no right of recovery from any indorser, and therefore claims that the plaintiff rightly reimbursed it. It also claims that Shostak's act in taking up the forged check on demand of the Lincoln bank was a voluntary payment, which he was not legally obligated to make, and having done so under a mistake as to the facts, he was entitled to recover the amount of such payment from the bank, and that, even though they held Shostak's $500 for a few days, the First National Bank was never actually reimbursed for the loss sustained by it in paying the forged check, and that the plaintiff was fully informed concerning all of the facts in relation to the Shostak reimbursement. Mr. Chisholm testified that Mr. Shostak's attorney threatened to bring suit, insisting that Shostak's payment was not voluntary and that he should have his money back, and that after the bank had

repaid the $500, when the forged check was returned to them the second time, he had a conversation with the claim adjuster of the plaintiff company, and said, in answer 508: "I told him we were threatened with a lawsuit unless we refunded the money to Shostak at Lincoln, and he said, 'That is all right, refund it, file your claim with us under your forgery bond, and we will pay the claim.'" Therefore, Mr. Chisholm refunded the money to Shostak and accepted payment of the claim from the plaintiff company. These facts Mr. Carroll absolutely denies, and testifies that he would not have delivered the draft to the bank if he had known that Shostak had paid the $500.

Testimony was introduced in regard to the rules of the Omaha clearing house, and defendant's exhibit No. 11 is a copy of section 13 of the constitution and by-laws of the Omaha clearing house, as adopted August 21, 1923, in relation to the hours of returning checks between members, and provides: "All checks received in the morning exchanges, not found good, are to be returned the same day to the member from which received before three (3) o'clock p. m." Under this clearing house by-law it was impossible for the First National of Omaha to return the forged check on the following day, October 9, when it was returned to said bank from the Jerpe Commission Company, and the transaction on this check was ended, so far as its presentation and payment were concerned.

At the close of the evidence the defendant moved the court for an instructed verdict in its favor, or, in the alternative, that the jury be discharged and judgment entered in its favor. Whereupon, the plaintiff joined in the motion to discharge the jury, but moved for a judgment for the plaintiff. In consideration of these motions, the jury were discharged, and the cause came on for hearing to the court. Whereupon, the court entered judgment for the plaintiff for $683.50, with interest at 7 per cent.

The errors relied upon for reversal are: That the judgment is contrary to law, and is not sustained by

sufficient evidence, and is contrary to the evidence; that the court erred in entering judgment for plaintiff, and in not entering a judgment for the defendant.

When a check has been paid and canceled by the drawee bank, and the amount is charged to the drawer's account, and credit given the account of the bank presenting the check, and the drawee bank fails to return the check to the presenting bank within the time allowed by the clearing house rules, it is considered paid for all purposes. This is because the drawee bank is deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled once for all, and if the forgery is overlooked and payment is made, it must be deemed final. The rule seems to be well established that a drawee bank which pays a forged check to a *bona fide* holder for value and without fault, cannot recover the payment from him. 5 Michie, Banks and Banking, sec. 269. It has been held that, although the rules of the clearing house provided that drawee banks might return checks at any time before 3 p. m., a bank can only do so where it has at no time debited the amount of the check against the account of the drawer. *First Nat. Bank of Philadelphia v. National Park Bank of New York,* 165 N. Y. Supp. 15.

The defendant bank calls our attention to the case of *Price v. Neal,* 3 Burrows (Eng.) 1355. This case was tried before Lord Mansfield at Guildhall, November 16, 1762. Two bills were drawn, which had been accepted and indorsed for a valuable consideration and paid, but both bills had been forged by one Lee, who was hanged for this forgery shortly thereafter. It appears that the defendant, Neal, acting innocently, and without the least privity or suspicion of the said forgeries, paid the whole value of those bills. The arguments of Mr. Stowe for the plaintiff are set out at length, and the argument of Mr. Yates for the defendant was begun, when he was stopped by Lord Mansfield saying that this was one of those cases that could never be made plainer by argument. He held that it was an action upon the case for money

had and received, in which the plaintiff could not recover the money unless it be against conscience in the defendant to retain it; that the defendant gave notice to the plaintiff of a bill drawn upon him; that he sent his servant to pay it and take it up, and then "lies by, for a considerable time after he has paid these bills; and then found out 'that they were forged;' and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side." It was held by Lord Mansfield that an innocent indorsee cannot be compelled to refund the money paid to him on a forged acceptance. This case was reviewed at length by Mr. Justice Story in *Bank of United States v. Bank of Georgia,* 10 Wheat. (U. S.) 333.

Dean Ames, in 4 Harvard Law Review, 297, shows that, while the rule adopted in *Price v. Neal, supra,* has been recognized in Europe and the United States, still there is no unanimity as to the reason for the rule. He says that the reason usually given is the negligence of the drawee, which prevents his recovery. But Dean Ames says the true principle is that, as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. Each paid in the belief that the instrument was genuine, but the holder has the legal title to the money.

We find another review of *Price v. Neal, supra,* by Prof. Aigler in 24 Michigan Law Review, 809, in which he says that Gibbs, C. J., in *Jones v. Ryde,* 5 Taunt. (Eng.) 488, said that in *Price v. Neal* the bill was paid by the person who of all others was the best judge whether the acceptance was his handwriting or not. Prof. Aigler says that only a few states have disapproved the doctrine, and only one state, Pennsylvania, provided a contrary rule by statute in 1849.

In another review of this famous case, in 24 Columbia Law Review, 469, it is said that when a bank pays a check it parts with its own money, and not the money of the depositor whose name is signed as the drawer. The bank may not charge the check to the depositor,

because the bank is bound to know the genuine signature of its customer.

As the bank paid the money under a mistake of fact, can it recover the money from the indorser? Since the decision in *Price v. Neal,* it has been settled that the bank could not recover. It is a rule of convenience, rather than logic or equity. The rule of *Price v. Neal* is the basis for that section of our negotiable instruments law set out in section 62-503, Comp. St. 1929. See Brannan, Negotiable Instruments Law (5th ed.) sec. 62.

Where a draft purported to be drawn by the acting quartermaster of the United States army upon the treasurer of the United States, who paid the same, Mr. Justice McReynolds held that the government could not, upon discovering that the same was forged, recover the sum paid by it on such draft to an innocent collecting bank. *United States v. Chase Nat. Bank,* 252 U. S. 485, 10 A. L. R. 1401. See, also, *State Bank of Chicago v. First Nat. Bank of Omaha,* 87 Neb. 351.

It has been held that, where a mistake of fact is due to the wilful or intentional neglect on the part of the person making the payment to investigate the facts, he should not be allowed to recover the money paid, for under such circumstances he would be estopped to allege that he was without knowledge, and therefore the negligence of a drawee of a forged bill of exchange in not discovering the forgery before payment is held to preclude him from recovery. 21 R. C. L. 167, sec. 196; *Smith v. Rubel,* 140 Or. 422, 87 A. L. R. 644.

The First National Bank of Omaha, drawee, having actually accepted and paid the forged check and canceled it, suffered the loss thereof. Shostak's voluntary payment of $500 was one he was not required in law to make, having made such payment by mistake, without knowing that the check had actually been paid and canceled by the drawee bank. He paid it upon the representation that it was returned unpaid by the bank because the signatures were forged. After Shostak had taken the check to the store he discovered for the first

time that the check had actually been canceled and paid by the drawee bank, and immediately consulted his attorney, who threatened suit in his behalf.

As a general rule, payment under a mistake of fact, which the payor was under no legal obligation to make, may be recovered back. 48 C. J. 759; *Billings v. McCoy Bros.*, 5 Neb. 187; 21 R. C. L. 167, sec. 196; *Douglas County v. Keller*, 43 Neb. 635.

We therefore hold that the payment made by Shostak was under a mistake of fact, and that he was legally entitled to recover the amount from the First National Bank of Omaha, which bank had the right to recognize this liability and repay the amount to Shostak, without suit.

This question being settled, it is plain that the defendant bank, having paid a forged check and suffered a direct loss thereon, was entitled, under its blanket bond, to recover the amount of its loss from plaintiff, United States Fidelity & Guaranty Company.

For prejudicial errors in the trial, and judgment in conflict herewith, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

W. CLAYTON CLARK, APPELLEE, V. JOSEPH HASS, APPELLANT.

FILED MAY 17, 1935. No. 29216.

Mortgages: FORECLOSURE: MORATORIUM. Where, upon a hearing on an application for a moratory stay of proceedings under section 20-21,159, Comp. St. Supp. 1933, it appears that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application.

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

Fred P. Komarek and *Bernard J. Klasek*, for appellant.

Robert R. Hastings, contra.

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

CARTER, J.

This suit was commenced to foreclose a real estate mortgage on 160 acres of land in Saline county. The land was in two tracts, one consisting of 120 acres and the other of 40 acres. The district court found that the appellee had a first lien upon the 120-acre tract which at the time of the sale amounted to $12,314.64, and that the appellee had a first lien upon the 40-acre tract which at the time of the sale amounted to $3,311.77. The court also found that there was a valid second lien against all of the lands mentioned, which at the time of the sale amounted to the sum of $3,491.38. The decree of foreclosure was entered on September 27, 1932. By stipulation, the appellant and mortgagor received a stay of proceedings for one year instead of the usual nine months' stay allowed by statute. After the expiration of the stay, the mortgaged land was sold under an order of sale. Before a confirmation of the sale was had, the appellant, Joseph Hass, as owner and mortgagor, applied for a moratorium staying further judicial proceedings until March 1, 1935, under the Nebraska moratory act. Comp. St. Supp. 1933, sec. 20-21,159. Under this statute, mortgagors were permitted by judicial order to retain possession of the mortgaged premises until March 1, 1935, on condition of paying rent and complying with other terms imposed by the trial court, unless upon hearing of the application, good cause is shown to the contrary. From an order denying the application and confirming the sale, the appellant brings this appeal.

The appellee contends that the trial court rightfully denied the application and confirmed the sale for two reasons: First, that the moratory act, section 20-21,159, Comp. St. Supp. 1933, is unconstitutional; and, second, that the mortgage indebtedness far exceeds the value of the land, and that under such circumstances the trial court was not required to grant the application.

It is conceded by counsel in the argument to the court, and the record so discloses, that the constitutionality of section 20-21,159, Comp. St. Supp. 1933, was not raised in the district court. It cannot therefore be considered on this appeal under the recent holdings of this court in *Bell v. Niemann,* 127 Neb. 762, and *Howarth v. Becker,* 128 Neb. 580.

The only question left for consideration is whether the trial court erred in denying the application for a moratorium under the facts in this case. The counter showing of the appellee discloses that the total amount of the liens against the mortgaged lands is $19,117.79. The land was sold for $15,626.41, which the court found to be a fair value. The appellant offered no evidence to dispute the fact that the value of the mortgaged real estate was less than the amount of the liens against it and we therefore assume that the appellant has no equity in the property at the present time. The question is whether the trial court must, as a matter of right, grant a moratory stay under section 20-21,159, Comp. St. Supp. 1933, where it appears that the mortgage security is of less value than the liens against it.

Under the moratory law the court is required to grant the stay therein provided for, "unless upon hearing on said application, good cause is shown to the contrary." In other words, does a showing that the liens against the mortgage security exceed its value constitute good cause to the contrary? The very purpose of the moratory act was to protect the interests of the mortgagors where, because of the existing emergency, their lands would be sold to satisfy mortgage liens of a much less amount than the value of the mortgagor's interest. But a mortgagor who has no actual equity in the land has no valuable interest to protect. The appellant quotes freely from the opinion in *Blaisdell v. Home Bldg. & Loan Ass'n,* 189 Minn. 422, and especially from the concurring opinion of Chief Justice Wilson therein. However, the language of Wilson, C. J., on page 434, in that case upholds our view of the law, viz.: "It follows that it is detrimental to the

public interest for our people to lose their valuable lands, improved or unimproved, at a time when the banks are closed and when it is impossible to find any one who will make a mortgage loan. Funds are simply not available regardless of the security offered. The plight of the landowner has been enhanced because of the depreciation in land values resulting in many cases of the land being worth less than the mortgage. In such case the mortgagor can have no legislative help."

There is still another reason why *Blaisdell v. Home Bldg. & Loan Ass'n, supra,* is not an authority in the case at bar. It must be borne in mind that the opinion of a court should be interpreted as a whole, and construed with reference to the facts on which it is based; the language used must be held as referring to the particular case and read in the light of the circumstances under which it was used and of the issues as framed by the pleadings. 15 C. J. 970. "Judicial precedents are valuable only in so far as they state definite rules for guidance in future similar cases. The authority of a former decision as a precedent must be limited to the points actually decided on the facts before the court." 15 C. J. 939.

In this connection it must be remembered that the evidence in *Blaisdell v. Home Bldg. & Loan Ass'n, supra,* as disclosed by the opinion in *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U. S. 398, showed, and the court so found, that the property covered by the mortgage was of the reasonable value of $6,000, and that it was sold at judicial sale under mortgage foreclosure for the sum of $3,700.98. In *W. B. Worthen Co. v. Thomas,* 292 U. S. 426, Chief Justice Hughes, in distinguishing the case of *Home Bldg. & Loan Ass'n v. Blaisdell, supra,* said: "But we also held that this essential reserved power of the state must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the

state, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the state is entitled to direct its legislation. Accordingly, in the case of *Blaisdell,* we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed."

Also, in *W. B. Worthen Co. v. Kavanaugh,* 55 Sup. Ct. Rep. 555, Justice Cardozo, in delivering the opinion of the court, said: "Upholders of the challenged acts appeal to the authority of *Home Bldg. & Loan Association v. Blaisdell, supra,* the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, *if there was a proper showing of necessity,* to stay the foreclosure of a mortgage, but only upon prescribed conditions. 'The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.' 290 U. S. 398, at page 445, 54 Sup. Ct. 231, 243, 78 L. Ed. 413, 88 A. L. R. 1481. None of these restrictions, nor anything approaching them, is present in this case. There has been not even an attempt to assimilate what was done by this decree to the discretionary action of a chancellor in subjecting an equitable remedy to an equitable condition. Not *Blaisdell's* case, but *Worthen's (W. B. Worthen Co. v. Thomas, supra),* supplies the applicable rule." (Italics ours.)

It can readily be seen that in a case where the value of the security is less than the amount of the liens against it, as in the case at bar, the decision in *Blaisdell v. Home Bldg. & Loan Ass'n, supra,* could not be a controlling

authority because of the wide variance of the facts in the two cases. We fail to see how there could be a "proper showing of necessity" if the applicant for the moratory stay had no valuable interest to protect. We hold in the case at bar, in the words of Justice Cardozo, that our statute contemplates "an equitable remedy to an equitable condition," and "Not *Blaisdell's* case, but *Worthen's (W. B. Worthen Co. v. Thomas, supra)*, supplies the applicable rule."

It was clearly not the intent of the legislature that every person should be entitled to a moratory stay as a matter of right, otherwise there would have been no occasion for the words, "unless upon hearing on said application, good cause is shown to the contrary," contained in the act. We therefore conclude that it must have been the intent of the legislature to relieve only such mortgagors as have an interest in their lands over and above the liens against them.

It was the intent of the legislature undoubtedly to afford relief to mortgage debtors who would lose valuable property because of the existing economic emergency. It was not its intention to keep mortgagors in possession of their lands irrespective of the fact that they had no valuable interest therein.

We hold, therefore, that the showing that the amount of the liens exceeds the value of the mortgaged lands is such a showing as may constitute good cause to the contrary within the purview of section 20-21,159, Comp. St. Supp. 1933. It is largely a matter of discretion on the part of the trial court after hearing the evidence and considering the circumstances of each particular case, and, in the absence of an abuse thereof, the judgment of the trial court will not be disturbed on appeal. The trial court did not abuse the discretion reposed in him by statute when he denied the application in the case at bar. The judgment of the trial court is right and the same is

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, APPELLEE, V. CARL C. CARLSEN ET AL., APPELLANTS.

FILED MAY 17, 1935. No. 29272.

1. **Mortgages:** EXTENSION: RATIFICATION. Where a trustee for bondholders of a real estate mortgage entered into an agreement for an extension of the maturity date of the mortgage without authority from the bondholders, and they subsequently, without objection, permitted copies of the extension agreement and new interest coupons to be attached to the original bonds, presented all of the coupons for payment as they fell due and received payment of the same, they thereby ratified the extension agreement and made it valid by adoption.
2. **Trusts.** It is the duty of a trustee to fully inform the *cestui que trust* of all facts relating to the subject-matter of the trust which come to the knowledge of the trustee and which are material for the *cestui que trust* to know for the protection of his interests.
3. ———. Where it appears that a trustee has practiced concealment, evasion or misrepresentation, thereby depriving the *cestui que trust* of material information relative to the subject-matter of the trust to his injury, the trustee, together with the persons participating in the wrong, may be required to respond in damages.
4. **Torts.** "The degree of participation in the commission of an actionable tort does not affect the extent of liability, and all persons who instigate, promote, encourage, advise, countenance, cooperate in, aid, or abet the commission of an actionable wrong by another are liable as principals to the party injured to the same extent and in the same manner as if they had performed the wrongful act themselves." *Dickinson v. Lawson*, 125 Neb. 646.
5. **Corporations.** The officers of a corporation are responsible for the fraudulent acts of the corporation in which they participate, 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.
6. **Trusts.** Every violation by a trustee of a duty required of it by law, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.
7. **Evidence** examined, and *held* insufficient to sustain the judgment in the amount rendered by the trial court.

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

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

Beghtol, Foe & Rankin, contra.

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

CARTER, J.

This is an action at law brought by the appellee, First Trust Company, as successor trustee of the Lincoln Trust Company, against the appellants for damages for the breach of a trust agreement in which the Lincoln Trust Company was named as trustee. The jury returned a verdict for appellee for $28,867, and judgment was entered for that amount. Each of the appellants filed a motion for a new trial, from the overruling of which this appeal is taken.

The record discloses that the Lincoln Trust Company was organized as a trust company with its principal place of business at Lincoln, Nebraska, and that its operations were directed and controlled by a board of directors, an executive committee, a loan committee and various officers including a president, vice-president and trust officer. The appellant Carl C. Carlsen was president, a director and member of the executive and loan committees. The appellant John A. Reichenbach was vice-president, a director and member of both committees heretofore mentioned. The appellant William R. Mellor was trust officer, a director and member of both committees; and the appellant Paul H. Holm was a director and member of the executive and loan committees.

The record further discloses that the Lincoln Safe Deposit Company was a corporation authorized to own and hold real estate. It was a holding company for the Lincoln Trust Company and was owned and managed by the officers, directors and stockholders of that company.

It appears from the evidence in this case that on June 30, 1919, the Lincoln Safe Deposit Company loaned Webb Kellogg the sum of $45,000 and took as security therefor a mortgage for a like amount on 480 acres on land in Dixon county, Nebraska, due March 1, 1925. The bonds accompanying the mortgage were sold to customers of the Lincoln Trust Company. This suit is brought by the First Trust Company for the benefit of the present owners of these bonds.

The mortgage contained the following provision: "And it is further agreed herein, by and between said parties, their heirs, devisees, administrators, executors and assigns, that whenever any of the bonds hereby secured, shall have passed into other hands than said mortgagee, by indorsement, assignment or otherwise, then and in that case, the Lincoln Trust Company, is hereby constituted a trustee, to demand payment thereof, both principal and interest; to demand payment also of any and all losses occasioned by or through insurance or otherwise; to bring actions at law for the recovery thereof; and to foreclose this mortgage for and on account of breach in its conditions; and when any money as above mentioned shall have come into the hands of said trustee, to disburse the same as required; and, generally, under said trust to do and to perform each and every act in respect of said indebtedness that said mortgagee could do and perform."

On January 12, 1920, Webb Kellogg sold the lands covered by the mortgage to J. F. Whittemore, subject to the mortgage lien of $45,000. On August 18, 1922, Whittemore conveyed said lands to the Farmers National Bank at Wakefield, subject to the $45,000 mortgage, and on January 31, 1925, the Farmers National Bank conveyed the land to R. H. Mathewson subject to the same lien. On February 2, 1925, Mathewson entered into an extension agreement with the Lincoln Safe Deposit Company whereby the loan was extended to March 1, 1930. The outstanding bonds were called in and a copy of the extension agreement and interest coupons for the additional five-year period were attached to the original bonds. The

interest coupons thus attached all bore the signatures of R. H. Mathewson and Elizabeth M. Mathewson. On February 26, 1925, Mathewson conveyed the land back to the Farmers National Bank of Wakefield subject to the mortgage of $45,000. The Farmers National Bank of Wakefield subsequently became insolvent and was placed in the hands of a receiver. On August 16, 1929, the receiver conveyed said lands to the Lincoln Trust Company for a consideration of $25 subject to the mortgage of $45,000. On March 1, 1929, a default in the payment of interest occurred and the same was advanced by the Lincoln Trust Company. On November 15, 1929, the Lincoln Trust Company conveyed the mortgaged premises to the Lincoln Safe Deposit Company subject to the mortgage for $45,000, but did not have the deed recorded. On or about March 1, 1930, some person connected with the Lincoln Trust Company caused certain coupons to be prepared bearing the unauthorized facsimile signatures of Webb Kellogg and Margaret Kellogg and caused them to be attached to the original bonds. Advancements were made to pay interest coupons falling due on and prior to September 1, 1931, but after this date no further interest was paid. On July 9, 1932, the Lincoln Trust Company and the Lincoln Safe Deposit Company were adjudged bankrupts by the United States district court, district of Nebraska. On September 7, 1932, the deed conveying the mortgaged premises from the Lincoln Trust Company to the Lincoln Safe Deposit Company was placed of record by the trustee in bankruptcy.

The appellee contends that it was the duty of all the appellants by virtue of their offices to deal honestly and fairly with persons having relations with the Lincoln Trust Company; to diligently protect the interests of beneficiaries of trusts; to abstain from profiting personally or from permitting the Lincoln Trust Company to profit from trust relations; and to conduct the business of the Lincoln Trust Company so as not to defraud beneficiaries of trusts. The allegations of the petition are to the effect that the appellants failed to perform the duties required

of them by law and the prayer is for the damages resulting to the beneficiaries of the trust.

The answers of the appellants allege in substance that the conveyance of the mortgaged premises to the Lincoln Trust Company was for the benefit of bondholders and that the holders of the bonds acquired and still have a valid lien on the premises; that the value of the security was in excess of the amount of indebtedness and that the extensions of the mortgage granted by the Lincoln Trust Company or the Lincoln Safe Deposit Company deprived the bondholders of no rights under the mortgage and therefore did not cause them a loss.

The reply denies that the security of the mortgage was not impaired or lost by the conduct of the Lincoln Trust Company and the Lincoln Safe Deposit Company; denies, also, that the mortgage is still a lien on the lands covered by the mortgage and that the bonds are valid and enforceable obligations; and alleges that by the fraudulent manipulation of said bonds by the appellants, as officers and directors of the Lincoln Trust Company and the Lincoln Safe Deposit Company, the bonds were avoided and the mortgage lien extinguished.

The evidence is not disputed that the original loan of $45,000 was made and the mortgage taken on the 480 acres of Dixon county land prior to the date that the appellants became officers and directors of the Lincoln Trust Company. The matter first came before them on or about March 1, 1925, when a five-year extension of the loan was applied for. The application for the extension was approved by the appellants Carlsen, Mellor and Reichenbach. The extension agreement was entered into with the then owner and copies of the same were attached to each of the outstanding bonds. Each of the coupons attached to the orginal bonds was signed by Mathewson and his wife as owners. They were all subsequently presented at the office of the Lincoln Safe Deposit Company and paid. It is clear that the bondholders did not authorize the extension of the loan from March 1, 1925, to March 1, 1930, but it is equally clear that they approved

and ratified the action of the trustee in so doing. A copy of the extension agreement was attached to each bond and there is no contention that the copies did not state the actual agreement. The bondholders accepted them without objection. The coupons attached were signed by the then owners and they showed that the owner was a different person than the original mortgagor. The bondholders accepted the coupons, retained them without objection, and subsequently presented them for payment and they were paid in full. The bondholders cannot now be heard to complain that the extension agreement was unauthorized and constituted a breach of trust. The unauthorized action of the trustee in extending the maturity date of the loan to March 1, 1930, was completely and fully ratified by the bondholders. It is therefore clear that the mortgage was a valid and enforceable lien at this time and properly extended to March 1, 1930.

The interest coupons were paid up to, but not including, March 1, 1929, by the owner of the security. The interest due on March 1, 1929, was not paid by the owner of the real estate, but the same was advanced by the Lincoln Trust Company. There was no duty on the part of the Lincoln Trust Company to make this payment of interest or of any of the subsequent payments that came due. The failure of the owner of the mortgaged lands to pay the interest on March 1, 1929, was a default under the terms of the mortgage and it became the duty of the trustee to follow the provisions of the trust agreement in protecting the beneficiaries of the trust. Bondholders were entitled to notice of this default, which they did not receive. The payment of the interest coupons by the Lincoln Trust Company effectually concealed from bondholders the fact that there was a default. The subsequent action of the Lincoln Trust Company and Lincoln Safe Deposit Company in causing unauthorized coupons to be attached to the original bonds further concealed the fact that the owner of the mortgage was not paying his interest. The Lincoln Trust Company was also advancing funds for the payment of

taxes and other items of expense, which fact was never communicated to the bondholders. It is clear therefore that the Lincoln Trust Company and the Lincoln Safe Deposit Company pursued a course of action that could have been very detrimental to the interests of bondholders.

In the case of *First Trust Co. v. Ricketts,* 75 Fed. (2d) 309, involving the same trustee as in the case at bar, Sanborn, J., summarizes a like situation in the following apt language: "The failure of the bankrupt to notify the bondholders of default and of the failure of the mortgagor to pay interest is attributable to only one thing, and that is the desire of the bankrupt to maintain a market for the securities which it was selling. * * * It might not be fair, upon this record, to say that the bankrupt in this case had dug a pit and was anxiously keeping the pathway to it in good order, but it is very apparent that it had no desire to place any obstructions in the beaten pathway to its door. Its advancing of interest to its customers is to be attributed to a desire on its part to preserve an unimpaired market for its mortgage bonds, rather than to a desire to confer a boon upon them by purchasing their interest coupons."

We find no evidence, however, that would sustain the theory of the appellee that the mortgage lien had been lost or that the bonds were void and unenforceable. We are therefore of the opinion, and we so hold, that the appellants are liable for any damages sustained by the appellee as trustee for bondholders in not foreclosing the mortgage after the default occurring on March 1, 1929, and for failure to give notice to bondholders of this default in order that they might have taken action to protect themselves had they so desired.

The duty of a trustee to the beneficiaries of the trust are concisely stated in 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1066, as follows: "The second branch of the trustee's obligation is to use care and diligence in the discharge of his functions. This duty is very comprehensive; it extends through the entire range of his

conduct; it is entirely independent of the question of good faith, for he will be liable for its failure even when no wrongful intent nor violation of good faith is charged upon him. He may be liable for its neglect by being held answerable for property actually lost through want of care or prudence, and also for moneys which he might have received if he had exercised due care, prudence, and judgment in his investments and other dealings with the trust estate."

The duty of the Lincoln Trust Company and the Lincoln Safe Deposit Company to the beneficiaries of the trust, as evidenced by the trust agreement already referred to, is quite analogous to the rules of agency thus expressed: "It is always the duty of an agent, as will be more fully seen hereafter, to fully inform the principal of all facts relating to the subject-matter of the agency which come to the knowledge of the agent, and which it is material for the principal to know for the protection of his interests. This duty, moreover, has a specific application in this connection which justifies a reference to it here. As has already been seen, it is absolutely essential, when an agent undertakes to sustain dealings with his own principal, that it shall appear that the agent frankly and freely gave to his principal full information respecting, not only the agent's relation to the contract, but also, the various conditions respecting time, value, situation, condition and the like, which may fairly be deemed to be material in determining upon the desirability of entering into the contract. * * * The law will not permit these important safeguards to be easily defeated. Hence it has been held that the rule that an agent who undertakes to act for his principal may not, without the latter's consent, in the same manner act for himself, cannot be avoided upon the authority of any local or temporary usage of which the principal was ignorant and which he had no reason to anticipate. * * * If, therefore, it does not appear that the principal was fully informed, and *a fortiori* where the agent has practiced concealment, evasion, or misrepresentation, the

transaction cannot stand." 1 Meecham, Agency (2d ed.) secs. 1207, 1220, 1221.

The appellee contends that, when the Lincoln Trust Company took title to the mortgaged lands, it became the owner and the mortgage was then merged in the fee title causing a loss of the security to the bondholders. The contention is also made that the purpose of the Lincoln Trust Company in taking title in itself was eventually to pay off the mortgage with its own funds, sell the land to reimburse itself and retain any excess as a profit to the company. To this we cannot agree. This same proposition was raised in the case of *First Trust Co. v. Ricketts, supra,* in which the court in that case said: "It is possible that the bankrupt intended to take title to the mortgaged real estate, to pay the carrying charges, and eventually to pay off the bonds out of its own funds and to sell the land for its own reimbursement, keeping any profit which might accrue from a sale. The fact is, however, that the bankrupt was trustee for the bondholders, that it bore toward them a relation of trust and confidence which the law would not permit it to violate, and that it could not acquire an interest in the trust property adverse to them." The trustee, under the provisions of trust agreement authorizing foreclosure in the event of a default, was authorized to take title to the security for the benefit of the bondholders. The fact that the security was subsequently conveyed to the Lincoln Safe Deposit Company can make no difference in view of our holding herein that, for the purposes of this suit, the Lincoln Trust Company and the Lincoln Safe Deposit Company are in effect identical. As between the bondholders on the one hand and the Lincoln Trust Company and the Lincoln Safe Deposit Company on the other, the relation of trustee and *cestui que trust* has, at all times herein mentioned, been existent and the lands securing the mortgage which were conveyed to the trustee were at all times thereafter held in trust for the benefit of the bondholders.

It might be argued that the appellants Mellor, Reichenbach and Holm had no knowledge of the default of interest occurring on March 1, 1929, and for that reason no liability could attach to them. The facts show, however, that on or about March 1, 1930, the matter of the Kellogg loan was before the loan committee consisting of the four appellants. The evidence is clear that all of the facts pertaining to this loan could have been obtained by them within a very few minutes. Instead of making any kind of an investigation, they approved the attaching of additional coupons when they well knew, or should have known, that an extension agreement had not been entered into. This conduct in directing the affairs of the trustee corporation was a fraudulent concealment of the facts pertaining to the loan which they were under obligation to communicate to the bondholders. In approving the attaching of the unauthorized coupons, they thereby aided and abetted in the concealment of the default occurring on March 1, 1929, and became liable for all damages occurring because thereof.

It has been held by this court in the case of *Dickinson v. Lawson,* 125 Neb. 646, as follows: "The degree of participation in the commission of an actionable tort does not affect the extent of liability, and all persons who instigate, promote, encourage, advise, countenance, cooperate in, aid, or abet the commission of an actionable wrong by another are liable as principals to the party injured to the same extent and in the same manner as if they had performed the wrongful act themselves." In the case of *Ashby v. Peters,* 124 Neb. 131, this court has held: "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."

A breach of trust has been defined as follows: "It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudu-

lent, 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. This broad conception of breach of trust, and the liabilities created thereby, are not confined to trustees regularly and legally appointed; they extend to all persons who are acting trustees, or who intermeddle with trust property." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1079.

The facts pertaining to the defaults of interest were not known to the beneficiaries of the trust because of the fraudulent concealment hereinbefore stated. When the Lincoln Trust Company and the Lincoln Safe Deposit Company were adjudicated bankrupt, the beneficiaries of the trust for the first time discovered the fraudulent course of action pursued by these appellants. In this connection, it will be remembered that, as already noted, the Lincoln Trust Company and the Lincoln Safe Deposit Company were identical as to stockholders, ownership, officers and control. They were merely two instrumentalities which the same persons controlled and made use of in effecting the present course of action and in carrying out the fiduciary relations involved therein, created by the mortgage indenture of June 30, 1919. We are of the opinion that the reasoning and principle announced by Rose, J., in *Enos v. Hanff*, 95 Neb. 184, are applicable to the case at bar, viz.: "In a business sense the interests of the controlling factors in both corporations are identical. Where the financial interests * * * are thus united, the court, in furtherance of a public policy established by the legislature, will look beyond the legal entity of a corporation to the relations of the individuals behind it and enforce the law according to its terms." See, also, *State v. Interstate Power Co.*, 118 Neb. 756, and cases cited therein.

The testimony in the instant case, examined from the point of view herein suggested, is certainly ample to sustain the allegations of the petition alleging the employment by appellants of a fraudulent device and ample to justify the submission of the case to a jury.

We are of the opinion that the evidence shows a breach of duty on the part of the Lincoln Trust Company as trustee in the instant case. We are also convinced that the evidence sustains the proposition that the appellants all encouraged, promoted, aided, abetted and cooperated in the course of action that resulted in such breaches of trust. The only question remaining is whether the evidence, viewed in the light of what we have heretofore said in this opinion, will sustain the judgment of $28,867 entered by the trial court.

We are convinced that the damages, if any, suffered by the beneficiaries of the trust were those occasioned on and after March 1, 1929, the date of the default on the first interest payment which the trustee failed to communicate to the bondholders. As has already been said, the lien of the mortgage was at all times valid and enforceable. The bondholders were, however, deprived of the right to foreclose because of the fraudulent concealment of defaults in the payment of interest on the part of these appellants until on or after July 9, 1932, the date that the Lincoln Trust Company and the Lincoln Safe Deposit Company were adjudicated bankrupts. The evidence of the value of the security in 1919, 1922, and 1925 was immaterial and improperly admitted. If the bondholders suffered a loss in their security between March 1, 1929, and the date of filing this action, because of delay in the commencement of the foreclosure proceedings brought about by the fraudulent conduct of these appellants, they are entitled to recover such damage. The evidence of George J. Adams, called as a witness for appellee, is to the effect that the lands secured by the mortgage had a market value of $19,200 to $24,000 in 1930. The witness Adams fixes the market value at the date of the trial at $19,200. The witnesses

called by appellants fix the value in 1930 at $48,000. None of the witnesses called testified to market values in 1929. No competent evidence was offered tending to show damages except losses sustained by the depreciation of the security. Clearly, there is no evidence in the record which under any logical theory could sustain a judgment of $28,867 in the instant case. Under the evidence adduced, the judgment is clearly excessive.

We, therefore, hold that the judgment is not sustained by the evidence and the same is hereby reversed and the cause remanded for a new trial.

REVERSED.

LILLIE J. KINGSLEY ET AL., APPELLANTS, V. CLARA E. NOBLE ET AL., APPELLANTS: MARY E. KLONE, APPELLEE.*

FILED MAY 17, 1935. No. 29170.

1. **Husband and Wife:** ANTENUPTIAL CONTRACTS. Under the statute, antenuptial agreements for the purpose of settling the rights of one in the property of the other between persons contemplating marriage are recognized as lawful and enforceable, provided they meet the requirements of equity.
2. ———: ———: CONSTRUCTION. "A court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements." *Rieger v. Schaible*, 81 Neb. 33.
3. ———: ———: VALIDITY. Where a husband before marriage, without consulting his prospective wife, employs a lawyer to prepare for him an antenuptial agreement, and, when such agreement has been prepared and is ready for signature, brings the wife to the office of the scrivener without informing her that such an agreement is in existence, has the same hurriedly read to her and obtains her signature thereto without her having an opportunity to ascertain the legal effect thereof, or without her knowing what her rights under the law would be, a contract entered into under such circumstances is not fairly procured as required by equity.
4. ———: ———: ———: BURDEN OF PROOF. "Where the

*Opinion vacated. See p. 808, *post*.

provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case the marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place." *In re Estate of Enyart*, 100 Neb. 337.

5. ———: ———: EQUITY. After entering into an antenuptial contract where the property conveyed to the wife in consideration of the same has been sold by her and a part of the proceeds used for the support of herself and husband during the existence of the marriage relation, and after the death of the husband she challenges the validity of such contract, a court of equity which holds such contract unenforceable will require the wife's estate to be charged with the repayment of any balance from the proceeds of the sale of the property conveyed to her under such contract.
6. **Contracts:** EQUITY. Equity will not permit a person to affirm that part of a contract which is beneficial and disaffirm as to the part detrimental.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed as modified.*

G. M. Spurlock and *W. W. Wyckoff*, for appellants.

Sandall & Webster, contra.

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

CHASE, District Judge.

This is a suit in partition which involves the validity of an antenuptial agreement entered into between the testator and his prospective wife. The trial court found the contract to be null and void; recognized the widow's election to take under the law; and found that she had an undivided interest in the estate of the deceased notwithstanding the contract; but charged her interest with the payment of $2,000, a sum which she had received for some land conveyed to her in consideration of the contract.

From the finding that the contract is null and void, the plaintiffs and all of the defendants except the widow appeal, and from that part of the decree charging the widow's estate with the payment of $2,000, the widow prosecutes a cross-appeal.

The facts are substantially as follows: Hermon H. Klone, the testator, and the defendant Mary E. Klone, were married on the 4th day of August, 1915. The testator at that time was 72 years of age, and his widow was then 56. This was the testator's third marriage. He had a number of children by the first marriage and a number by the second marriage. His second wife died in 1915, some three months before this marriage. During the active years of his life he pursued the occupation of a farmer, and through industry and economy was able to accumulate quite a substantial estate, most of which consisted of real property. He had retired from the farm and had been living in the city of York as a retired farmer for some time before his third marriage, and continued to live in York until the time of his death. Mary E. Klone, before her marriage to the testator, had been previously married in the state of Illinois. Subsequently, with her husband and family, she moved to York county, where her husband, a tenant farmer, died about the year 1901, leaving her with some small children and practically no estate. After her husband's death she moved with her family to Omaha, where by labor and saving she kept the family together, giving the children an opportunity for education until nearly all had reached maturity and some had married. Some of her children, in the meantime, had moved to York and Polk counties. Later she left Omaha and made her home with her children, spending most of the time with a daughter near Polk, Nebraska. Immediately previous to her marriage with the testator, she was staying with her married daughter, Mrs. Brott, in York, and while at the Brott home she met the testator, which acquaintance, within a very short time, culminated in marriage.

The testator appears to have been a farsighted, shrewd

and successful business man, capable not only of producing wealth but safeguarding it against loss or dissipation. When his marriage with this defendant became imminent, presumably in order to preserve his estate intact for his children, on his sole initiative, he procured a very skilful and prominent lawyer to prepare for him the antenuptial contract involved in this proceeding. He had informed his lawyer of his matrimonial intentions and plan to retain his estate subject to his control and disposition. This all occurred some days previous to the date of the marriage. Pursuant to his desires the contract in question was drafted. It bears evidence of the skill of the draughtsman, being worded and phrased with the precision of a common-law indictment. It is as follows:

"These articles of agreement, made in duplicate at York, Nebraska, this 4th day of August, 1915, by and between Hermon H. Klone, a widower at the age of 72 years and a resident of York county, Nebraska, party of the first part, and Mary E. Downey, a widow of the age of 56 years and a resident of Polk county, Nebraska, party of the second part, witnesseth:

"For, that, whereas a marriage is shortly intended to be had and solemnized between the said parties; and whereas the first party is the owner of a quarter section of land in Washington county, Colorado, of the value of about $1,500, and also of about four hundred acres of farm land in York county, Nebraska, of the value of about $60,000, and also of a homestead estate together with an undivided one-third interest in the fee of a certain dwelling-house and the land upon which it is situated in the city of York, Nebraska, of the value of about $3,000, and also grain, live stock and household and other chattel properties of the aggregate value of about $5,000:

"And, whereas, the first party accumulated said property in the past with the aid and assistance of his first wife and his children by her, and which the second party has had no part in accumulating, and which, together with the hereafter acquired property of the first party, it is hereby agreed and understood should and shall in justice and

propriety and as a matter of antenuptial contract between the parties, with the exception only of said quarter section of land in Colorado, go to the other heirs of the first party, and to his devisees, grantees and vendees as he shall choose and elect wholly divested of any and all right, interest or estate of the second party therein by reason of her marriage with the first party, and which it is hereby understood and agreed by the parties hereto shall be and remain at all times hereafter in the exclusive, several and separate control and ownership of the first party in all respects the same as though he had remained and were an unmarried person:

"And, whereas, the children of both the parties are all of them adults and the parties do not wish to be under the necessity of seeking a home and companionship in the homes of any of their children, they, the parties hereto, contemplate said marriage for the sole purpose of establishing a home of their own wherein they may have the convenience, comfort and companionship of each other, but they do not, by said marriage, intend to endow or confer upon each other any of the usual interests, estates and marital rights in the property and estate of each other:

"Now, therefore, in consideration of the premises and of the conveyance by the first party to the second party of said lands in Colorado, to wit: The northwest quarter of section twenty-eight (28) in township three (3) north, range fifty (50) west of the sixth principal meridian in Washington county, Colorado, the receipt of which conveyance is hereby acknowledged by the second party, it is agreed that if the intended marriage shall take place and effect, that during the married life of the parties hereto, all the property of the first party, which he now has or hereafter may acquire, both real, personal and mixed and wheresoever situate, shall be held and owned by him separately and severally in all respects as though he were an unmarried man, and wholly divested of all rights, interests and estates of the second party by reason of her marriage with him, and that the second party shall and

will permit and suffer the first party to give, grant and dispose of his said property which he now has or hereafter may acquire, or any part thereof, as he shall see fit in his lifetime, and to make such will, conveyance or other writing as aforesaid as he may desire, and thereby to give, convey, devise or limit his said property, or any part or parts thereof, to any person or persons, for any use, trust, intent or purpose whatsoever, and if necessary to satisfy the requirements or demands of the first party's vendees and grantees, the second party will and shall, whenever requested or required by the first party, join with him in the execution, acknowledgment and delivery of all such deeds, conveyances, mortgages, bills of sale, and all other writings concerning said property, or any part or parts thereof, as the first party may require.

"It being the spirit and intent of the contract to give to the first party, after such marriage, full and complete control over his said property which he now has or hereafter may acquire, with power to sell and dispose of the same, or any part or parts thereof, without let or hindrance from the second party, and that upon the death of the first party, the second party shall not have, take or inherit any of the property of the deceased, or have any interest or right by way of dower, homestead or award, or by reason of the statutes of descent and distribution, or by reason of said marital relation, in or to the same or any part thereof, but the said property shall, in default of a will, go and descend to the other heirs of the first party the same as though the second party had never been his wife.

"And the parties sign and deliver this instrument simultaneously with the delivery by the first party to the second party of a due conveyance to her of said Colorado lands, in the presence of H. G. Hopkins and W. L. Kirkpatrick, and after this contract has been carefully read and explained to the parties, and each of them, by the said H. G. Hopkins who is not of counsel for either of the parties nor interested in this contract, but who has read and explained it and signed it as a witness at the request of the parties.

"In the presence of
"W. L. Kirkpatrick Hermon H. Klone
"Harry G. Hopkins Mary E. Downey.
"State of Nebraska, York county—ss:

"On this 4th day of August, 1915, before me, Harry G. Hopkins, the duly elected, qualified and acting county judge in and for said county, came Hermon H. Klone and Mary E. Downey, to me personally known to be the identical persons described in and whose names are affixed to the foregoing instrument as the makers thereof, and they severally acknowledged said instrument to be their voluntary act and deed and the voluntary act and deed of each of them.

"Witness my hand and the seal of the county court of York county, Nebraska.

"Harry G. Hopkins, County Judge.
"(Seal County Court of York county, Nebraska.)"

On the day before the marriage, Mrs. Klone was staying with her daughter at Polk, Nebraska. The testator on that day went from York to Polk, where he stayed overnight, and while there it was arranged between the parties that they should be married on the following day at Seward, Nebraska. They left Polk on an early train, and while on the train between Polk and York the testator, for the first time, informed his prospective wife that he desired to stop in York to have some papers executed, without informing her of the purport thereof. The testator was the owner of a quarter section of land in Colorado, and he told her, while on the train, that he wanted to deed this land to her, but, according to her testimony, said nothing as to any other instruments that he proposed to have executed. They arrived at the lawyer's office in York shortly after noon on the wedding day. While there the antenuptial contract was produced, hurriedly read to the widow and executed. Only about fifteen minutes were consumed in the whole matter. The contract was prepared and ready for execution some time before the wife knew anything about its existence. She had no opportunity of employing or advising with counsel as to her rights, and had little or no

knowledge of a wife's interest under the law in the property of the husband.

The parties lived together as husband and wife from the marriage until the husband's death, which occurred in 1933. The husband executed a will, which was duly probated, but the widow filed her election to take under the statute. In the will he made a bequest to her of $1,500.

The lawyer who drafted the contract testified that it was read to the parties by the county judge before signature. The county judge testified that he had no recollection whatever of reading the contract to the parties. The widow testified in one place that she thought she knew what interest she would take under the law in case of marriage, but was not informed or told by anybody that day what her interest would be. Later she testified that she knew nothing of what interest in the husband's estate the law gives the wife in case of his death, and had no information upon that subject until after the contract was signed.

Antenuptial contracts have been before this court for consideration on a number of occasions. The attitude of the courts, not only in this state, but elsewhere, seems to be that no definite rule can be adopted applicable to all such agreements; that each contract must stand or fall according to the particular facts and circumstances surrounding it. However, the courts hold that certain things are essential to support the validity of these contracts: First, they must be fairly entered into; second, the terms must be just and reasonable; third, the property provided for the prospective spouse must bear a just and reasonable proportion to the estate of the prospective husband; fourth, the husband must make a full disclosure as to his property. *In re Estate of Enyart,* 100 Neb. 337; *In re Estate of Maag,* 119 Neb. 237. It is lawful under our statute for parties, before marriage, to enter into a contract to bar the respective rights in the property of each other. Section 30-106, Comp. St. 1929, provides:

"A man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or

wife by a contract made in lieu thereof before marriage. Said contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made."

Equity, in construing these contracts, looks beyond the mere terms thereof and takes into consideration the atmosphere and surroundings under which the contract was entered into. No doubt the reason equity regards the rights of the parties so jealously under the circumstances is because of the peculiar relationship that exists between them. In the whole realm of human relations we are aware of no incident where more trust and confidence exists than when two parties agree to enter into the matrimonial state. Especially does a woman place all her faith in the honor and affections of the man in whose keeping she is about to deposit her future happiness. From him she ordinarily keeps no secrets, and she believes he withholds none from her. While under the influence of such ecstatic anticipation, she is quite often deprived of the normal ability to provide for her future security, or to insist upon the preservation of her full legal rights. The law views the institution of marriage as a thing too sacred to be regarded as an article of commerce upon a bargain counter or the subject of barter and sale, in which parties deal at arm's length. The legal effect of contracts of this character cannot be ascertained by fixed and definite rules of interpretation, or their scope determined by any common method of measurement.

"Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured, will be set aside; and one whose terms are grossly inequitable, especially if involving unreasonable sacrifice of the wife's rights, can only be sustained upon very clear proof of concurrent intent." Schouler, Husband and Wife, sec. 360.

In antenuptial contracts a provision for the benefit of the wife "should be characterized by the utmost good faith,

free from fraud on the part of the husband, and the provision for the wife should be reasonably proportionate to the means of the husband. If these essentials are lacking, the settlement may be set aside in equity. The parties to an antenuptial contract do not deal at arm's length, but they occupy a confidential relation to each other, and while they may lawfully contract with each other, when there is full knowledge of all that may materially affect the contract, yet if the provision secured for the intended wife is disproportionate to the means of the intended husband, it raises a presumption of fraud or concealment, throwing upon those claiming in the husband's right the burden of disproving the same." Tiffany, Persons and Domestic Relations, Hornbook Series, sec. 86.

The rule applicable to the construction of contracts of this character makes it incumbent upon the husband or his representatives to show that an antenuptial agreement, apparently unjust to the wife, was fairly procured. *In re Estate of Enyart, supra; In re Estate of Maag, supra.* By the appraisement the testator placed upon his property in the contract, his estate was then of the value of $69,500, of which, in consideration of the wife entering into the same, he gave her the Colorado land valued at $1,500. She was, by a designing husband, hurried into this arrangement, having little or no knowledge of what her rights would be under the law in case of marriage. The provision made for the wife, according to the valuations put in the contract, is slightly more than one forty-sixth of his estate. This amount, as we view it, was so grossly disproportionate to the value of his entire estate as to make the contract unjust.

The representatives of the testator having failed to assume the burden of establishing that the contract was fairly procured, the same is therefore ineffectual to bar any rights of inheritance on the part of the wife. In so far as the validity of the contract is concerned, the case is affirmed.

As to the matters presented by the cross-appeal, it appears that the widow sold the Colorado land for $2,200,

part of which was used during the marriage relation by herself and husband to satisfy obligations that the law would cast upon the husband, thus relieving him from the payment thereof. It appears further that there remains as a balance from the original consideration of the Colorado land to the credit of the widow the sum of $1,160. Since the wife challenges the validity of the contract under which she originally acquired the $1,160, equity will not permit her to retain any moneys derived therefrom. In equity a party will not be permitted to affirm a contract as to a part beneficial to such person and disaffirm as to a part detrimental. Her estate, therefore, should be charged with the payment of $1,160. With this modification of the case presented by the cross-appeal, the same is

AFFIRMED AS MODIFIED.

CARTER, J., dissenting.

The record in this case shows that the deceased, Hermon H. Klone, died on January 5, 1933, leaving a will in which he disposed of all of his property. Lillie J. Kingsley, a daughter of the deceased, brought this suit to obtain a partition of the real estate devised by the will. Mary E. Klone, the widow of the deceased, filed an answer alleging that she had elected not to accept the provisions of the will and to take under the statute. The reply sets up the antenuptial contract as a bar to her claim of right under the statute, which contract is set out in full in the majority opinion in this case. Mary E. Klone filed a pleading denominated a reply to the reply in which she alleged the antenuptial contract to be void and of no force and effect for the reason that the same is unconscionable, unfair, inequitable, fraudulent, and not honestly and fairly made. From a decree holding the antenuptial contract to be null and void, the case was brought to this court for review.

The appellee was the third wife of the deceased and was not the mother of any of his children. The deceased had seven children by his first wife and seven by the second. At the time appellee married the deceased, she was 56 years of age and had four children by a former marriage. The deceased was 72 years of age at the time of his mar-

riage to appellee on August 4, 1915. The evidence shows that appellee was without means of support at the time of her marriage to Klone except for her ability to work as a housekeeper. She testifies that she first met Klone at the home of one H. W. Brott who recommended Klone to her as a prospective husband. Appellee testifies Klone called on her at least four times prior to their marriage. On the day of the marriage, Klone and his prospective wife stopped at the office of W. L. Kirkpatrick in York, Nebraska, where the contract in question was executed. At the same time a deed was executed by Klone to appellee conveying a quarter-section of Colorado land.

The evidence other than the statement contained in the antenuptial contract itself, as to the circumstances surrounding the execution of this agreement, is very conflicting. It shows that W. L. Kirkpatrick, the attorney who drew the contract, was present, and H. G. Hopkins, the county judge of York county, was also called in. These were the only persons present other than the contracting parties.

W. L. Kirkpatrick testified in substance as follows: That he had prepared the antenuptial contract and the deed to the Colorado land as attorney for Hermon H. Klone; that H. G. Hopkins, the county judge of York county, was called in to take the acknowledgments, which he did; that Judge Hopkins read the contract to the appellee before she signed it; after the reading, she was asked if she desired to ask any questions, to which she replied, "It isn't necessary, that's the agreement I have with Mr. Klone, anyhow I understand it;" that the contract was then signed, witnessed, acknowledged and delivered; that the deed to the Colorado land was executed and delivered to appellee at the same time and the transaction closed. The testimony of Kirkpatrick is that he is confident, but not positive, that it was explained to appellee the interest she was relinquishng in Klone's property.

The testimony of Judge Hopkins was to the effect that he witnessed and acknowledged the contract, but that he could not recall the conversations that took place at the

time, or whether or not he had read the contract to the appellee.

The testimony of appellee was that she was told that she was to sign a deed to the Colorado land that Klone was conveying to her; that she did not understand what the transaction was; that the contract was not read by any one to her; that she did not know the extent of Klone's property or the interest she relinquished therein, and that Klone had never talked to her about such an agreement until they were in Kirkpatrick's office.

It is further disclosed by the record that after the execution of the contract the appellee was given a copy. She admits that she had it several months and read it over many times, but made no complaint to any one until the lips of her husband were sealed by death more than 17 years later. Two years after her marriage, and after being fully acquainted with the provisions of the antenuptial contract, she conveyed the Colorado land and kept the proceeds in a bank in her own name. The evidence also shows that, shortly before the death of Klone, the appellee and one Elenor Aiden took him to the bank and attempted to get possession of the antenuptial contracts for the purpose of destroying them. The bank officers, because of the then physical and mental condition of Klone, refused to turn the papers over, and, in lieu thereof, called Klone's attorney who efficiently protected his interests.

That the deceased made a fair disclosure of his property in the contract cannot be denied. The Colorado land was valued therein at $1,500 and it was sold two years later by the appellee for $2,200. The total assets of the deceased were valued in the contract at $68,000 and they were appraised when his estate was probated in the sum of $35,986.88. The record also shows that appellee received $1,000 from the deceased some time after their marriage which she put into a home that she now owns. In addition thereto, she received $1,500 and all of his household goods and furniture, except a piano and one bed, under the provisions of his will. In addition to all of this, she was provided for until Klone's death in a home which

appellee admits was very comfortable. Under this statement of the evidence, did the trial court err in declaring the antenuptial contract null and void? I am of the opinion that he did.

The right to make an antenuptial contract is granted by statute. Comp. St. 1929, sec. 30-106. That the marriage of the contracting parties was a sufficient consideration is not disputed. There is no question but what the deceased made a full and fair disclosure as to the extent of his property in the contract itself. The contention of the appellee that the contract was not read and that she did not understand it is without merit, in my opinion, in the light of all the evidence. The evidence of Kirkpatrick is that it was read and explained to her. Hopkins does not dispute the testimony of Kirkpatrick, though his evidence is of little help. The evidence shows, however, that Hopkins was a friend of the appellee of long standing and that she had absolute confidence in him. The deceased had never met him before. This is at least an indication that Klone was fairly and honestly making the contract, and that he was not the grasping and designing husband that the appellee would have the court believe him to be. Her subsequent action in examining the contract and making no complaint is consistent with Kirkpatrick's testimony that she said, at the time of the execution of the contract, when asked if she had any questions to ask, "It isn't necessary, that's the agreement I have with Mr. Klone, anyhow I understand it." It is to be borne in mind that these contracting parties had met only four times prior to their marriage. Apparently the intention of each was to procure a home without the necessity of imposing on their respective children in their declining years. That the contract was a strict business proposition and not made while the appellee was under the influence of any "ecstatic anticipation" is fully borne out by the record. Can it be said that, if the deceased had lost all of his property after this marriage and prior to his death, this contract could have been set aside on the part of the heirs of the deceased? Any court would hold that it was a valid contract

made for the protection of the widow under those circumstances. Have we reached the point in our jurisprudence where a widow may successfully elect whether she will take under an antenuptial contract or under the statute? Such would seem to be the import of the holding of the majority opinion. Two previous wives and fourteen children by them helped to accumulate this property. The deceased had a right to take this into consideration in making the contract in question. Under such circumstances, the wife is not in a position to demand such a large proportion of his estate as she might if there were no children or no previous wives. I am convinced, under the evidence and circumstances of this case, that the amount given appellee therein was not so disproportionate as to void the contract or place the burden of proof on the deceased and his representatives to uphold its fairness. This conclusion is supported by the recitals in the contract itself, over the signature of the appellee, which show that the contract was honestly and fairly entered into and that she was properly advised of her legal rights. This being true, it becomes the duty of this court on a trial *de novo* to reverse the holding of the trial court.

It might be said that the contract is void for the reason that it was not explained to appellee the interest she was relinquishing in Klone's property. It will be borne in mind that a full and fair disclosure of the extent of Klone's property was made to appellee. Under such circumstances, there is no requirement that appellee be advised as to the value of the rights relinquished. This is the law in many jurisdictions, including our state.

In *Robbins v. Robbins,* 225 Ill. 333, it was said in the opinion: "It is conceded by counsel for complainant that she was fully informed as to the amount of property owned by her prospective husband and of every fact and circumstance material to the contract, but he contends that she is entitled to avoid it because she was not fully and correctly informed as to her legal rights. She had full information as to the property of Robbins and there was no actual fraud inducing her to execute the contract. Mrs.

Bennett told her that if she did not sign the contract she would get nothing, but this information was given through ignorance of the law. None of the parties knew that the marriage would revoke the will of Robbins and there was no actual fraud inducing her to execute the contract. * * * Robbins died in the belief that the will was valid. After his death probate of the will was refused because it had been revoked by the marriage. Mere ignorance of the law in that respect would not be sufficient to avoid the contract."

In the case of *In re Estate of Enyart,* 100 Neb. 337, the case relied upon in the majority opinion, it was held: "Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case a marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place." It will be noted that the rule therein set out is in the alternative. A full disclosure of the property of the husband must be made *or* she must be informed of the nature, character and value of the estate she relinquishes. This is on the theory that if she is acquainted with the facts she is presumed to know the law applicable thereto. Having concluded that the appellee was fully advised of the nature and extent of Klone's property at the time the contract was made, there was no necessity, in order to uphold the contract, to explain the nature and value of the rights relinquished in the absence of evidence that she was fraudulently misled as to the law.

This contract should be upheld on the theory of an estoppel. The appellee remained silent for over 17 years after knowing all the facts. The husband died in the honest belief that it was a binding contract. He made additional provision for her by gift and in his will. The

appellee accepted and retained the property obtained by the contract. She waited until the death of her husband before she ever voiced any objection of any kind with reference to the contract. Might it not be reasonably supposed that the stilling of the husband's voice was necessary before appellee could prove the semblance of a case? "A party cannot accept and retain the benefits of a contract of marriage settlement and at the same time maintain an action based upon the ground of its invalidity." 30 C. J. 663.

In *Erb v. McMaster*, 88 Neb. 817, this court said: " 'The parties not only intermarried pursuant to the contract, but, as long as the wife lived, both she and her husband, the plaintiff, believed they had a valid contract, and acted upon and treated it as such. The wife lived and died in that belief, and paid out her money and made her will accordingly. Plaintiff accepted $330 of her money, and gave a written receipt acknowledging that he received it on said contract, and still keeps and retains said money and makes no offer to return it. It was not until his wife's death that he doubted the validity of the contract, which he wrote with his own hand. The court is of the opinion that good faith and common honesty require that he should still abide by the contract, now that she is dead. In good conscience he is estopped to do otherwise. The part performance which will take an oral contract out of the statute is such conduct as will amount to an equitable estoppel against the party who would resort to the statute to defeat the oral agreement. *Brown v. Hoag*, 35 Minn. 373; 4 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1409. Plaintiff's wife, relying upon the antenuptial agreement, married the plaintiff, paid a large sum of money to plaintiff, which he otherwise would not have received until after her death, made her will disposing of the rest of her property to those whom she desired to have it, and then died, thus putting it out of his power to put her in the position that she would have occupied had he not induced her to do such things, relying upon said contract; and, while admitting the contract, he now seeks to repudiate it

by invoking the statute of frauds. It seems to me it would be a fraud upon the dead as well as the living to permit him to do so.' No offer is made in the petition to return to the personal representative of the deceased (who is a party to the suit) the money paid on the contract. A tender was made at the argument in this court, which was too late to be effectual. Mrs. Erb disposed of her property and died with the knowledge that plaintiff had accepted the benefit of the contract by the receipt of the money paid him thereunder. She cannot change this disposition, and the other party should not be permitted to do so. The money was paid plaintiff in lieu of his interest in the real estate, and its acceptance and retention bars him in equity. Even if the contract were wholly invalid, which we do not decide, under these circumstances, the plaintiff is estopped to allege its invalidity." This holding was cited with approval in *Eberhart v. Rath,* 89 Kan. 329. We believe these cases to be controlling in the case at bar.

It will be borne in mind that there is no evidence in the record showing a rescission of the contract and tender of the benefits received under it. In fact, the appellee by her cross-appeal is still claiming the funds obtained as a part consideration for the contract. In my opinion the appellee is estopped from claiming the antenuptial contract to be null and void.

Under the evidence and circumstances of this case, I can perceive no reasons of public policy why this contract should not be enforced. Public policy almost demands that it should. The court in *Stilley v. Folger,* 14 Ohio, 610, in discussing a like case, said: "Antenuptial contracts have long been regarded as within the policy of the law, both at Westminster and in the United States. They are in favor of marriage and tend to promote domestic happiness, by removing one of the frequent causes of family disputes, contentions about property, and especially allowances to the wife. Indeed we think it may be considered as well settled, at this day, that almost any *bona fide* and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or

a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery. Though, for many purposes, by the marriage, the legal existence of the wife is merged in that of her husband, the law recognizes her legal and separate identity and her separate rights; and she may preserve the one and enforce the other, in contracts of this character." The Illinois court, in the case of *McGee v. McGee,* 91 Ill. 548, stated the situation in the following language: "The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could, with great propriety, make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide the contract. Our opinion is, the fair construction of the antenuptial agreement is, that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seised." Both of the above cases were cited with approval by this court in *Rieger v. Schaible,* 81 Neb. 33. In my opinion, the reasoning contained in these authorities sustains the contentions of the appellants in the case at bar.

For the reasons herein stated, the antenuptial contract set out in the majority opinion should be enforced. If this contract cannot be upheld after considering all the facts and circumstances of the case, section 30-106, Comp. St. 1929, might as well not have been written; it has become ineffective by judicial rules and the will of the legislature has been defeated.

ROSE, J., concurs in the above dissenting opinion.

PAINE, J., dissenting.

I fully concur in the above dissenting opinion. The antenuptial contract set out in the main opinion in this case is in model form, was carefully drawn, and deals fairly

with both parties under all the circumstances disclosed. Having the parties execute it before the county judge, supposed to be impartial in the matter, was an added precaution, in the hope that its validity would be unquestioned. An old man, marrying his third wife after only four social calls, doubtless felt a moral duty to protect the many children of his two marriages in the rights which they had in his property accumulated in part by the assistance of the older children.

In general, the purpose of a marriage settlement, as I view it, is that before the marriage the parties may, with some deliberation, decide and settle what the rights of each shall be in the property respectively owned by each of them. By such an agreement a prospective wife, who longs for a home and the companionship and protection of a successful man, may well decide that property is but an incident, and not the primary purpose of her approaching marriage, and may wisely enter into an agreement which will convince the adult children of former marriages that she is not what is spoken of in common parlance as a "gold digger," but that she is anxious merely for a happy home and comfort. The family relationships may be far more pleasant under such conditions, and it is not unusual for such a prospective wife to be willing to take far less than what might be an exact mathematical division founded on cold, legal rights.

A wife may, and often does, convey to her husband all of her property; why should it be deemed fraudulent if a prospective wife is modest in her demands upon his property in an antenuptial contract?

The consideration for such forbearance is the marriage, which may be desired above all else by a widow, and is a consideration of the highest value in law. From the earliest times it is said that courts look with favor upon such contracts *(Neves v. Scott,* 9 How. [U. S.] 196), yet, in these later times, it seems almost impossible to have one approved by our supreme court; it appears strange that, in the opinion of the majority of this court, lawyers should fail, in case after case, in drawing these contracts.

The main opinion appears to consider chiefly the property interests involved, and to be concerned with whether the amount of property reserved to the intended wife is "grossly disproportionate" to what she might have secured under the law.

Our court has held that, if it is fairly and equitably made, and entered into in good faith, it will not be disturbed after the death of one of the parties. *Neneman v. Rickley,* 110 Neb. 446. See *Rieger v. Schaible,* 81 Neb. 33, 16 Ann. Cas. 700; *Erb v. McMaster,* 88 Neb. 817; *In re Estate of Maag,* 119 Neb. 237.

I insist that in the case at bar there was no romance whatever; an old gentleman, with many children by two marriages, wanted a housekeeper; a mutual acquaintance brings them together; she had been working out in different families, and had found that housekeeping for hire was drudgery, and dependence upon her children had its drawbacks, and she wanted a home.

Seventeen years later, after he had faithfully carried out his part of the contract, and had died, she discovers that the antenuptial contract was a fraud upon her rights.

Equity and good conscience ask, why did she not attempt to set it aside while her husband was still living and could have protected the rights of his children and grandchildren?

I insist that other considerations, rather than a purely mercenary view of money and lands, may in some cases be the controlling motive, and the survivor should be held to abide by an antenuptial contract fairly and legally made.

WATERBURY STATE BANK, APPELLEE, V. JOHN S. O'NEILL ET AL., APPELLANTS.

FILED MAY 17, 1935. No. 29250.

1. **Fraudulent Conveyances:** VACATING: BURDEN OF PROOF. In a creditor's suit to set aside a conveyance by a debtor to his wife alleged to have been made in consideration of money turned over by the wife to the husband many years before, the burden

is upon the wife to show that the debt is genuine, that her purpose was honest, and that she acted in good faith in obtaining the title.

2. **Appeal.** In a trial *de novo* of an equity action, this court, in determining the weight of evidence, will consider that the district court has the advantage of observing the witnesses.
3. **Fraudulent Conveyances:** CONVEYANCE FROM HUSBAND TO WIFE. The court will carefully scrutinize a conveyance from husband to wife by which other creditors are prevented from collecting their claims, will consider the fact that knowledge probably rests solely with the parties to the transaction, and will take into account reasonableness or unreasonableness of their evidence, their manner of testifying, and all facts and circumstances in evidence bearing upon the *bona fides* of the transaction.
4. ———: JUDGMENT: PROOF. Where the creditor's suit is brought in the same county as the judgment upon which it was founded was obtained, it is not necessary to allege and prove that the judgment was indexed and docketed. It is sufficient to allege and prove the judgment.
5. **Creditors' Suit:** PARTIES. In a creditor's suit, all parties interested in the controversy or who may be affected by the judgment or decree should be made parties.

APPEAL from the district court for Dixon county: JAMES M. FITZGERALD, JUDGE. *Affirmed in part, and reversed in part.*

P. F. Verzani and *D. Van Donselaar,* for appellants.

Kingsbury, Kingsbury & Kingsbury, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

LIGHTNER, District Judge.

Creditors' bill by plaintiff bank to set aside a deed and two mortgages. The judgment of the district court was for plaintiff and all defendants have appealed. On September 15, 1931, John S. O'Neill gave his note of $2,645 to the bank which represented the amount he then owed it, which indebtedness had been in existence for a number of years. This note was payable on demand, and on January 30, 1933, the plaintiff secured a $3,003.50 judgment there-

on, upon which execution was issued and returned *nulla bona* prior to bringing this suit.

The deed which the bank seeks to set aside is one given by the defendant John S. O'Neill, to his wife, Mary Ellen O'Neill, on the 28th day of January, 1932. The mortgages are a mortgage of $1,500 given to the defendant Verzani on May 25, 1932, by the O'Neills and assigned to and now owned by defendant Van Donselaar, and a mortgage of $400 given by them to defendant Verzani on the 28th day of May, 1932. The O'Neills were married May 13, 1913, at which time Mr. O'Neill was the owner of the 160 acres of real estate here in question, which had been given to him by his father, but subject to a $3,000 mortgage against it. The first mortgage at the time of trial of this suit amounted to $3,500.

The stated consideration for the deed from John S. O'Neill to his wife is $500 and their claim now is that Mrs. O'Neill had about $350 when they were married and that she inherited $150 from her grandfather a number of years later, both of which sums were turned over to her husband, with the agreement that any time she wanted the money and he could not give it to her he would give her a deed to the land. She claims further that she did not know that her husband was indebted to the bank, although he first began to borrow from it in 1915, and that the transaction by which she got the land was *bona fides*. It appears from the evidence that Mr. O'Neill made a number of property statements to the bank in and about the time in question, in none of which he mentioned this alleged indebtedness, except that the last one made on September 15, 1931, the day he gave the note, referred to "incidental debts" of $500; that his wife knew considerable about his business affairs; that she checked on his account at the bank, had access to his safety box, made out some of his reports while he was administrator of his father's estate, frequently visited the bank, and in the winter of 1931-1932, while her husband was sick, advised it that he was not able to come at the particular time they had requested him to come in, but would do so later. She states

that she earned the $350 during three years teaching, but does not state the wages she received, nor how she was able to save that amount during the three years. She refers to banks in which the money was kept, but does not produce any records to show that she ever had accounts in the banks referred to. No change in the apparent possession or management of the farm was made after the purported deed. Some questions that were asked of her were not answered and in some cases her answers were evasive or at least hesitant and apparently for the purpose of enabling her to decide what her final answer would be, as witness the following: "Q. Where did you have that money? A. I had it. Q. Whereabouts did you have it? A. I had it with me. Q. Did you have it at home? A. (No answer.) Q. Where did you keep it? A. Well, I kept part of it, maybe a part of it at the Waterbury State Bank and part in the Jackson State Bank. Q. That is the money you let John have? A. $350 of it. Q. Did you give him a check on the Waterbury State Bank? A. No; I didn't, not a check. I came and drew it out when I was married; I think I drew it before I got married, I mean. I am not just sure what time of the year I did draw it, but I had it when I was married."

The burden to establish the *bona fides* of this deed was upon the grantee. The district court held that she did not sustain this burden, and a careful analysis of the evidence convinces us that the district court was right. In *Flint v. Chaloupka,* 78 Neb. 594, it is said: "The indebtedness claimed by the wife represented alleged advancements to her by her father * * * and an inheritance from her father. * * * We cannot say, as a matter of law, that the relationship of debtor and creditor existed between husband and wife when the note was executed and delivered to her. * * * The defense may be true, but it is not shown by clear and satisfactory evidence. * * * If the record contained any written evidence, or testimony of disinterested witnesses corroborating the testimony of the Chaloupkas, we would not hesitate in affirming the judgment. As it is, the *bona fides* of the transaction remains in doubt,

and we are required to resolve that doubt against the parties upon whom the law has placed the burden of proof." And in another place in the same case it is said: "It is a well-established rule that, where a transfer of land is made by a debtor to a near relative in consideration of a past-due indebtedness, the burden rests upon the grantee in a creditor's suit to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. Such transactions are looked upon with suspicion, and the suspicion continues until the grantee shows the good faith of the transfer by clear and satisfactory evidence. Generally, when the transaction is in fraud of creditors, knowledge thereof rests only with the near relatives, or others in privity with the debtor. When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion." See, also, *Meighen v. Chandler*, 20 N. Dak. 238, and *Eggleston v. Slusher*, 50 Neb. 83.

If Mrs. O'Neill had a claim against her husband, she did not assert it, but permitted him to obtain credit from the bank because of his apparent ownership of the land. The district court had the advantage of observing the witnesses; even the typewritten record shows a failure on Mrs. O'Neill's part to answer questions that were propounded to her. Many things were left unexplained that should have been explained. Mrs. O'Neill failed to sustain the burden of proof which the law imposes upon her.

In appellant's brief the further claim is made that an additional consideration was the payment by Mrs. O'Neill of certain debts of her husband. A sufficient answer to this contention is that these alleged payments apparently were not in the minds of the parties when the deed was given to her. The consideration mentioned in the deed is $500 only. Furthermore, there is the possibility that the district court found that these alleged payments of $245 to Leonard O'Neill, Mr. O'Neill's brother, and $1,105 to George W. Teller, Mrs. O'Neill's father, were fictitious. At least Mr. O'Neill never revealed any such indebtedness

in any of his property statements, and neither Leonard O'Neill nor George W. Teller testified, nor is there anything in the record to justify the court in finding that there was any actual indebtedness or any actual payment of these two amounts. It is true that the record shows that these persons went into the bank with Mr. and Mrs. O'Neill, and that they added their names to the indorsement, but it does not clearly show that they got the money, or, if they did get it in the bank, that they continued to retain it.

There does not seem to have been any valid consideration for the $400 mortgage to Mr. Verzani, and the district court was fully justified in setting it aside. It is claimed that part of this was for Mr. Verzani's fees in acting as an attorney for Mr. O'Neill in settling his father's estate. Mr. Verzani did not testify and it does not appear from the record why Mr. O'Neill personally assumed this indebtedness for which his father's estate was liable. The other alleged consideration was commissions for obtaining the $1,500 loan from Mr. Van Donselaar, but again the record is void of any evidence as to what a reasonable consideration for such service would be. Other services are referred to, but there is not even a hint what they were except a reference to this suit which had not then been filed.

The district court also set aside the $1,500 mortgage now owned by Mr. Van Donselaar and for which he claims he paid $1,500. It appears from the record that the O'Neills applied to the bank for a $1,500 loan and were unable to obtain it; that they then went to their attorney, Mr. Verzani, and asked him to procure that amount for them; that he took the matter up with Mr. Van Donselaar, and that Mr. Van Donselaar inspected the land, ascertained the amount of encumbrances against it and decided to make the loan if Mr. O'Neill would also give a chattel mortgage on the personal property then on the farm; that thereupon Mrs. O'Neill and her husband executed the $1,500 mortgage on May 25, 1932, to Mr. Verzani, and Mr. O'Neill on the same day executed to Mr. Verzani a $1,500 chattel

mortgage covering live stock on the farm and growing crops; that the parties then met in Sioux City, Iowa, on the 27th day of May, 1932, at which time Mr. Van Donselaar received an assignment of the $1,500 mortgage on the real estate to Mr. Verzani and gave therefor to Mr. and Mrs. O'Neill three checks, one for $150 upon which the O'Neills got the money, a $245 check upon which it is claimed Leonard O'Neill got the money, and $1,105 check upon which it is claimed George W. Teller, Mrs. O'Neill's father, got the money. It is further claimed that Mr. O'Neill owed his brother Leonard and his father-in-law these sums. The only suspicious circumstances connected with this transaction are the fact that Mr. Verzani, who apparently knew about the affairs of the O'Neills, was acting also for Mr. Van Donselaar, and the further fact that two of these checks were made to cover indebtedness which might have been fictitious; that is, the $245 and $1,105 checks above referred to. The district court might have come to the conclusion that, while these checks were made out and probably cashed, Mr. Van Donselaar actually did not part with any money permanently. It does not seem likely to us that Mr. Van Donselaar, a comparative stranger to the O'Neills, would enter into such an elaborate scheme to defraud the plaintiff bank. No motive is shown. The burden of establishing that this was a fraudulent conveyance was on the plaintiff. At most it seems to us the evidence justifies a suspicion that Mr. Van Donselaar was acting with the others in a scheme to defraud. It appears just as likely that he made the loan in good faith and that in making the loan he relied upon the then condition of the title which was in Mrs. O'Neill. Appellees refer to an Iowa case (*Brittain Dry Goods Co. v. Plowman,* 113 Ia. 624) where a mortgage given for a present loan was held void as to creditors. An examination of the facts in that case show a purported loan from one brother to another, but there were many suspicious circumstances, and the court in that case say: "It is at least doubtful whether the last money hired was ever paid to the mortgagor, but, regardless of whether this was done, the circumstances were

such as to put appellant, as an ordinarily prudent man, on inquiry concerning the purpose of G. W. Plowman in executing the mortgage." Then follows in the opinion a statement of the various suspicious circumstances which would put the mortgagee on inquiry, none of which, in so far as we can see, exist in this case. Here it appears that Mr. Verzani went to Mr. Van Donselaar and solicited a $1,500 loan for the O'Neills. He would have no occasion to tell Mr. Van Donselaar the trouble the O'Neills had had with the bank; in fact, he would be more likely to get the loan if he told Mr. Van Donselaar nothing about such matters. Mr. Van Donselaar then looked at the farm and concluded to make the loan. He knew from some source that the title was in Mrs. O'Neill, and there were no suits pending against either Mr. or Mrs. O'Neill; the bank at that time not having reduced its indebtedness to judgment or begun to do so. Mr. Van Donselaar then advised Mr. Verzani that he would make the loan, and Mr. Verzani procured the mortgage and assigned it to Mr. Van Donselaar in exchange for the $1,500. The law presumes that all men act honestly. It does not appear that Mr. Van Donselaar was connected with any fraud and the decree setting aside his mortgage will have to be reversed.

There was a sharp difference of opinion as to the value of the land, plaintiff's witnesses placing it at from $75 to $100 an acre, and defendants' at from $30 to $35 an acre. The weight of evidence justifies a finding that there may be an equity above the first mortgage, Mr. Van Donselaar's second mortgage and the homestead interest.

Appellants insist that a cause of action is not stated because plaintiff did not allege that the bank's judgment was docketed and indexed in the county where the land lies. The case cited by them (*Thies v. Thies,* 104 Neb. 248, *id.* 111 Neb. 805) was where a judgment was obtained in Douglas county and the creditors' bill was brought in Keith county. Here it is established that the judgment was rendered in Dixon county, execution was issued thereon in Dixon county and returned unsatisfied, and the land lies in Dixon county. This is a sufficient foundation for the

creditors' bill. See, also, *State Bank of Ceresco v. Belk*, 68 Neb. 517. The rule laid down in *Metz v. State Bank of Brownville*, 7 Neb. 165, and *German Nat. Bank of Beatrice v. Atherton*, 64 Neb. 610, is for the protection of innocent purchasers and has no applicability here.

Defendants also claim that there was a misjoiner of defendants and causes of action, but the general rule is: "All parties interested in the controversy, or who may be affected by the judgment or decree rendered therein, should be made parties." 27 C. J. 750.

Affirmed as to deed and Verzani mortgage, reversed as to Van Donselaar mortgage.

AFFIRMED IN PART, AND REVERSED IN PART.

EMMA WULF, APPELLEE, V. WILLIAM H. WULF ET AL., APPELLANTS.

FILED MAY 24, 1935. No. 29277.

1. **Husband and Wife:** ANTENUPTIAL CONTRACTS. "A court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it." *Rieger v. Schaible*, 81 Neb. 33.
2. ———: ———: CANCELATION: BURDEN OF PROOF. Where each party to an antenuptial contract knows, or is properly chargeable with knowledge of, the extent and value of the other's property, a disproportion between the contractual provision for the wife and the amount allowed by the statute of descent does not shift to the husband the burden of proving a full disclosure in an action wherein the wife demands the cancelation of the contract on the ground of fraudulent concealment on his part.
3. ———: ———. Under the facts outlined in the opinion, the antenuptial contract copied therein *held* not void on the ground that the husband had not fully disclosed in advance the nature and extent of his property or on the ground of an unfair disproportion between the contractual provision for the wife and the amount allowed by the statute of descent.
4. ———: ———: CONSIDERATION. In an antenuptial contract,

the mutual release by each party of all interest in the farm lands of the other is a sufficient consideration as to both parties.

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

Baldwin & Baldwin and *Sloans, Keenan & Corbitt,* for appellants.

P. I. Harrison, Walter C. Weiss and *Hall, Cline & Williams, contra.*

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

ROSE, J.

This is an action by Emma Wulf, plaintiff, for the partition of 410 acres of land in Thayer county, near Deshler, of which her husband, Henry Wulf, died seised September 21, 1932, without leaving a will. The action was commenced April 14, 1933, while the estate of decedent was in the course of settlement; William H. Wulf being administrator. Intestate, Henry Wulf, in addition to plaintiff, his widow, left surviving him William H. Wulf and Albert F. Wulf, sons, and Alma Wulf and Clara Wulf Ehlers, daughters. These sons and daughters were adult children by the former wife of decedent. Henry Wulf was the third husband of plaintiff. She was not the mother of any of his children, but had three living children of her own as the issue of her first marriage. The sons and daughters of decedent are defendants. The administrator, the wife of William H. Wulf, the wife of Albert F. Wulf, and the husband of Clara Wulf Ehlers are also defendants.

Plaintiff claims an undivided one-fourth interest in the 410 acres of land described in her petition and that each of decedent's sons and daughters is entitled to three-sixteenths thereof. The relief sought by plaintiff depends upon the invalidity of an antenuptial contract, a copy of which follows:

"Antenuptial Contract

"This agreement made and entered into on this 24th day of December, 1927, by and between Henry Wulf, a

widower, of Deshler, Thayer county, Nebraska, and Emma Harms, a widow, of Deshler, Thayer county, Nebraska.

"Witnesseth: That the parties to this contract have agreed to become man and wife and each of said parties have property and heirs at law and that each of them desire to keep their own property in their own name and that the separate property now owned by each of them shall descend to the lawful heirs of said parties just as it would *to* had this intended marriage not been contracted.

"It is hereby agreed by each of said parties that in case the said Henry Wulf shall depart this life leaving the said Emma Harms a widow that she shall have his town property valued at about $5,000 located in Deshler, Nebraska, being the home of the said Henry Wulf.

"It is further agreed that no part of the property belonging to either of the parties hereto shall descend to the other except the homestead hereinbefore described and each party to this contract hereby releases all estate, personal property and real estate belonging to each other and waives any claim that either of them might have on the property of the other and that the property of each of them shall descend to their respective heirs except the town property which is especially given to Emma Harms.

"This agreement shall be binding upon the executors, administrators and heirs of each of the parties hereto.

"Witness our hands and seals the day and the year last above written.

"In the presence of:

"J. P. Baldwin	Henry Wulf
"Doris McDonald	Emma Harms."

This contract was signed by the parties to it, acknowledged by them before a notary public and officially recorded December 24, 1927. Its validity was put in issue by formal pleadings.

Upon a trial of the cause the district court canceled the antenuptial contract as void, confirmed in plaintiff title to the undivided one-fourth of the land in controversy as her share under the statute of descent and ordered a partition as prayed in her petition. Defendants appealed.

Propositions argued by plaintiff in support of the decree canceling the antenuptial contract which she made with Henry Wulf before they were married may be summarized for the purposes of a trial *de novo,* as follows: The provision made for her was grossly disproportionate to the amount she would have received from his estate under the law, if the antenuptial contract had not been made. She was not aware of the nature, character and value of the estate she was relinquishing when entering into the antenuptial contract. A full and fair disclosure of the character, extent and value of Henry Wulf's property was not made before she signed the agreement. It was obtained by concealment and actual fraud. The burden was on the persons relying upon the validity of the antenuptial contract to prove that a just and fair disclosure was made to plaintiff before she signed it.

On the other hand, defendants contend that there was no evidence of such gross disproportion as to cast on them the burden of proving a full, fair and timely disclosure of the value, extent and character of decedent's property; that the antenuptial contract should not be set aside in equity without competent evidence that a full and fair disclosure of the extent, character and value of the property was not made; that the written instrument should not be canceled without competent evidence that plaintiff was not aware to all intents and purposes of the nature, character and value of the estate relinquished by her in the event of marriage; that invalidity of the contract was not proved; that it is valid and prevents partition at the suit of plaintiff.

The validity of an antenuptial contract depends upon the circumstances of each particular case. The rule in equity has been stated as follows:

"A court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all

antenuptial arrangements." *Rieger v. Schaible,* 81 Neb. 33, 57. Followed in *In re Estate of Enyart,* 100 Neb. 337.

In the light of the circumstances surrounding this particular case, as shown by a preponderance of the evidence, does equity require the cancelation of the antenuptial contract? The agreement into which the parties entered does not on its face create any suspicion of fraud. Each party had real estate to protect from the heirs of the other. The contract was mutual. Courts of equity have sometimes exalted the antenuptial contract as a benign aid to domestic happiness. In a case upon which plaintiff relies to sustain her position the supreme court said:

"Such instruments frequently tend to peace and happiness by settling questions concerning rights of property which, especially in the case of marriage of people in later life having children of a former marriage, often furnish grounds of irritation and friction which may defeat the very purpose of the union." *In re Estate of Enyart,* 100 Neb. 337.

The rules of equity applied in that case were not intended to create an easy method of destroying such a contract, without substantial reasons, after death has terminated the marriage relation.

Plaintiff and Henry Wulf were engaged to be married before they executed their antenuptial contract. He was about 62 years of age and she was past 50. He had four adult children by a former wife and she had three by her first husband. The contracting parties were farmers residing in the same neighborhood. He had 410 acres of land. Adjoining, or near, she had a farm. She was an aunt of his first wife and had lived all her adult life in the same vicinity; had frequently passed his farm on her way to church of which both were members; had often visited his home on his farm when his first wife, her niece, was alive. After the death of his first wife, he called at the home of plaintiff three times. During the first call he proposed marriage. Later they became engaged. In the situation outlined, they called at Hebron, the county seat, upon J. P. Baldwin, a lawyer in good standing. His testi-

mony and proper inferences therefrom disclose the following facts: They called at Baldwin's home December 24, 1927, when he was ill. Later, the same day, they appeared together in his office, pursuant to arrangement, and asked him to prepare the instrument in controversy, saying neither was to have property of the other, except that plaintiff was to have the Wulf home in Deshler. They talked about the effect of the contract and were told by the attorney for both that "both were waiving a fourth interest in the other's estate when one of them died." They said at the time they knew each other's property. Henry Wulf said in her presence he paid $4,200 for the home she was to get and had built a garage and improved the house. The written instrument was read to both parties. While plaintiff, testifying in her own behalf, contradicted the testimony of her attorney in some respects, the evidence shows her memory was not good. She could not remember details of many important affairs of her life, about which she was interrogated. She admitted she asked Henry Wulf in advance how much he would give her and said he had answered, "everything," but all she claimed he had promised her was the Deshler home and $2,000. The advice of their counsel was available to her. For many years she had opportunity for acquiring knowledge of the extent and value of the property in controversy. After entering into the contract, she had a home with Henry Wulf in Deshler from December 24, 1927, until September 21, 1932. She preserved her own estate for herself and children. She had access to the antenuptial contract; examined it a year and a half after her third marriage; had a disagreement with her third husband over the $2,000 she said he had agreed to give her; called upon her relatives at a family meeting to aid her in obtaining redress; left her Deshler home for a few days; refused temporarily to return without her husband's recognition of her additional claim; did not sue to reform the contract; returned to him at his request with the contract unchanged and lived with him until he died. From proceeds of the sale of her own farm, after her marriage to Henry Wulf, she received over

$2,000 for herself and $1,000 for each of her three children. The value of decedent's farm land, as estimated by witnesses best qualified to testify, did not exceed $45,000. It was not scattered in different states or counties. It was within the range of plaintiff's vision practically all her adult life. Its extent and value could not have been concealed from her. She could have been a competent witness to testify to the value of her own adjoining land. Under the circumstances, Henry Wulf had good reason to assume her knowledge of the extent and value of his 410 acres of land was equal to his own. If she did not know the value of the Deshler home, he told her what he paid for it and mentioned improvements. In the antenuptial contract it was valued at $5,000, a fair estimate. There is nothing in the record to show that the personal property owned by Henry Wulf exceeded his personal obligations to any considerable extent. He performed his written agreement with plaintiff and his marriage contract as long as he lived. After his death the administrator and the children tendered her a deed for the Deshler home. There was no such disproportion in values under the facts of this case as to cast on the children of decedent the burden of proving a more complete disclosure than that made, in view of plaintiff's knowledge. A preponderance of the evidence does not prove fraud or unfairness or violation of duty invalidating the antenuptial contract. The mutual release by each party of all interest in the farm lands of the other was a sufficient consideration as to both parties. *In re Estate of Enyart,* 100 Neb. 337. In law and equity under the facts, plaintiff is bound by her agreement as made and it defeats her claim for one-fourth of the farm lands of which her husband, Henry Wulf, died seised.

For the reasons stated, the judgment of the district court is reversed and the action in partition dismissed.

REVERSED AND DISMISSED.

JOE BACHMAN ET AL., APPELLEES, V. RUSSELL J. JUNKIN, APPELLANT.

FILED MAY 24, 1935. No. 29284.

1. **Bills and Notes:** ACCOMMODATION MAKER. An accommodation party is one who signs an instrument as maker, without receiving value therefor and for the purpose of lending his credit to some other party.
2. **Banks and Banking.** Unless especially authorized so to do, a bank cashier has no authority to release, otherwise than in due course of business and on payment, the maker of a promissory note payable to the bank.
3. **Trial:** DIRECTION OF VERDICT. The trial court may properly direct verdict for plaintiff where evidence sustains his cause of action and is insufficient to sustain verdict for defendant.

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

Cloyd E. Clark and *O. E. Bozarth,* for appellant.

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

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

GOOD, J.

This is an action upon a promissory note. In his answer defendant admitted the execution of the note, and, as a defense, pleaded that the note was given without consideration and as an accommodation to the payee thereof. Under this state of the pleadings, the defendant was properly required to first adduce his evidence. At its conclusion and on motion of the plaintiffs, the court discharged the jury and rendered judgment for the plaintiffs. Defendant has appealed.

In his brief for reversal defendant has advanced many sound propositions of law, buttressed by ample authority, but, as we view the record, it is unnecessary to consider these questions. The only questions that we are called upon to determine are: Was the evidence sufficient to require submission of the cause to the jury? and did the

court commit prejudicial error in excluding proffered evidence?

The record discloses that on the 1st of January, 1926, defendant had a deposit of more than $1,500 in the First State Bank of Bertrand, Nebraska. On that day Freeman Dobbin, cashier of the bank, borrowed from defendant $1,500 and gave him his note for that amount, due in one year, and also assigned to defendant, as collateral, a policy of life insurance. This note was renewed in 1927, and again in 1928. The latter renewal was signed, not only by Freeman Dobbin, but by his father, who was president of the bank. Interest upon this series of notes was paid from time to time to defendant, or credited to his account in the bank, and which he drew out.

Either in May or July, 1929, defendant went to the bank and informed Freeman Dobbin that he wanted repayment of the money which he had loaned. Dobbin informed defendant that it was not convenient to pay his note at that time. Thereupon an arrangement was made whereby defendant executed his note to the First State Bank of Bertrand for $1,500, and that amount was placed to his credit in the bank, which he checked out in the usual course of business. Some time later the Bertrand bank failed and certain of its assets, including the note of defendant, were assigned to plaintiffs, as trustees for the bank's depositors. So far as the record discloses, defendant is still the owner and holder of the last of the series of notes executed by Dobbin.

Defendant testified that when Freeman Dobbin first borrowed the money in 1926 he said he was borrowing it for the bank. It is not clear whether Freeman Dobbin was indebted to the bank and wanted the money to pay his obligation. In any event, the loan was made by defendant to Dobbin. The purpose for which Dobbin borrowed is immaterial. The bank was not a party to the note and could not be held liable thereon. It may be noted that, since the bank had the money of defendant in its possession as a deposit, it could gain nothing by borrowing the money from its depositor, especially where it would be paying the

depositor a higher rate of interest than the deposit would draw.

Defendant also testified that at the time he executed the note to the bank Freeman Dobbin told him he would not be called upon to pay the note or the interest thereon. He contends that this makes it an accommodation note, but the record discloses that he received full value for the note which he signed.

An accommodation party is one who signs the instrument as maker, without receiving value therefor and for the purpose of lending his credit to some other person or party. Comp. St. 1929, sec. 62-206; *Farmers Nat. Bank v. Ohman,* 112 Neb. 491; *Bliss v. Venner,* 121 Neb. 44; *Cozad State Bank v. McLaughlin,* 128 Neb. 87.

It is a rule that, unless especially empowered to do so, a bank officer has no authority to release, otherwise than in due course of business and on payment, the makers of notes or other debtors of the bank. *Farmers Nat. Bank v. Ohman, supra; Bliss v. Venner, supra; Cozad State Bank v. McLaughlin, supra;* 3 R. C. L. 448, sec. 75.

From the record it is clear that defendant received full value for the note in question; that he has paid no part thereof except the sum of $79.68, which amount was to his credit in his account at the time the bank closed, and this amount was credited upon the note. Under this state of the record, it cannot be said that the note was given without consideration or merely as an accommodation to the bank.

The evidence before us would not have sustained a verdict in favor of defendant. The evidence would have sustained no other verdict than one for plaintiffs. It is proper for the trial court to direct a verdict for plaintiff where the evidence is sufficient to support his cause of action and is insufficient to sustain a verdict for defendant. *Agnew v. Montgomery,* 72 Neb. 9; *Emerson-Brantingham Co. v. McNair,* 94 Neb. 553; *Morgan v. United Benefit Life Ins. Co.,* 123 Neb. 47.

Defendant complains of numerous rulings of the trial court in excluding proffered evidence as to his previous

course of dealing with the bank and as to conversations alleged to have been had with the officers of the bank. The proffered evidence was not material to the issues. A careful examination of each of the rulings fails to disclose any that was prejudicial to the rights of defendant.

It follows that the judgment should be, and is,

AFFIRMED.

R. N. MONCRIEF, ADMINISTRATOR, APPELLANT, V. INTERSTATE TRANSIT LINES, APPELLEE.

FILED MAY 24, 1935. No. 29215.

1. **Trial:** MOTION FOR DIRECTED VERDICT. A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Highways:** ARTERIAL HIGHWAYS: RIGHTS OF MOTORISTS. "A motorist on a nonfavored street, having stopped as required by ordinance, and having looked to the right and left before entering an arterial highway and found the intersection clear of traffic, has a right, in proceeding to cross it, to assume that motorists on the arterial highway will likewise obey traffic regulations, exercise due care and, if necessary to prevent a collision, slacken their speed." *McCulley v. Anderson*, 119 Neb. 105.
3. **Negligence:** QUESTION FOR JURY. "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Casey v. Ford Motor Co.*, 108 Neb. 352.
4. **Evidence** in the record examined, and *held* to require the submission of the issues involved to a jury for their determination.

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

Ted R. Frogge and *York & York*, for appellant.

Thomas W. Bockes, James T. Keefe, T. M. Hewitt and *T. F. Hamer, contra.*

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

EBERLY, J.

This is an action for damages brought by Moncrief, as administrator of the estate of Edna M. Woolard, deceased, against the Interstate Transit Lines, a Nebraska corporation, engaged in operating a line of buses through Dawson county, Nebraska, as a common carrier. Plaintiff seeks a recovery under sections 30-809 and 30-810, Comp. St. 1929 (Lord Campbell's Act), for the death of his intestate, occasioned by injuries suffered by her in a collision occurring on September 12, 1932, between an automobile then operated by the deceased and a bus then owned and operated by the defendant company. This collision concededly took place at the intersection of Thirteenth and Washington streets in the city of Lexington, Nebraska, and plaintiff alleges it was caused solely by the careless, negligent and unlawful operation of the defendant's bus by its driver and agent, and without fault or negligence on part of Edna M. Woolard. The defendant admits the occurrence of the accident at the time and place alleged, and that Edna M. Woolard died from injuries suffered in this collision; denies the allegations of negligence made in the petition, and pleads contributory negligence as an affirmative defense. To the answer plaintiff replied by way of a general denial. On these issues a trial was commenced before a jury, and at the close of the plaintiff's evidence the defendant moved the court for a directed verdict in its favor, "for the reason that the evidence offered is not sufficient to sustain a verdict against it." This motion the trial court sustained, and from the order of that court overruling his motion for a new trial, plaintiff appeals.

A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every in-

ference that can reasonably be deduced from the facts in evidence. *Schmelzel v. Leecy,* 104 Neb. 672; *Boomer v. Lancaster County,* 115 Neb. 295; *La Fleur v. Poesch,* 126 Neb. 263; *Bainter v. Appel,* 124 Neb. 40.

In *Boomer v. Lancaster County,* 115 Neb. 295, this court held: "Where from the facts and circumstances proved reasonable minds might draw different conclusions concerning the negligence or lack of negligence of the respective parties, it is error to sustain a motion for an instructed verdict."

Again, in *Casey v. Ford Motor Co.,* 108 Neb. 352, we held: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury."

See, also, *Vorce v. Independent Telephone Co.,* 86 Neb. 27; *Sgroi v. Yellow Cab & Baggage Co.,* 124 Neb. 525; *Swengil v. Martin,* 125 Neb. 745; *McDonald v. Wright,* 125 Neb. 871.

It is an admitted fact that the death of Edna M. Woolard resulted from a collision between a Ford touring car, of which the deceased was the driver, and a bus operated by the defendant as alleged. The impact between the motor vehicles took place in the intersection of Thirteenth and Washington streets in the residence district of the city of Lexington. Washington street was a federal and state highway constituting a portion of Highway No. 30, otherwise designated as the "Lincoln Highway." The block immediately south of this intersection was 400 feet in length. Looking northward from the intersection of Twelfth and Washington streets there was no obstruction to a clear view along the latter street, and indeed to the eastward thereof to a point some six feet east of the east stop button on Thirteenth street. The accident occurred in the daytime. Immediately preceding the fatal collision, the plaintiff's decedent was proceeding in her Ford touring car west along Thirteenth street, accompanied by a lady friend. She stopped her car within a few feet of the east stop button on Thirteenth street.

Defendant, in its brief, with reference to the movements and conduct of the deceased at this time, says: "From where she stood, with the front wheel of the Ford six feet behind the (east) stop button, she had to drive 27 feet * * * before the front wheels of her Ford cleared the (east) curb of Washington street."

It was 20 feet from the east curb line of Washington street to its center. The defendant's brief also concedes that the evidence is that the Ford started from this position east of this stop button and moved "slowly, very slowly," westward across the intersection. At this time defendant's bus driver was driving north on Washington street at from 40 to 45 miles an hour, and collided with the left side of the Ford and well towards its rear, at a time when the rear wheels of the Ford had arrived at a point approximately not more than 5 feet east of the center of Washington street and 7½ feet north of the center line of Thirteenth street. The impact crushed the left rear side of the Ford and also its left hind wheel, and drove the damaged Ford diagonally northwesterly across the intersection to the west boundary of Washington street some distance north of the intersection. The bus continued along Washington street after the collision, and was stopped in the center of that street some 50 or 75 feet north of the wreck of the Ford touring car.

It will be remembered that from the point where the Ford started, after coming to a full stop at the east stop button on Thirteenth street, it had covered 47 feet before it was intercepted by the oncoming bus. In passing over this distance it seems agreed that the Ford touring car traveled "slowly, very slowly." On the basis of an average speed of 5 miles an hour, this distance was covered in from 6½ to 8 seconds. On the other hand, defendant's bus was approaching from the south at the rate of from 40 to 45 miles an hour, or from 60 to 66 feet a second. On the basis assumed, the bus thus appears to be traveling approximately ten times faster than the Ford. It would follow that when the Ford stopped, before entering the intersection, and its driver glanced south along Washington

street, the bus was then from 400 to 530 feet distant. Remembering that the angle of sight was such as to render difficult to plaintiff's decedent the possibility of accurately judging the rate of speed of the bus, we find no reason for characterizing her action in continuing her journey across the intersection at this time as in any degree negligent.

We are not convinced that the evidence conclusively establishes that the plaintiff's decedent failed to properly look to the southward before driving into the intersection. The presumption is that no person deliberately places himself in a position of danger, and this court has held: "A motorist on a nonfavored street, having stopped as required by ordinance, and having looked to the right and left before entering an arterial highway and found the intersection clear of traffic, has a right, in proceeding to cross it, to assume that motorists on the arterial highway will likewise obey traffic regulations, exercise due care and, if necessary to prevent a collision, slacken their speed." *McCulley v. Anderson,* 119 Neb. 105. See, also, *Barrett v. Alamito Dairy Co.,* 105 Neb. 658.

The statutes in force at the time of the collision in the instant case limited lawful speed of motor vehicles on Washington street to 20 miles an hour. The physical facts disclosed in the case conclusively establish that, had the bus proceeded at a lawful speed, the collision would have been impossible, and its occurrence must therefore be deemed wholly due to the acts of defendant's driver.

Then, too, the undisputed evidence is that as the bus approached this intersection it swerved first to the left and then turned back to the right. As a result of this maneuver, the rear portion of the Ford touring car was struck by it, thus causing the death of plaintiff's intestate. At the time of this collision the physical facts testified to disclose that ample clearance existed between the rear end of the Ford touring car and the east curb line of Washington street for the passage of the bus. The law of the road applicable to the situation disclosed by this record, declared by this court, is:

"In this state, upon highways of sufficient width, except

upon one way streets, the driver of an automobile shall drive the same upon the right half of the highway, unless it is impracticable to travel on such side of the highway, and in crossing an intersection of highways shall likewise cause such vehicle to travel on the right half of the highway, unless such right half is obstructed or impassable." *Bainter v. Appel,* 124 Neb. 40.

It is equally obvious that, had the bus proceeded strictly as required by law, it would have passed in the rear of the Ford touring car without the possibility of injury to the latter. Indeed, even under the contentions as made by appellee in its brief, the conclusions as to the facts therein contained necessitate the consideration and application of the doctrine of the "last clear chance."

At all events, the rule in this jurisdiction is, as hereinbefore stated: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Casey v. Ford Motor Co.,* 108 Neb. 352. See, also, *Day v. Metropolitan Utilities District,* 115 Neb. 711.

It follows, therefore, that the order of the trial court sustaining the defendant's motion for an instructed verdict, and its judgment thereon, were erroneous, and the same are hereby reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

KITTYE GLENN, APPELLEE, V. W. T. GRANT COMPANY, APPELLANT.

FILED MAY 24, 1935. No. 29226.

Evidence in the record examined, and *held* ample to sustain the verdict in, and judgment of, the district court.

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

Brown, Fitch & West, for appellant.

Fried & Mars, contra.

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

EBERLY, J.

This is an appeal from a judgment of the district court for Douglas county. In the court below plaintiff, Glenn, sued the defendant, W. T. Grant Company, for personal injuries sustained by her when, as she alleged, she slipped upon an excessively and improperly oiled basement floor in the defendant's store on the morning of March 4, 1933. In its pleading defendant put in issue plaintiff's allegations and, in addition, pleaded contributory negligence on part of plaintiff. A trial to a jury resulted in a verdict and judgment for plaintiff, and from the order of the trial court overruling its motion for a new trial, defendant appeals.

In this court appellant does not question either the nature of the injuries suffered by appellee, nor the amount of damages allowed by the jury. It here presents only the question of its liability, challenges the sufficiency of the evidence, and the correctness of certain instructions given or refused by the trial court.

There is no question but what Mrs. Glenn entered the store of defendant on the forenoon of the day of the accident as a customer. She testifies: "I was going to the bird department; the bird department is across the west end of the wall; and as I neared the pet department, and I was on the north side of the yard-goods department, my foot skidded in the oil and I turned my ankle, and I caught myself, I did not fall clear down, I caught myself with my arm on this counter." Further, she noticed a skid mark of her heel on the floor, and this mark was "just like anything that has slid in oil or anything like that; it is just a mark that my heel had made," and was maybe "eight or ten inches long." The undisputed evidence is that this floor had been oiled by the servants of defendant company under the directions of the managing officer of the appellant. The dangerous condition of such floor, if such there was, was produced by the acts of the defendant company.

One of defendant's employees, who was working in the "pet department" at the time of the accident, testified in behalf of Mrs. Glenn, substantially as follows: That this floor was first oiled around the first of March, 1933; that after it had been oiled this floor presented "the appearance of being oiled, in that it was dull looking, and you could see in between the cracks that they were either filled with oil or dirt." Further, she was present when Mrs. Glenn fell, and observed the skid mark about a foot in length where Mrs. Glenn fell; that toward the last part of the week (during which Mrs. Glenn's fall occurred) she first noticed that this floor had these dark spots and pools of oil on it; and it was the last part of this week that Mrs. Glenn fell; also, that the janitor did not sweep the basement on the day of the accident until in the evening.

We are committed to the view that the proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose. *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604; *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843.

It may also be conceded that the mere fact that an invitee falls on the floor of a salesroom or store does not of itself raise a presumption of negligence on part of the owner. But, on the other hand, what constitutes due care of an inviter is always determined by the circumstances and conditions surrounding the transaction under consideration.

In *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, and *Wendell v. Roberts*, 125 Neb. 619, the dangerous conditions which were charged as having caused the accidents involved were situated, not within the buildings, but without. The exercise of due care under the circumstances detailed in each of the cases last referred to necessarily approximated the due care of a pedestrian on a public street. Indeed, it must be conceded that a substantial difference exists between such a situation and one in which the accident occurs within a building or salesroom, as the custo-

mer, invitee, in proper pursuit of his business, passes along aisles, between counters, surrounded by merchandise displayed and designed by the proprietor to attract and hold his attention. Under such surroundings, reason suggests that the proprietor's invitee might not be required to exercise the same or an equal degree of care to avoid obstacles to safety as would be required of the pedestrian upon the open street. It would seem that, under conditions in a salesroom, such as above outlined, the customer might properly assume that the floor, then open to the general public, was reasonably safe to walk upon and over, and not in a dangerous condition. At least, in so treating it, the customer would not necessarily be guilty of contributory negligence as a matter of law. *Robinson v. F. W. Woolworth Co.*, 80 Mont. 431.

It also appears that in each of the four Nebraska cases cited by defendant, and herein referred to, the defendant had no knowledge, actual or implied, of the dangerous conditions claimed to exist. In fact, all the evidence was to the contrary. In the instant case, the defendant itself, and no one else, created the condition of which the plaintiff complains.

In the case at bar, on the question of actionable negligence involved, the cases cited by appellant afford but little light. In *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, the plaintiff caught her heel in a carpet. There is no evidence that the carpet was defective before the accident, or that the defendant had knowledge of any such condition. All the positive evidence on the subject was to the effect that there was no such defect. In *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, the plaintiff slipped on a wet, outside step, but failed to show that defendant caused the condition or had notice, actual or implied, thereof. In *Sokolof v. First Nat. Bank*, 122 Neb. 892, plaintiff slipped on some soap, but there was no evidence that the defendant bank caused any soap to be placed on the floor, or that the defendant had any knowledge of it. In *Wendell v. Roberts*, 125 Neb. 619, the controlling fact was that the condition of the steps complained of was not

shown by plaintiff to have been the proximate cause of the accident.

In the instant case, the conditions complained of were created by the defendant, and the evidence in the record, if believed, justifies the determination that such conditions were the proximate cause of plaintiff's injuries; also that contributory negligence on part of plaintiff was not proved. The facts of the instant case distinguish it from the cases upon which the appellant relies, and bring it fairly within the doctrine of actionable negligence, supported by the following authorities: *Isaac Benesch & Sons v. Ferkler,* 153 Md. 680; *Robinson v. F. W. Woolworth Co.,* 80 Mont. 431; *Bradford v. F. W. Woolworth Co.,* 141 S. Car. 453; *Smith v. S. S. Kresge Co.,* 116 Conn. 706; *F. W. Woolworth Co. v. Saxton,* 39 Ohio App. 118; *Parker v. Great Atlantic & Pacific Tea Co.,* 201 N. Car. 691; *S. H. Kress & Co. v. Dyer,* 49 S. W. (2d) (Tex. Civ. App.) 986; *Hall v. Great Atlantic & Pacific Tea Co.,* 115 Conn. 698; *Randolph v. Great Atlantic & Pacific Tea Co.,* 2 Fed. Supp. 462; *Kroger Grocery & Baking Co. v. Monroe,* 237 Ky. 60.

We have carefully examined the instructions of which appellant complains, in the light of the other instructions given by the trial court, and also in the light of the evidence in the record. We find that in this regard no substantial error was committed by the district court.

Therefore, this case was properly determined in the trial court, and its judgment is

AFFIRMED.

STATE, EX REL. RALPH CAMPBELL, APPELLEE, V. ALLIE O. CAMPBELL ET AL., APPELLANTS.

FILED MAY 24, 1935. No. 29345.

1. **Elections:** CANVASSING BOARD. The duties of a canvassing board are purely ministerial. It is its duty to tabulate the votes as returned to it.
2. ———: ———. An election canvassing board has no judicial power.

3. ———: ———. An election canvassing board has no power to inquire into the qualification of the judges and clerk of the election.
4. ———: ———. An election canvassing board has no authority to go behind the returns and pass upon the legality of the votes.
5. **Mandamus** lies to compel an election canvassing board to reassemble and perform its duty.

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

White & Heiss, for appellants.

Raymond & Raymond, contra.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BLACKLEDGE, District Judge.

DAY, J.

This is an action for a writ of mandamus directing the respondents as directors of the Central Irrigation District to canvass the returns of an election for the office of director. The trial court issued the writ and two of the three respondents appeal to this court.

It appears that the relator Campbell and director Wooldridge were rival candidates for the office of director. The board of directors of which Wooldridge was a member made arrangements for the election, fixed the time and place, and appointed election officials. All the electors of the division for which a director was to be chosen appeared at the designated time and place and voted. The judges and clerk of the election counted the votes and delivered a report of the result to the secretary of the district. The board of directors met thereafter and two of the three members, Hampton and Wooldridge, refused to canvass the vote and determine the result. The effect of the refusal of the board to canvass the vote is that Wooldridge is still holding the office.

At the time the board refused to canvass the election returns, a resolution was adopted which set forth the reasons for the refusal. Summarized, they are:

1. That the judges and clerk were not electors of the precinct and not eligible to serve as such.

2. That the judges and clerk did not subscribe to an oath to faithfully perform the duties imposed upon them.

3. That the notice of election specified a place outside of the precinct and the district.

4. That the time specified was contrary to law.

5. That all the votes were not cast by qualified electors.

The board concluded that no valid election was had and that no certificate of election could issue as a result of any purported election. Wooldridge then continued to hold the office of director, because he as director and member of the canvassing board determined that the election which he as such director had arranged was illegal and void.

We are of the opinion that the directors of the district have mistaken and overestimated their powers as a canvassing board. The duties of a canvassing board are purely ministerial. It is its duty to tabulate the votes as returned to it. An election canvassing board has no judicial power. *Hagge v. State,* 10 Neb. 51; *Long v. State,* 17 Neb. 60; *State v. Grimm,* 115 Neb. 230; *State v. Bower,* 106 Neb. 436. The great weight of authority declares that the powers and duties of an election canvassing board are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election as shown by the returns before it and certifying the result. See 20 C. J. 200, and cases cited. An election canvassing board has no power to inquire into the qualification of the judges and clerk of the election. *State v. Hill,* 10 Neb. 58.

An election canvassing board has no authority to go behind the returns and pass upon the legality of the votes. *Hagge v. State,* 10 Neb. 51; *State v. Stearns,* 11 Neb. 104; *State v. Van Camp,* 36 Neb. 91; *State v. Bower,* 106 Neb. 436. As suggested by Maxwell, C. J., in the *Hagge* case, *supra,* "If illegal votes have been cast, or irregularities occurred, * * * the law provides for contesting such election."

There is no new question presented to us by this record. It was the duty of the board to canvass the returns and

certify an election. This it failed and refused to do. Mandamus lies to compel an election canvassing board to reassemble and perform its duty. *State v. Grimm,* 115 Neb. 230; *State v. McFadden,* 46 Neb. 668.

There is no error in the judgment.

AFFIRMED.

MABEL NOLAND BRAMLETT V. STATE OF NEBRASKA.

FILED MAY 24, 1935. No. 29326.

1. Criminal Law: JURY. The officer in charge of a jury shall not allow any communication to be made to them, or make any to them himself, except to ask them if they have agreed upon a verdict, unless by order of the court.
2. ———: VERDICT. The verdict of a jury should represent the concurring intelligence, reason and judgment of the entire jury, free from outside influence of any sort whatever.
3. ———: ———. Verdict and sentence set aside where a bailiff in charge of a jury learned that a certain juror was voting for an acquittal and thereupon went into the jury room and, by his attitude and statements, influenced said juror into changing his vote.

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

Fried & Mars, for plaintiff in error.

William H. Wright, Attorney General, and *Paul P. Chaney, contra.*

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

PAINE, J.

The defendant was prosecuted in Douglas county for aiding, abetting, encouraging, and contributing to the delinquency of June Campbell, a delinquent child, 14 years of age. The jury returned a verdict of guilty, and she was sentenced to four months in the county jail, and, in addition, required to pay a fine of $100 and costs.

The motion for a new trial is based upon several

grounds, only one of which will be considered. The defendant claims that the trial court erred in refusing to set aside the verdict and grant a new trial because of the misconduct of the bailiff in the jury room while the jury were deliberating. In the bill of exceptions there appear two affidavits by two of the jurymen. The first of these affidavits is by R. D. Zimmerman, who states that, after the jury had been deliberating for some time as to the guilt or innocence of the defendant, the bailiff in charge of the jury came into the jury room and said to Ole A. Lerdahl, a member of the jury, who was holding out for acquittal, and in the presence of all the jury, "What the hell is the matter with you, get busy," and that the jury came in with their verdict about three-quarters of an hour later.

The other affidavit is signed by Ole A. Lerdahl, which sets out that he had been in favor of acquitting the defendant, and that the bailiff in charge of the jury at about 1 p. m. on Friday, May 18, 1934, came into the jury room and said to the affiant, in the presence of all the jurors, "You're not going to hold them back alone, are you?" and then said, "The judge will be here about 2 o'clock and then will be gone all afternoon." The state neither offered nor introduced any evidence in opposition thereto.

Let us consider a few of the cases involving such matters. In *Williams v. Chicago & N. W. R. Co.*, 11 S. Dak. 463, there was no fire in the courthouse except in the jury room, and between 2 and 3 o'clock in the morning a juror invited the bailiff to come into their room and get warm, as the night was bitterly cold. The bailiff came in and laid down on the floor near the door. He did not talk to any juror, nor were any of the jurors near him. No juror communicated with him by word, sign, letter, or otherwise, while he was in the room, nor did the jury take a vote while he was in the room. When he got warm he went out and locked the door behind him. It was held that nothing in the action or conduct of the bailiff or the jury warranted a new trial.

In *Hampton v. Van Nest's Estate,* 196 Mich. 404, during

the deliberations of a jury the sheriff, who had charge of them, was called to the jury room, which was the town hall, consisting of one room, to replenish the fire and furnish water for the jurors. He heard no part of their conversation and entered into no conversation between them. It was held that the presence of the sheriff was within the line of his duties, and that he violated no part of the spirit of his oath. However, it was further held in this case: "The court should not countenance or tolerate any act or conduct by court officers that might influence the conduct of any member of the jury in favor of either party in reaching conclusions in the case they are considering."

The jury are to be protected from hearing prejudicial conversations in public places while deliberating. In *Curry v. Willson & Sons*, 301 Pa. St. 467, it appeared that, while jurors were eating in a restaurant, attorneys not engaged in the trial of the case were discussing the probable size of the verdict. However, upon affidavit that the jurors did not hear the discussion by the attorneys, the motion for a new trial was overruled.

Even the judge himself is not supposed to hold private conversation with the jury. "Trial judge's conversation with jurors while deliberating, in absence of respective counsel, held prejudicial error." *Tawzer v. McAdam*, 7 Pac. (2d) 516 (134 Kan. 596).

In a prosecution for receiving stolen property, the jury had some trouble with the subtleties of the law, and after deliberating many hours signified a desire for further information. The jury were brought into the jury box, and a conversation took place between the jury and the court in the presence of the attorneys. No objection was made to this proceeding, but after the jury had retired the trial judge went to the jury room, put his head in the door, and held a conversation with them. The supreme court of Kansas said: "The conduct exhibited was, however, highly improper. Throughout the proceeding in a criminal case the trial judge's place is on the bench. The jury room is a place of seclusion and privacy for members of the jury

while they are deliberating on their verdict. The trial judge has no privilege to invade it, and all his communications with the jury ought to be in open court." *State v. Scholl,* 118 Kan. 629. If the jury are to be free from the influence of a conversation with the trial court, how much more important that they be shielded from the comments of a bailiff!

In Nebraska we have a statute which clearly covers this case. Section 20-1109, Comp. St. 1929, provides, among other things, that, when the case is finally submitted to the jury and they retire to deliberate, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court, and further, "The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon."

There are always to be found officious bailiffs, who often carry messages back and forth to the members of the jury, or lecture the jury as to their duty, and who bring about mistrials by their conduct. In *Olsen v. State,* 113 Neb. 69, we have such a case, where one such bailiff volunteered the information to the jurors, just before closing the room for the jury to begin their deliberations, that the wife of one of the jurors, naming him, would spend the night at the home of the prosecuting attorney. The trial judge had just administered the oath to this bailiff as to his duties as founded upon the above section of our statute, and, without the knowledge of the judge, this bailiff volunteered this gossip to the jury, which required this court to reverse a conviction in a felony case which had taken days to try.

We are unwilling to lend encouragement to the lax conduct of a bailiff which, if tolerated, would undermine the purity and efficiency of our jury system. "The verdict of a jury * * * should represent the concurring judgment,

reason and intelligence of the entire jury, free from outside influence from any source whatever." *Trantham v. Elk Furniture Co.*, 194 N. Car. 615.

The judgment and sentence are set aside, and a new trial is ordered.

REVERSED.

KATIE DAVIDSON, GUARDIAN, APPELLEE, V. FIRST AMERICAN INSURANCE COMPANY, APPELLANT.

FILED MAY 24, 1935. No. 29145.

1. **Pleading.** "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." Comp. St. 1929, sec. 20-836.
2. **Insurance:** PLEADING: WAIVER. "If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived." *Lehnherr v. National Accident Ins. Co.*, 126 Neb. 199.
3. ———: POLICY: CONSTRUCTION. A provision in a policy of insurance indemnifying the insured "for loss of time * * * from any bodily sickness or disease * * * which is contracted and begins after this policy has been in continuous force for not less than fourteen days" covers sickness or disease first manifesting itself after such period, although the medical cause may have antedated the policy.
4. **Evidence:** NONEXPERT OPINION: MENTAL CAPACITY. "If the mental condition of a person becomes a material subject of inquiry, a nonexpert witness may be permitted to state his opinion concerning that condition if he is shown to have had a more or less extended and intimate acquaintance with such person and gives the facts and circumstances upon which the opinion is based. The weight to be given such testimony is a question for the jury, to be considered by them in connection with the credibility and intelligence of the witness, and his opportunities for observation." *Kehl v. Omaha Nat. Bank*, 126 Neb. 695.
5. **Insurance:** CONDITION IN POLICY: PROOF. Under a policy requiring weekly personal attendance of a legally qualified physi-

cian or surgeon upon an assured, where the physician gave regular weekly attendance for three months but attended the assured only occasionally for the remainder of the period for which disability is claimed, the evidence showing that the weekly personal attendance of the physician would have been of no use or value during the latter period, such facts are sufficient to meet the terms of the policy.

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

Albert S. Johnston and *Chappell & Lundberg,* for appellant.

Carrico & Carrico, contra.

Heard before ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

CARTER, J.

This is an action to recover indemnity under a health and accident insurance policy. The defense offered by the insurance company was that the insured, Carrie Kaldal, had falsely warranted that she was in good health and had been free from disease for five years prior to the date of the application, that she had changed her occupation to one classified as more hazardous under the provisions of the policy, and that the terms of the policy have not been complied with to entitle her to recover. The verdict and judgment were against the insurance company in the amount of $946.66. From the overruling of its motion for a new trial, the insurer brings the case to this court for review.

The appellant first contends that the insured failed to give notice of illness within ten days from February 2, 1931, and that under the terms of the policy such failure will defeat recovery, unless it is shown "not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible." Notice of the illness of the insured did not reach the appellant until March 16, 1931, and no reasonable excuse for the delay was shown. Upon an examination of the pleadings, we

find that the amended petition alleges as follows: "All the conditions of said policy relative to notice of said sickness has been given as provided in said policy." The answer alleges "that the terms of said policy have not been complied with to entitle the plaintiff to recover in this action." Section 20-836, Comp. St. 1929, provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." Under this statute, a breach must be specifically pleaded before it is available as a defense. This court has recently said: "If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived." *Lehnherr v. National Accident Ins. Co.*, 126 Neb. 199, and cases therein cited. We therefore hold that appellant has waived its right to set up want of notice as a defense.

The appellant contends that its motion for a directed verdict should have been sustained by the trial court for the reason that the insured failed to prove that she suffered disability from illness which was contracted after the policy had been in force for fourteen days or more as provided by its terms. The provision of the policy referred to is as follows: "For loss of time * * * from any bodily sickness or disease * * * which is contracted and begins after this policy has been in continuous force for not less than fourteen days." The record shows that the policy went into effect on July 1, 1930. Appellee claims that she became ill on February 2, 1931, and claims benefits due under the policy since that date. The evidence shows that in December, 1929, appellee had her teeth X-rayed, with the result that the X-ray physician found that the roots of two of her teeth were infected. It is claimed by the appellant that her condition, during the time for which insured claims benefits under the policy, was due to the spread of the infection of the teeth. The expert testimony is to the

effect that this infection may have been a contributing factor, but that there was no certainty that it was a major cause. The general physical condition of the appellee gradually improved after her teeth were removed. Assuming that the condition of the teeth of the assured was the sole cause of her disability, the appellee would be entitled to recover if the disease or illness first manifested itself after the 14-day period provided in the policy, even though the medical cause may have antedated the issuance of the policy. In the case of *Valencia v. Continental Casualty Co.*, 127 Neb. 820, this court said: "A policy of insurance providing indemnity for disability resulting solely from bodily disease or sickness which is contracted and begins not less than 15 days after the date of the policy covers a disease first manifesting itself after such period, even though the medical cause may have antedated the issuance of the policy." The record is clear, however, that the insured was suffering from a derangement involving the gall bladder and liver which manifested itself principally by a discoloration of the skin commonly called yellow jaundice. That this condition caused a toxic insanity over a period of time is amply borne out by the evidence. The evidence is sufficient to sustain a finding that the insured became totally disabled under the terms of the policy because of a disease or illness which first manifested itself more than 14 days after the policy was in force. The trial court did not err, therefore, in overruling appellant's motion for a directed verdict.

The appellant further complains that the trial court erred in refusing to receive in evidence certain X-ray photographs of the teeth of the insured. The appellant did not dispute the testimony of the physician who took the X-rays. He testified to their condition in detail as shown by the X-rays and from his personal knowledge. In view of the fact that this evidence was not disputed, it appears to have been harmless error on the part of the court in failing to admit them in evidence.

The appellant also contends that the court erred in permitting the introduction by the appellee of evidence of

business transactions upon which lay witnesses expressed belief of the mental incompetency of the assured. This court has held: "If the mental condition of a person becomes a material subject of inquiry, a nonexpert witness may be permitted to state his opinion concerning that condition if he is shown to have had a more or less extended and intimate acquaintance with such person and gives the facts and circumstances upon which the opinion is based. The weight to be given such testimony is a question for the jury, to be considered by them in connection with the credibility and intelligence of the witness, and his opportunities for observation." *Kehl v. Omaha Nat. Bank,* 126 Neb. 695. The trial court did not err in permitting this testimony. The soundness of the conclusions of the nonexpert witnesses was for the jury to determine from all the facts detailed by them.

The last assignment of error is that the evidence is insufficient to support the judgment of the trial court. It cannot be questioned that the evidence was sufficient to require the submission of the case to the jury. It will be necessary to consider the evidence and the provisions of the policy applicable thereto in order to determine whether the verdict of the jury is excessive. The policy states that the insured shall receive $100 a month during the time "which the insured is rendered continuously unable to transact each and every duty pertaining to his or her occupation or any gainful occupation and while under the weekly personal attendance of a legally qualified physician or surgeon." It also provides that the insured shall receive $40 a month for partial disability during the time, not exceeding 52 consecutive weeks, that "the insured shall be continuously disabled and prevented by such sickness from attending to two or more daily duties essential to his or her occupation and while under the weekly personal attendance of a legally qualified physician or surgeon." The evidence is sufficient to sustain a finding that the insured was totally disabled from February 2, 1931, to May 27, 1933. The jury were instructed properly as to the method of determining the amount of the benefits due the

insured under the policy, but the record does not disclose what part of the verdict rendered was for total and what part was for partial disability. At any rate, the evidence was sufficient to sustain a finding that the insured was suffering from a toxic insanity during the period stated and that she was totally or partially disabled during the whole of that time. The appellant, however, complains that the appellee failed to prove that the insured was "under the weekly personal attendance of a legally qualified physician or surgeon" during any appreciable part of the period mentioned. The record discloses that the insured had medical attendance weekly for two or three months only. Her physician, however, testified that she called at his office occasionally during the whole period and that he had never to the date of the trial "completely discharged" her from his care. The evidence of the physician attending the insured was that she was suffering from a mental affliction resulting from a focal infection of the blood stream and as soon as the source of the infection was removed the patient began to improve. Naturally, during the period of convalescence, time and quiet were probably the only requirements of a complete recovery. At least, the evidence in the record indicates that the insured could not have been benefited in any way by the weekly attendance of the physician. Unless a benefit could have resulted, the appellant was not prejudiced thereby and a failure to comply with the literal wording of the policy could have in no way contributed to appellant's loss under the policy. If it was necessary for the insured literally to be under the weekly personal attendance of a physician or surgeon, the evidence will not support the verdict of the jury, otherwise it will. It will therefore be necessary to determine the legal effect of the provision, "while under the weekly personal attendance of a legally qualified physician or surgeon," contained in the policy.

While the weekly personal attendance of a physician establishes to some degree the serious nature of the ailment, it does not always do so. An incurable disabling malady in which the only alleviating agent may be rest

and care may make the physician's visits useless, futile and an unnecessary expense. The law does not ordinarily require the performance of futile acts, the maxim of the common law being, "The law will not force any one to do a thing vain and fruitless." That one is disabled is the primary cause for payment, and to hold the insured to the literal meaning of the policy would have the effect of exalting the letter and submerging the spirit of the contract.

In the case of *Hunter v. Federal Casualty Co.*, 191 N. Y. Supp. 474, the court held:

"The physicians called as witnesses all agreed that there was absolutely no treatment that could have been given to the plaintiff that would have been of the slightest assistance. The provision of the policy quoted was designed as a guard against fraudulent claims, and should be construed in view of the purpose which it was intended to serve. The construction to be given should be liberal, to carry out the spirit and purpose of the contract. The object of the clause being to guard against fraud, where it is manifest that there has been no fraud, it would violate the purpose of the contract to give the clause a literal, narrow construction. It seems to me that the clause should be read under the supposition that the use of the words 'regular treatment' presupposes that some treatment will be possible, and where it appears from the undisputed testimony of the physicians called by both the plaintiff and the defendant that no treatment was possible, then the words 'regular treatment' are suspended, because the law will not enforce an idle or impossible formality.

"To illustrate, if the plaintiff, having in mind such condition of the policy, had instructed his physician to call on him regularly once a week and give him sugar and water, that would have been a literal compliance with the terms of the contract, if the physician said that such was the treatment which he gave him regularly once a week. Therefore, where it appears that it would have been nothing but a sham and an idle ceremony to have had a physician give 'regular treatment' once a week, and that

there was no treatment that could have been given that would have been of any value, the court should enforce the contract, on the theory that the clause in question assumes that some treatment of value could be given to improve the condition of the injured person. It should be kept in mind that this indemnity of $35 a month is not to reimburse the insured for medical expenses, but that the primary purpose is to indemnify for the injury suffered."

In *Harasymczuk v. Massachusetts Accident Co.*, 216 N. Y. Supp. 97, the court said:

"The defendant raises the further question that the plaintiff cannot recover under clause C of the policy by reason of the fact that it claims the evidence does not show that the plaintiff was regularly attended by a legally qualified physician at least once in seven days during the time for which claim is made. * * * It frequently happens that a person totally disabled is beyond aid of medical assistance, and to hold that a person who could not be aided by medical assistance would have to go to the needless expense and trouble of having a physician at least once in seven days would be an unreasonable holding under a policy of this nature. This court can readily see how one partially disabled, and who could be aided by medical attention, should have a physician at frequent intervals.

"Apparently the condition of the plaintiff in the case at bar is not one requiring weekly attendance of a physician. After he received the operation in question, his primary trouble was remedied. By reason of the very serious injuries which he received, the muscles in his back are apparently permanently injured, and to hold that, if his physician did not call on him each week, he should be barred from recovery under the policy in question, certainly would not be in accordance with the spirit and intent of a policy of indemnity of this nature."

Also, in the case of *Bass v. Pioneer Life Ins. Co.*, 206 Mo. App. 626, the court, in its opinion, said:

"Defendant contends that the two calls in person made by the physician at the home of plaintiff, and the telephone

calls and personal visits of relatives and friends, to the physician and the prescriptions of the physician, do not meet the terms of the policy requiring that plaintiff shall be 'continuously confined within the house, and therein regularly visited at least once a week.'

"Obviously, the meaning of the clause is that the physician must be weekly in attendance upon the assured. The physician called at plaintiff's house on February 14, 1919, saw him in person, diagnosed his case and, thereafter, during the period of his illness, prescribed for him and insured was under his professional care. To hold otherwise would be to make such a policy of insurance of very little value. We think the contract should have a reasonable construction and be viewed in the light of common sense."

In *Conaway v. Commonwealth Casualty Co.*, 225 Mo. App. 421, the court said: "The assignment that the damages awarded in the amount recovered on the policy, to wit, $300, is grossly excessive, we do not think tenable. This claim of excessive damages is based on the contention that plaintiff's evidence does not show confinement to the house and being visited at least once a week by a licensed physician for more than four weeks while the award was for twelve weeks. We think a review of the testimony we have set out when viewed in the light of the authorities in this state will warrant a recovery for the twelve weeks for which the jury found plaintiff was entitled to compensation under the policy. These provisions in sick and accident insurance policies are always rather harsh and the courts are disposed to construe them liberally in favor of the insured in order to accomplish the real purpose for which the policy was taken out by the insured."

We are of the opinion that there are many cases where it would be impossible to comply with the provision of the policy under consideration. In many more cases, the weekly attendance of the physician would be useless, futile and an added unnecessary expense. That the insurance company has the right to limit its contract by reasonable

provisions in the policy is not to be questioned. But to prescribe methods of proof of disability, useless and futile, may in some cases amount to a forfeiture not favored by the law. This it did in the present case. The real purpose of the provision is to guard against fraudulent claims and, there being no claim of fraud, it would violate the very purpose of the contract to give it the construction contended for by the appellant. The major purpose of the insurance contract was to indemnify the insured for loss of time occasioned by a total incapacity to labor arising from sickness. Where the facts of total incapacity and loss of time are otherwise established, reversible error should not be made to rest alone on the mere failure to establish the vital fact by the evidentiary instrumentalities provided in the policy.

In the case at bar, direct and positive evidence was offered by the insured as to her disability. The jury have passed upon this question and determined it in favor of the appellee. It is now an established fact in this case. To put a literal construction on the provision being considered would defeat the purpose of the contract and amount to a forfeiture. Judge Pound, in an early opinion, construing an insurance policy, said: "There is equally strong reason, where the literal meaning of such a provision is broader than its reason, for restricting its operation to the mischief sought to be guarded against. Where the reason and the letter of a clause do not coincide, it is a universal rule of construction to limit the latter by the former. Hence, we think the operation of the provision in the policy against change of title ought to be limited by and not extended beyond the mischief obviously intended to be met." *Henton v. Farmers & Merchants Ins. Co.*, 1 Neb. (Unof.) 425. The logic of the above statement is particularly applicable to the instant case.

In *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, this court said: "We will, however, cordially agree with counsel for defendant in their argument that, in approaching the construction of an insurance policy, the court should

have in mind the same general principles which obtain in the construction of any other contract, in so far as that the language employed should be given its plain, natural and ordinary meaning, and not be twisted into an unnatural or exceptional meaning merely to avoid a forfeiture, and that, when such construction is demanded by the plain and unequivocal terms of the instrument, the courts, of course, should have the moral courage to so construe it, regardless of the consequences. But this rule, of course, presupposes the nonexistence of two very important factors in the equation: First, that such construction will not end in an unreasonable or absurd result; and, second, that it will not defeat the manifest intention of the parties and the very object and purpose they had in entering into the contract at all. If the construction indicated will inevitably lead to either one or both of the results above stated, then such construction will be avoided, and, if the provision to be construed will admit of no other construction than the one leading to and ending in such result, the provision itself will be rejected as inoperative, and, ignoring the special provision, the court will look to the whole instrument, and, if possible, in justice to all parties concerned, gather therefrom the real and evident intention and purpose of the parties in respect to the particular question involved, and thus enforce or decline to enforce the contract accordingly. This much would seem to result from the very necessities of the situation." In our opinion, to place a strict construction on this provision of the policy would require the violation of the rules of construction set out in the foregoing case.

For the reasons herein set out, we hold that the failure of the insured to have the weekly personal attendance of a legally qualified physician as required by the policy will not, under the evidence and circumstances of this case, bar a recovery.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JACK MANN ET AL., APPELLEES.

FILED MAY 24, 1935. No. 29256.

1. **Insurance:** TAXICABS. Section 60-202, Comp. St. 1929, requires, as a prerequisite to the right of owners and operators of taxicabs to use and operate same for hire, that they furnish indemnity of one of the three kinds named therein, to be filed and deposited with the Nebraska state railway commission for its approval, in such sum, and with such other terms and provisions, and on such conditions as the commission may deem necessary to adequately protect the interests of the public.
2. ———: ———. Section 60-202, Comp. St. 1929, invests the Nebraska state railway commission with power, by suitable order, to prescribe the amount, terms, and provisions of liability insurance policies for liability coverage for taxicabs, and to provide such conditions with regard to acceptance and approval, including a reasonable requirement as to financial responsibility, as the commission deems necessary to adequately protect the interests of the public.
3. **Automobiles:** INSURANCE. An order of the Nebraska state railway commission requiring, as a condition of approval of liability insurance policies covering taxicabs, that the company writing the risk have a surplus of at least $300,000, *held* to be a valid exercise of the power delegated to it by the legislature, and it will be presumed, without evidence to the contrary, that the commission acted reasonably in the exercise of such power, and in fixing that requirement deemed it necessary to adequately protect the interests of the public.
4. **Statutes.** "Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict." *Albertson v. State*, 9 Neb. 429.
5. **Automobiles:** INSURANCE. Where an association of persons operating or using taxicabs for hire has failed to meet the requirements of an order of the Nebraska state railway commission as to financial responsibility of an insurer, and the commission has refused to approve the indemnity tendered, which did not substantially conform to its lawful requirements, and such association thereafter continues to operate taxicabs for hire, *held*, in an action by the state to enjoin their continued operation, an injunction should be granted restraining them from so operating or using such taxicabs until compliance with the order of the commission.

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

William H. Wright, Attorney General, Edwin Vail and *William C. Ramsey,* for appellant.

Johnsen, Gross & Crawford, W. A. Schall and *John D. Lynch, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

HASTINGS, District Judge.

This action was instituted by the state of Nebraska to enjoin the defendants and appellees, who are common carriers of passengers by taxicabs, operated under the trade-name of "Checker Cab Company," within the city of Omaha and its environs, from continuing to operate as such common carriers until they complied with the regulations promulgated by the state railway commission (hereinafter called the commission), made pursuant to the provisions of a statute relative to the furnishing of liability insurance. The injunction was denied by the trial court and plaintiff's cause of action dismissed. The state appeals from the judgment.

The facts are not in dispute, and, as stipulated by the parties, are: That the defendants and each of them were operating taxicabs or public cars carrying persons for hire in Omaha and Douglas county; that each of the defendants had procured liability insurance in the Travelers Mutual Casualty Company of Des Moines, Iowa, for the amount of public liability and property damages required by the resolution of the commission, No. 110 and its supplements.

The commission received said insurance policy, but refused to approve the same. The insurer was a mutual company authorized to transact business in the state of Nebraska, and its financial statement as of September 14, 1933, showed a surplus of $129,563.60. The business of the insurer was the carrying of public liability risks and

other types of casualty business. It had in effect a reinsurance contract with the Excess Insurance Company of America, a New Jersey corporation, whose capital was, on the 31st day of December, 1932, $750,000, and a surplus of $850,000. The Excess Insurance Company was not authorized to transact business in the state of Nebraska. By said contract the reinsurer agreed to reinsure the Travelers Mutual Casualty Company as respects all third party automobile public liability policies, and agreed to repay any amounts of ultimate net loss which that company might be required to pay, not to exceed $2,500 on account of one person injured or killed, or $5,000 for two or more persons injured or killed in any one accident.

The particular order of the railway commission involved herein, known as supplement No. 3 to resolution No. 110, was made on the 21st day of April, 1932, and so far as material provides:

"It is further ordered that if liability insurance or surety bond be furnished the same will be accepted only when issued by an insurance company or licensed bonding company authorized by the bureau of insurance of the department of trade and commerce of the state of Nebraska, or their lawful successors, to do business in the state of Nebraska. The insurance company furnishing such indemnity, shall be possessed in its own name and right, of a surplus to policyholders of not less than $300,000, according to the financial statement of the company as of December 31st preceding, on file with and approved by the insurance bureau of the department of trade and commerce of the state of Nebraska."

The record does not show that defendants made any effort to procure liability insurance conforming to said order. So far as the record shows, liability insurance complying with the order of the commission might have been as readily procured, at the same expense, as the insurance tendered.

The controlling question in this case involves the power of the commission to prescribe, as a condition of approval,

that the insurance carrier for taxicabs have a surplus as provided in the order. The right of the commission to impose this condition depends upon the construction to be given section 60-202, Comp. St. 1929, which provides:

"No person, firm, association or corporation shall operate or use any taxicab in any manner as above defined in the state of Nebraska until there has been filed or deposited with the Nebraska state railway commission either a liability insurance policy or a surety bond with an approved surety company as surety or negotiable and salable securities at the option of such person, firm, association or corporation, but which shall be approved by the commission, in such sum and with such other terms and provisions and on such conditions as the commission may deem necessary adequately to protect the interest of the public having due regard for the number of persons and amount of property affected."

In the case of *Petersen v. Beal,* 121 Neb. 348, the general power of the commission to prescribe regulations as provided for in the statute was sustained.

It is urged by counsel for the defendants that because subdivision 12, sec. 44-401, Comp. St. 1929, permits companies to engage in the writing of liability insurance for coverage upon automobiles generally, and provides as a minimum requirement a surplus of $125,000, the question of financial responsibility of companies offering to write liability insurance is committed to the department of insurance, and that said section 60-202 does not authorize the commission to restrict the right to write liability insurance on taxicabs to companies having a surplus of $300,000 or more; nor to refuse to accept and approve policies from companies not having a surplus required by the commission, but which have been regularly licensed by the insurance department.

Section 60-202, Comp. St. 1929, requires as a prerequisite to the right of owners and operators of taxicabs to engage in that business that they furnish indemnity of one of the three kinds named in the statute, to be filed or

deposited with the commission for its approval. The statute invests the commission with the power to prescribe the amount, terms and provisions of liability insurance policies for liability coverage for taxicabs, and to prescribe such conditions with regard to the acceptance and approval, including a reasonable requirement as to financial responsibility, as the commission deems necessary adequately to protect the interests of the public. Neither the statute nor the orders of the commission made pursuant to its provisions modify or amend the general provisions as to the requirements necessary for liability insurance companies to engage in business generally, as provided by section 44-401, Comp. St. 1929. The statute is a special piece of legislation designed to give the commission a right to make additional requirements as to this specific class of risks. "Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict." *Albertson v. State,* 9 Neb. 429. This rule has been followed in *Richardson County v. Miles,* 14 Neb. 311; *State v. Cornell,* 53 Neb. 556; *Richards v. County Commissioners of Clay County,* 40 Neb. 45; *Merrick v. Kennedy,* 46 Neb. 264; *State v. City of Kearney,* 49 Neb. 325; *State v. Several Parcels of Land,* 79 Neb. 638; *Williams v. Williams,* 101 Neb. 369; *Salyers Auto Co. v. DeVore,* 116 Neb. 317.

The provisions of section 60-202, Comp. St. 1929, relate specially to the writing of liability coverage for taxicabs, and the orders of the commission made agreeable to its provisions takes precedence over the general provisions of section 44-401, Comp. St. 1929, as to such risks. The order of the commission requiring, as a condition of approval of liability insurance policies covering taxicabs, that the company writing the risk have a surplus of at least $300,000 was a valid exercise of the power delegated to it by the legislature, and it will be presumed, without evidence to the contrary, that the commission, in fixing that requirement as to surplus, gave the subject full consideration and deemed it necessary to fix such financial

responsibility to adequately protect the interests of the public.

It is insisted by counsel for the defendants that the order of the commission does not require, as a condition of approval, that a surety company, authorized to write the same risk, have a surplus of $300,000, and therefore is arbitrary and unreasonable. We do not think, from a reading of the order, that it was the intention of the commission to make the discrimination claimed. The language of the order may be fairly construed to include both a liability insurance company and a surety company. Furthermore, the statute gave the defendants the option of either furnishing liability insurance or a surety company bond, and if the order is given the construction claimed by counsel, defendants are not in a position to complain, as they might have furnished that kind of security had they so desired. The claim of counsel for defendants that in any event the statute and order of the commission were substantially complied with, and the public amply protected, is without merit. This claim is based upon the reinsurance contract. The company in which the reinsurance was placed was not authorized to do business in the state of Nebraska, as required by the order of the commission. It was a nonresident corporation not primarily liable, as contemplated by the order, and under its contract its liability was a limited secondary liability.

The defendants not having furnished the indemnity required by the order of the commission, an injunction should have been granted by the trial court restraining defendants from operating taxicabs until such time as they comply with the statute and the order of the commission.

The judgment is reversed, with directions to grant an injunction in conformity with this opinion.

REVERSED.

SOLOMON CRESSMAN ET AL., APPELLANTS, V. LUTHER J. BONHAM ET AL., APPELLEES.

FILED MAY 24, 1935. No. 29224.

1. **Receivers.** An action for the appointment of a receiver is purely an ancillary remedy, and cannot be maintained in a proceeding instituted solely for that purpose.
2. ———. The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court, and its ruling thereon will not be reversed on appeal unless an abuse of discretion is shown.
3. **Evidence** examined, and *held* that no ground exists for appointment of a receiver.

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

David F. Foster, J. P. O'Gara and *Perry, Van Pelt & Marti,* for appellants.

John C. Hartigan, George A. Skultety and *Denney & Denney, contra.*

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

REDICK, District Judge.

Action in equity for injunction and the appointment of a receiver for the Rasse Wholesale Grocer Company, a corporation. The action is brought on behalf of the holders of $17,000 of the preferred stock of the company and two creditors in the aggregate sum of about $8,500. The petition alleges that about the 1st day of April, 1929, the grocer company (hereinafter referred to as the corporation) had been successfully operating a wholesale grocery business with a common stock capitalization of $300,000, all of which was owned by Lorenzo J. Rasse, Lorenzo S. Rasse and Luther J. Bonham, except $7,500 which was owned by plaintiff Katherine Kassebaum; that at said time the common stock was worth in excess of $105 a share; that the defendants Bonham, Lorenzo J. and Lorenzo S. Rasse were acting and managing directors of the corporation and completely dominated and controlled

it; that on said 1st day of April, 1929, the defendants Bonham, the two Rasses and Lloyd Wright entered into a combination and conspiracy to take over the said company and all its assets and transfer the same to said defendants without any consideration; that the scheme was to organize a corporation to be known as the "Efficiency Stores," which was to establish a number of retail stores in the territory theretofore tributary to the corporation and in which were located the great bulk of its customers to whom it sold merchandise; that said plan or scheme contemplated that the defendants, under the name of Efficiency Stores, would purchase groceries and other merchandise from the corporation in large amount, and that in fact such purchases were made in excess of $160,000; that defendants have not paid said amount to the grocer company, but that defendants now have and hold said sum in trust for said corporation, and are now threatening to and are about to dissipate said assets and convert the same to their own use and benefit; that as the result of the establishment of said stores the grocer company lost its most valuable customers, and its business and good-will, which plaintiff alleges was worth not less than $100,000, were destroyed; that as a further part of said plan and scheme the bills and accounts receivable and other credits and property belonging to the grocer company should be transferred to the defendant Bonham under pretense that they would be used to finance said Efficiency Stores, and that the assets so transferred exceeded any indebtedness of the grocer company by a sum not less than $140,000; that since April 1, 1929, the defendants have refused and neglected to function as directors and officers of said corporation and their interests have been adverse and inimical to said company; that they have threatened to sell and have transferred all the assets of said company to corporations and firms who were formerly competitors of the said grocer company, and that whatever said defendants have realized from the sale of said merchandise has been retained by them and is unaccounted for as between said

defendants and the grocer company; that no assets of any considerable value are now in the possession of said Rasse Wholesale Grocer Company, and no provision has been made to pay dividends or retire the preferred stock or pay creditors. Plaintiffs pray that the defendants be enjoined from further dissipating the assets of said company and that a receiver be appointed to liquidate said company, and for further relief.

The defendants Bonham and Lorenzo S. Rasse filed answers specifically denying all the allegations of the petition, and defendant Wright answers denying all the allegations of the petition, and specially that he ever entered into any conspiracy or combination as alleged. Defendant Wright also filed a counterclaim setting up a judgment in his favor against the grocer company and praying that an accounting be had, and that, if it be found that there are any assets of the grocer company in the hands of the defendants, his judgment be decreed a first lien thereon. Plaintiffs filed a reply putting in issue the allegations of the answers and cross-petition.

By the decree of the district court, the prayer for the appointment of a receiver was denied and the petition dismissed, and the counterclaim of the defendant Wright dismissed without prejudice to future actions. Motions for new trial were filed and overruled, and plaintiffs appeal.

The bill of exceptions containing the evidence produced before the trial court is very voluminous and the exhibits very numerous, and we do not think that the interests of the parties, the court or the profession require a detailed examination of the record; suffice it to say that we have read and scrutinized the record with great care, and must content ourselves with a statement, as concise as may be, of what it shows and our conclusions thereon.

It appears that up to the 1st of January, 1929, the grocer company had been doing a fairly successful wholesale grocery business of about three million dollars a year, and making a net business profit for the year 1927 of about $25,000, and for 1928 of about $34,000. Among defend-

ants' principal customers was an organization known as the "Safeway Stores" whose business amounted to about a million dollars a year. In the fall of 1928, without notice, the Safeway Stores withdrew its patronage from the corporation. Prior to that event, and in anticipation of the continuance of said account, the grocer company purchased a very large stock of merchandise, and entered into contracts for considerably more, so that it was excessively over-stocked and its indebtedness exceeded $400,000. The defendant Bonham was president of the First National Bank of Fairbury, where the grocer company was located, and acted as the financial advisor and sponsor of the corporation. The corporation dealt with the bank, and when the limit of loans which the bank could make was reached, loans were procured from banks in Kansas City, Omaha and elsewhere, the corporation giving its notes and Bonham indorsing the same until his liability exceeded the sum of $150,000. Bonham was the owner of $75,000 of the stock of the corporation.

Upon the withdrawal of the patronage of the Safeway Stores, the directors considered ways and means to dispose of the excess merchandise which the corporation had purchased and contracted for, and concluded to establish a number of retail stores (which was permitted by their articles of incorporation) as an outlet. The stores were to be established as a selling agency for the grocer company, and the evidence fails to show that the directors expected any individual profit from the enterprise. It was intended to form a Delaware corporation under the name of "Efficiency Stores" for this purpose, the incorporators being Bonham, the Rasses, and the defendant Wright, and articles were prepared to that end, but were never signed.

About April 1, 1929, the establishment of the retail stores was begun, and within a short period 34 had been started under the name of "Efficiency Stores, Inc." The process was to acquire locations and enter into leases under that name and, as Efficiency Stores had no separate capital, the grocer company furnished the fixtures and

capital necessary to open the stores, and furnished merchandise from its own stock to the extent of about $5,000 a store. These advances and cost of the merchandise were charged to Efficiency Stores on the books of the company. The Efficiency Stores proved a bad investment or adventure, and almost from the start showed a loss, until about December 1, 1929, they were indebted to the grocer company in the sum of about $140,000.

Early in December, 1929, it was determined by the directors that the Rasse Wholesale Grocer Company should be liquidated, and to that end all of the assets of the corporation were sold to the Grainger Brothers Company, wholesale grocers at Lincoln, for the sum of about $246,000 in cash and real estate, withholding from said sale, however, all the accounts and bills receivable of the corporation, which were assigned and transferred to Bonham as security to protect him from loss on account of his indorsement of corporation paper. The propriety or legality of this sale is not attacked, although the meetings of stockholders and directors were informal and without written notice having been given. However, the Grainger Brothers Company is not a party and no relief is prayed to have the sale set aside. The retail stores were closed and liquidated and the proceeds applied to the payment of the indebtedness of the grocer company through the assistance and cooperation of Bonham; all of the bills and accounts receivable collected and other assets coming into the hands of Bonham or the grocer company were applied to the payment of the debts of the corporation as far as they would reach; the assets of the corporation have been exhausted, Bonham being short on the indebtedness of the company to him in the sum of $20,000, and the stockholders, common or preferred, received nothing.

The evidence is entirely insufficient to sustain the allegations of conspiracy. The directors in December, 1929, were confronted with a situation in which hundreds, and perhaps thousands, of mercantile institutions found themselves when the whole machinery of production and commerce

broke down. The company was in the situation of a landowner possessed of many acres and other real property having a great potential value, but with no purchasers for his property. He is described in common language as "land poor," so the grocer company was "merchandise poor," with no customers and a very large indebtedness. The evidence satisfies us that the directors made an honest attempt to secure an outlet for its excess merchandise for the benefit of the corporation and its creditors. They may have taken an unwise course, but they exercised their best judgment, which was all that was required of them, and the record is absolutely devoid of any evidence that they acted fraudulently or in their individual interests; and the evidence also fails to establish that any of the defendants derived any profit from the transactions complained of. That the liquidation of the grocer company was positively called for by the exigency of the situation seems not debatable. If we correctly interpret the facts as revealed by the record, we are unable to perceive what benefit plaintiffs could derive from the appointment of a receiver to recover or conserve nonexistent assets. The only substantial relief sought by the petition in this case is the appointment of a receiver, which is purely an ancillary remedy and cannot be maintained in a proceeding instituted solely for that purpose. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222; *Mann v. German-American Investment Co.*, 70 Neb. 454; *Miller v. Kitchen*, 73 Neb. 711. The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court (*McKenzie v. Beaumont*, 70 Neb. 179), and we think it was properly exercised by the district court, and its judgment is

AFFIRMED.

ALVA G. WAITS, APPELLEE, V. COLUMBIA FIRE UNDERWRITERS AGENCY ET AL., APPELLANTS.

FILED MAY 31, 1935. No. 29300.

1. **Evidence.** Letter, written by party offering it in evidence, should be excluded upon proper objection by adverse party, when such letter contains self-serving statements and does not tend to support any issue raised by pleadings.
2. ———. Statements by an agent, made subsequent to the close of the transaction, not connected therewith and not specially authorized by the principal, cannot be received in evidence against the latter.
3. **Trial.** Trial court properly refused to direct verdict for defendant where there was substantial evidence tending to sustain plaintiff's cause of action.

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

Wells, Martin, Lane & Offutt, for appellants.

Hoagland, Carr & Hoagland, contra.

Heard before GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

GOOD, J.

Plaintiff sued Columbia Fire Underwriters Agency of the National Fire Insurance Company (hereinafter called Columbia company) and National Fire Insurance Company (hereinafter designated National company) on an alleged lost policy of tornado insurance. The National company denied the existence of any such policy of insurance. The Columbia company also denied the existence of the policy and alleged that it was not engaged in writing insurance for itself but only as agent for the National company. A trial of the issues resulted in judgment for plaintiff against both defendants. Defendants have appealed.

There is no evidence in the record that the Columbia company is an insurance company engaged in writing insurance on its own behalf. There is no evidence that any policy of insurance was ever issued to plaintiff by such

company or on its own behalf. If any such policy was issued by the Columbia company, it was on behalf of and as agent for the National company. It is clear that there can be no liability so far as the Columbia company is concerned.

It is plaintiff's contention that on or about the 13th of June, 1928, a policy of tornado insurance was issued to him by the National company through its soliciting agent in the village of Tryon; that the policy was for $2,000, for a term of five years, and covered plaintiff's barn; that on the 22d of May, 1933, while said policy was in force, plaintiff's home and barn were wholly destroyed by a tornado, and the policy and other papers of plaintiff were lost in that tornadic storm. Plaintiff and his son testified as to receipt of the policy from the soliciting agent either in June or early in July of 1928. Plaintiff testified that he paid the premium on the policy, amounting to $58. Plaintiff's wife also testified as to seeing and examining the policy; that it was placed and kept in a bureau drawer in their residence; that after the tornado no trace of the bureau or any part of it could be found.

A short time after the tornado, plaintiff wrote a letter to the Columbia company, giving information of the tornado, the loss of his barn and of the policy, and containing statements that the agent at Tryon had said their insurance was all right and in force. This letter, over objection of the defendants, was admitted in evidence, it was claimed, for the purpose of showing notification to the company of the loss. There was no issue on notification to the company; there was no issue on proof of loss. The only issue tendered was that no such policy was ever in existence or had ever been written. The letter amounted to a self-serving declaration, was clearly incompetent, and should have been excluded.

During the course of the trial, plaintiff called a number of witnesses who testified, over objection of defendants, to conversations with one Warren, who was the soliciting agent for the National company. These conversations re-

lated to a time after the tornado and to a period five years after the time plaintiff claimed delivery of the policy by Warren. These conversations related to statements by Warren to the effect that plaintiff was protected by insurance; that the insurance was in force, and that he could recover for his loss. Plaintiff attempts to justify the admission of this evidence on the ground that Warren was the agent of the company and the only person in the vicinity acting for the company; that his acts and declarations were the acts and declarations of the defendants and were, therefore, admissible. He cites and relies upon a number of authorities, which we have carefully examined, and find none of them in point. In some instances the authorities recognize that the declarations of a general agent in the transaction of the principal's business are admissible in evidence against the principal, and that even the declarations of a soliciting agent of an insurance company may be received in evidence against the principal, when he is directly and specially authorized to make such representations.

These cases are not applicable to the situation disclosed by the record. In this case, whatever transaction Mr. Warren had on behalf of the insurance company with the plaintiff was completed and closed either in June or July, 1928. The statements by agent Warren were made subsequent to May 22, 1933. There is nothing in the record to show that Warren was authorized by the defendants, or either of them, to make any statements on behalf of the defendants respecting the issuance of a policy.

In 22 C. J. 367 *et seq.*, cited and relied upon by plaintiff, it is said: "An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made. Conversely, a declaration of an agent, not within the scope of his authority nor in the course of the negotiation to which it refers, is not admissible against the

principal, unless it was made under such circumstances that the silence or acquiescence of the principal makes the admission his own, or was ratified by the principal. * * * The admission which it is sought to use must have been made in connection with the discharge of the agent's duty, must have been based on his own knowledge, and must be a statement of fact, rather than an expression of opinion."

In *Union Life Ins. Co. v. Haman*, 54 Neb. 599, this court held:

"The statements of an agent while acting in a matter in which he has authority, and of matters within the scope of his authority, and of and concerning the business in hand, made at the immediate time of its transaction, or a part thereof, are admissible in evidence against his principal.

"Such statements made subsequent to the close of the transaction, not connected therewith and not specially authorized by the principal, cannot be received in evidence against the latter."

In *Shoemaker v. Commercial Union Assurance Co.*, 75 Neb. 587, it was held: "It is not every admission or declaration of an agent that is binding on his principal. The general rule is that the principal is not bound by such admissions or declarations, unless they are made during the transaction of business by the agent for the principal, and within the scope of the agency."

In *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103, it was held: "The declarations of an agent made after the transaction to which they relate is fully completed and ended are not competent to be given in evidence as a part of the *res gestæ*." Chief Justice Cobb, in the opinion, said (p. 107): "It is a recognized rule that the admissions of an agent made at the time of the particular transaction which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against his principal, as a part of the *res gestæ*. But it is equally well settled that the agent's declarations made after the transaction is fully completed and ended, as in this in-

stance, are not admissible." In that case the admissions were made two days after the date of the transaction.

Other authorities holding to a like tenor are *Cleveland Stove Co. v. Hovey & Peck,* 26 Neb. 624; *Columbia Nat. Bank v. Rice & Co.,* 48 Neb. 428; *Clancy v. Barker,* 71 Neb. 83; *Sheridan Coal Co. v. Hull Co.,* 87 Neb. 117; *Southern Surety Co. v. Nalle & Co.,* 242 S. W. (Tex. Civ. App.) 197; *Vicksburg & Meridian Railroad v. O'Brien,* 119 U. S. 99; *Wash v. Cary,* 17 Ky. Law Rep. 1066; *Emerson v. Burnett,* 11 Colo. App. 86; *Serbinoff v. Wolverine Mutual Motor Ins. Co.,* 242 Mich. 394; *North American Accident Ins. Co. v. Frazer,* 112 S. W. (Tex. Civ. App.) 812; 2 Jones, Evidence (2d ed.) p. 1801.

Clearly, the admissions of statements and declarations, made by the soliciting agent, Warren, five years subsequent to the transaction, were not only incompetent, but were prejudicial to the rights of defendants.

The National company, with general western headquarters located in Chicago, offered testimony that blank policies were forwarded to the Columbia company as agent; that such policies were consecutively numbered and a record kept thereof, and that every policy issued and delivered to the Columbia company agency had been checked and accounted for, and that no such policy as contended for by plaintiff had ever, in fact, been issued. Also, the soliciting agent, Warren, was called as a witness, and he testified that he had no records, other than an expiration register, and that an examination of this register did not show any such policy to have been issued to plaintiff. He further testified that he had no recollection of delivering any such policy; that he had searched his bank account, the bank records were searched, and no record of any check, claimed to have been written by plaintiff, could be found; nor was any deposit made to the credit of Warren, nor any record of any remittance made by him to either of the defendants, to cover the premium claimed to have been paid by plaintiff. In view of this evidence, defendants insist, the evidence is insufficient to sustain any recovery.

With this view we are not in accord. Whether such a policy as claimed by plaintiff was issued was a question of fact. The evidence of plaintiff, his wife and son that such policy had been issued and delivered; that they had seen and examined it, was sufficient to require the submission of that question to the jury.

Because of the errors pionted out in the admission of evidence, the judgment of the trial court as against the National company is reversed and the cause remanded for further proceedings. The judgment as against the Columbia company is reversed and, as to it, the action is dismissed.

JUDGMENT ACCORDINGLY.

GEORGE W. MARTIN, APPELLANT, V. GEORGE A. SANFORD ET AL., APPELLEES.

FILED MAY 31, 1935. No. 29186.

1. **Trial:** MOTION FOR DIRECTED VERDICT. A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Criminal Law:** PLEA OF GUILTY. A defendant having entered a plea of guilty to a valid complaint then pending in a county court, which complaint properly charges him with the commission of a misdemeanor, it is lawful for the county judge, upon receipt of such plea, to render a judgment of "imprisonment not to exceed six months, or a fine not to exceed five hundred dollars, or both according to the law of the case, and pass sentence accordingly, and to enforce the same according to law." Comp. St. 1929, sec. 29-513.
3. ———: ———. The issuance of a warrant on such complaint, or the previous arrest of the defendant pursuant to such process, is neither contemplated nor necessary.
4. **County Court:** COURT OF RECORD. "The county court is always and under all circumstances a court of record. The county

judge, in whatever official capacity he may act, is a judge of a court of record; he is not a justice of the peace even when exercising the ordinary powers and jurisdiction of a justice." *Scott v. Flowers*, 61 Neb. 620.

5. **Criminal Law:** DATE OF JUDGMENT. The omission of the date of a judgment in the county court imposing a sentence is a mere irregularity, and will not render the judgment void. Such date may be fixed by reference to the proceedings in the county court, or extrinsic evidence may be given of the day on which the judgment was rendered.
6. **Evidence:** PAROL EVIDENCE. Under the facts in this case, parol evidence as to the actual issuance of the warrant, the delivery of the same to the sheriff, and the arrest thereunder, was competent and properly received; and in no manner does it tend to contradict the records of the county court which import verity.
7. ———: DECLARATIONS AGAINST INTEREST. "The general rule is that every material fact must be proved by testimony on oath and not by declarations or admissions not on oath. One of the exceptions to this rule is that the declarations of a party to the record, or of one identified in interest with him against his interest, are, as against such party, admissible in evidence." 1 Ency. of Evidence, 504.
8. ———. In view of the issues involved in the present case and the parties thereto, the evidence offered by the plaintiff as to the oral statements of the county judge to the effect that no warrant was ever issued in the case of State v. Martin *et al.*, which case was fully concluded in his court five or six months previous, *held* properly excluded.
9. **False Imprisonment.** Under the facts in the present record, it is deemed established that the arrest of plaintiff, his subsequent detention, and other exercise of official powers by the defendant sheriff complained of, which are alleged to have occurred prior to the imposition of sentence by the county court, were regularly and properly done pursuant to a lawful warrant then in possession of the defendant officer, fair on its face, and issued by a court of competent jurisdiction upon a valid complaint theretofore made and filed with it. Further, plaintiff's detention after imposition of sentence was in strict compliance with the penalty judicially imposed by such court.
10. **Process:** ABUSE. "Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad

intention, is not a malicious abuse of process." 1 Cooley, Torts (4th ed.) 437.

11. **Criminal Law:** ARREST. "Any officer or other person having in lawful custody any person accused of an offense for the purpose of bringing him before the proper magistrate or court, may place and detain such prisoner in any county jail of this state for one night or longer, as the occasion may require, so as to answer the purposes of the arrest and custody." Comp. St. 1929, sec. 29-410.
12. **False Imprisonment.** A known officer in making an arrest by virtue of a valid warrant, if no resistance is offered by the party arrested, ought always, upon demand made, to show his warrant to the party arrested or notify him of the substance of it: Provided, however, if the party arrested has actual knowledge of the charge, the reading of the warrant by the sheriff or its actual production by that officer is unnecessary, and, under such circumstances, the failure of such officer to produce and exhibit the same on demand will not subject him to liability in an action for false imprisonment.
13. **Evidence** in the record examined, and *held*, first, to be insufficient to sustain plaintiff's contention that his arrest and subsequent detention by the defendant sheriff were made by that officer without warrant or process authorizing the same and thus constituted false imprisonment; and, second, that the recovery of damages by the plaintiff on his cause of action for malicious prosecution is precluded, and the trial court rightfully directed a verdict for the defendants thereon.

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

Russell W. Bartels, for appellant.

Sidney T. Frum and *Gaines, McGilton, McLaughlin & Gaines, contra.*

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

EBERLY, J.

This is a civil action for damages. It was brought by the plaintiff, Martin, in Wayne county, Nebraska, against the defendant as sheriff of Dakota county and the bonding company as surety on his official bond. The petition set

forth two causes of action, viz., (1) a cause of action for false imprisonment; and (2) a cause of action for malicious prosecution; all alleged to have been committed by defendant Sanford in his official capacity as sheriff of Dakota county, on the theory that an arrest and subsequent detention of plaintiff by him was made without a warrant or process authorizing the same. The allegations of this pleading were put in issue by the answer of defendants. In the first paragraph of this answer, it was alleged, in part: "That though such fact does not appear on the face of the petition, plaintiff will be unable to produce evidence to establish a cause of action against either of these defendants under section 20-404, Compiled Statutes of Nebraska, 1929; * * * that by reason of the foregoing facts, this court has no jurisdiction over the subject-matter of this action or the person of the defendants," and the several defendants "severally object to the jurisdiction of this court" over their persons and "to the jurisdiction of the court over the subject-matter of the action."

Such section 20-404 provides in part: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: * * * Second. An action against a public officer, for an act done by him in virtue of or under color of his office, or for any neglect of his official duty. Third. An action on the official bond or undertaking of a public officer."

Defendants also, in addition to traversing the allegations of plaintiff's petition, by way of justification, pleaded the following: (1) The filing of a proper complaint in the county court of Dakota county, Nebraska, on May 20, 1932, by the county attorney of Dakota county, charging in appropriate terms the unlawful violation in Dakota county on that date by George W. Martin, the plaintiff herein, of section 28, and also section 11, of chapter 110, of the session laws of Nebraska for 1931, and also setting out a copy of such complaint; (2) the issuance by such county court on that date of a warrant in due form directing the arrest of George W. Martin, and delivery of this warrant to the

defendant Sanford; that as directed in this warrant defendant Sanford on the day of its issuance arrested the plaintiff, Martin, and on May 21, 1932, produced his body in the county court of Dakota county, together with said warrant with his official return indorsed thereon; that a copy of the warrant, together with the return indorsed thereon, is set out as a part of the answer; (3) that Martin, plaintiff herein, was immediately arraigned by the county court, and the complaint read to him, and that to this complaint he pleaded guilty; that thereupon a judgment of guilty was entered by the county court, and sentence imposed as provided by law, which is and remains in full force and effect, and a copy of this judgment and sentence is also set out as a part of the answer.

Thereupon plaintiff moved to strike from such answer the first paragraph thereof, which motion the trial court sustained. However, the challenge to the jurisdiction of the court based on section 20-404, Comp. St. 1929, was amply preserved in the record subsequently made. Plaintiff then filed a reply which in effect amounted to a general denial.

Upon the trial of the issues thus found, at the close of plaintiff's evidence, the trial court sustained a motion to instruct the jury to return a verdict for the defendants on count 2 of plaintiff's petition, and at the close of all the evidence a similar motion was sustained as to count 1. From the order overruling the motion for a new trial, plaintiff appeals.

The undisputed evidence, including all offers of proof in the record tendered by plaintiff, is that on May 20, 1932, George W. Martin was involved in an accident while conducting a truck over Highway No. 77 in Dakota county. He sought to pass a buggy, having a led horse behind it, and in such passing the horse was injured. It is not questioned in the record that after the accident the truck proceeded on its way without stopping. The plaintiff now testifies that he was wholly unaware that an accident had ever occurred.

Malcolm R. Smith, who has been county attorney of Dakota county for seven years, and a resident of South Sioux City, Dakota county, testifies that he, as county attorney, prepared, swore to, and filed in the county court of Dakota county the complaint in State v. George W. Martin (a copy of which is set forth in defendants' answer); that he "did not see George A. Sanford before this complaint was filed in regard to it;" and that the information on which the complaint was based was furnished by citizens of Dakota county, other than George A. Sanford, and that he knows the county judge started to write up the warrant while he was in his office.

Sherman W. McKinley, a resident of South Sioux City, Nebraska, and county judge of Dakota county for 18 years, testifies that he remembers the occasion when a case entitled State v. George W. Martin was filed; that the complaint, which he identifies, was filed by the county attorney, Malcolm R. Smith; that the warrant was issued thereon on May 20, 1932, and he "put it in the hands of the sheriff for service" on that date, May 20, 1932. In reference to these dates the county judge on cross-examination says: "I couldn't remember just exactly what I did on May 20, 1932, without something to refresh my memory and my signature here and the date of the warrant now makes me certain that that is when I issued it. I remember issuing the warrant, but I couldn't just say when without something to refresh my recollection. This does it."

Defendant Sanford testified, in substance, that he was the sheriff of Dakota county, and had been such for about nine years previously; that about 4:30 o'clock in the afternoon of May 20, 1932, a complaint had been filed in the county court by Malcolm R. Smith, county attorney, in the case of State v. George W. Martin and John Doe; that this witness furnished no information to the county attorney as to the accident involved, or the facts which led up to the filing of the complaint, and that he knew nothing about the facts involved prior to the time the complaint was prepared and signed; that the warrant, then produced and

handed to him, was the original warrant delivered to him by the county judge of Dakota county on the day of its date, and was exactly in the same condition as when thus received excepting his "return" thereto that was put on this instrument by this witness on May 21, 1932; that immediately on receipt of this warrant he proceeded to Carroll, Nebraska, with that document in his possession, to make the arrest of George W. Martin as therein commanded.

There is no competent evidence in the record that contradicts the evidence of the facts covered by the testimony thus summarized. The validity and form of the complaint are not questioned, and the recitals and commands of the warrant appear technically regular in all respects. Unquestionably, it was process, fair on its face, and lawfully issued by a court of competent jurisdiction.

In this connection we do not overlook the fact that plaintiff challenges the competency of this parol evidence supplementing the records of the county court, and offers in support of his position certain evidence as to statements made by the county judge of Dakota county in a conversation had with plaintiff's attorney in the office of the county judge at a date not definitely fixed, but apparently some five or six months after the filing of the original complaint, and after the judgment and sentence thereon had been entered. In substance, this offered proof was, that plaintiff's attorney at that time, having, upon his request, received from the county judge the court wrapper containing the complaint in the case of State v. Martin, but not then containing the original warrant issued thereon, addressed an interrogatory to the county judge, in reply to which this official stated "that there was no warrant in the files and that none was needed and that none was had in said case." This offer of proof was excluded by the trial court. It may be said in passing that the original warrant, bearing date of May 20, 1932, was produced at this trial, with the sheriff's return under date of May 21, 1932, indorsed thereon, and that the county judge, on cross-exam-

ination by plaintiff, expressly denied so much of this offer of proof as pertained to the statement, "that none (no warrant) was had in said case."

However, the county court docket in this case, at the time of this conversation, disclosed, by proper recitals, "that on May 20, 1932, Malcolm R. Smith, county attorney within and for Dakota county, Nebraska, filed the following complaint, subscribed and sworn to on the same day by said county attorney, before me, and that afterwards the following proceedings were had and orders entered, to wit:" Then follows a complaint, properly verified, in two counts charging the commission of two offenses under the Nebraska motor vehicle act. Following the copy of the complaint on the docket, but without further date, it is set out that "the defendant, George W. Martin, being arraigned in open court pleaded guilty as charged in the complaint, and upon due consideration thereof the court finds that the defendant is guilty as therein charged." Following the foregoing statement, the sentence imposed is set out in this record, and then appears the official signature of the county judge.

The facts recited in this docket entry bring these proceedings squarely within the purview of section 29-513, Comp. St. 1929. The defendant having thus entered a plea of guilty, it was lawful for the county judge to render a judgment of "imprisonment not to exceed six months, or a fine not to exceed five hundred dollars, or both according to the law of the case, and pass sentence accordingly, and to enforce the same according to law." Comp. St. 1929, sec. 29-513. See, also, *Ex parte Maule,* 19 Neb. 273.

The only prerequisites to the exercise of these powers by the county judge were the filing of the proper complaint and the entry of a plea of guilty thereto. The issuance of a warrant on such complaint, or the previous arrest of the defendant pursuant to such process, was neither contemplated nor necessary. *Cohoe v. State,* 79 Neb. 811. Nor is the validity of this judgment affected by the omission on the docket of the date of its rendition. "The omission of

the date (of judgment), however, is a mere irregularity, and will not render the judgment void. The date may be fixed by reference to the record of proceedings in the case. A clerical error may be shown so as to support the judgment." 33 C. J. 1211. And, again, "The date of the judgment may be fixed by reference to the record of the proceedings in the case, or extrinsic evidence may be given of the day on which the judgment was rendered." 34 C. J. 70.

It is obvious that the parol evidence as to the actual issuance of the warrant in this case, and of the arrest thereunder, was competent and properly received; and in no manner does it contradict the terms of the judicial records which import verity. *Bantley v. Finney,* 43 Neb. 794.

This record is also to be sustained by all the presumptions which support the records of a "court of record." Section 16, art. V of our Constitution, provides, in part: "County courts shall be courts of record." In *Scott v. Flowers,* 61 Neb. 620, this court held: "The county court is always and under all circumstances a court of record. The county judge, in whatever official capacity he may act, is a judge of a court of record; he is not a justice of the peace even when exercising the ordinary powers and jurisdiction of a justice."

In discussing the nature of the jurisdiction vested in county courts, in *Foote v. Chittenden,* 106 Neb. 704, 707, Clements (E. J.), district judge, says in part: "They are courts of record, and as to such matters (guardianship and probate proceedings) they are courts of general, superior, and not inferior, jurisdiction. *Scott v. Flowers,* 61 Neb. 620; *Genau v. Roderick,* 4 Neb. (Unof.) 436. Their records import verity, and their proceedings possess, as a general rule, the same presumptions of jurisdiction and regularity possessed by courts of superior common-law jurisdiction. Where a county court possesses general jurisdiction of a given class of subject-matter, the possession of jurisdiction assumed to be exercised in a particular case falling within that class is, in a collateral proceeding, pre-

sumed. All matters necessary to give the court jurisdiction, upon which the record is silent, are presumed. *Davis v. Hudson,* 29 Minn. 27; *Shroyer v. Richmond,* 16 Ohio St. 455. The reasons for the foregoing rule are clearly stated in *Davis v. Hudson, supra,* which case is cited in plaintiffs' brief on another point." See, also, *In re Estate of Ramp,* 113 Neb. 3.

On the other hand, the tendered evidence of contradictory statements of the county judge who issued the warrant, to the effect that no such warrant was ever issued, was properly excluded by the trial court. This county judge was not a party to the present litigation, nor do the pleadings herein charge him with complicity in the wrongs therein alleged, and, further, the defendant was not present at the times to which plaintiff's evidence was limited.

"The general rule is that every material fact must be proved by testimony on oath and not by declarations or admissions not on oath. One of the exceptions to this rule is that the declarations of a party to the record, or of one identified in interest with him against his interest, are, as against such party, admissible in evidence." 1 Ency. of Evidence, 504.

The testimony which plaintiff offered was plainly not within the foregoing exception, and its exclusion was therefore required under the terms of the general rule. It purported to be a narration of the facts of a transaction which occurred five or six months previously, at which the defendant herein was not present, by a third person not at any time the representative of such defendant.

It may be said that in all material matters the testimony of plaintiff as to improper conduct on part of the officers of Dakota county, including that charged to the sheriff forming a part of the transaction complained of, is positively denied by the testimony of competent witnesses. As to the manner of the arrest, the defendant testifies that plaintiff, on the sheriff's arrival, was found at the "pump house or police station or light plant" in Carroll, Nebraska; that in the presence and hearing of the plaintiff, in answering the

inquiry of a Mr. Merrill, the defendant sheriff then and there stated that plaintiff was charged with a violation of the motor vehicle act; that, en route from that place to plaintiff's home, in the sheriff's automobile, the warrant directing plaintiff's arrest was actually delivered to him by defendant, and was returned to the sheriff by plaintiff after examination of the writ when the party arrived at the plaintiff's residence. The testimony of the sheriff's deputy sustains this testimony that during that time the plaintiff was given physical possession of the warrant.

Mr. Merrill, a witness for plaintiff, testified on his direct examination that no warrant was produced or read to plaintiff by the sheriff at the "pump house." However, on cross-examination, he testifies that at the Carroll pump house, in the presence of the plaintiff, Martin, a conversation was had by and with the defendant sheriff, substantially as follows: "Q. Mr. Sanford, the sheriff, told you what he had come after Mr. Martin for? A. Yes. Q. So that Mr. Martin knew what he was charged with at that time? A. I presume he would; yes." It is admitted that at the time of the arrest plaintiff, Martin, knew the defendant sheriff was sheriff of Dakota county, and that he was acting in his official capacity. Thus, it will be seen that what the sheriff actually did and accomplished on May 20, 1932, including the commitment of the plaintiff to the county jail, was contemplated and required by the lawful warrant then in the sheriff's possession.

It will be remembered that "Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." 1 Cooley, Torts (4th ed.) 437.

The plaintiff admits that, during the time covered by the acts of the sheriff complained of, plaintiff knew the identity of defendant, and that he was acting in his official capacity as sheriff of Dakota county; that plaintiff was at

the "light plant" of the village of Carroll, but denied that he understood what the defendant then said as to the charge on which he was then arrested.

Plaintiff testifies: "The sheriff came over to me (at the light plant). He said, 'Let's get going.' I asked him if he had a warrant. He said, 'I don't need one.'" Plaintiff further testified that the sheriff took him home and permitted him to change clothing, and then the sheriff, plaintiff and the sheriff's deputy drove to Dakota City, and during the trip nothing was said to him by anybody; but that the warrant was never read to him. Later the plaintiff testified that Saturday morning (the next day), at the Dakota county jail, the improper acts of the sheriff, constituting the alleged wrongs of which plaintiff complains, occurred.

However, in consideration of plaintiff's statements and contentions, it is to be remembered that the evidence in the record, substantially uncontroverted, is that on May 20, 1932, a proper complaint charging plaintiff in the present action with the commission of a misdemeanor was filed in the county court of Dakota county; that on that day a warrant in due form of law was issued thereon and delivered to the defendant as sheriff of that county; and that with this warrant in his personal possession such defendant proceeded at once to Wayne county, Nebraska, and, as commanded by the process in his personal possession, took plaintiff Martin into custody and returned to Dakota county, where he arrived some time between 7 p. m. and 9 p. m. of the same day, and thereupon committed plaintiff to the county jail. It will also be remembered that immediate service on a warrant when received by a sheriff is a statutory requirement. Comp. St. 1929, secs. 28-720, 28-721.

In view of all the facts reflected in the evidence, the commitment of plaintiff to the county jail of Dakota county seems authorized by section 29-410, Comp. St. 1929, which provides: "Any officer or other person having in lawful custody any person accused of an offense for the

purpose of bringing him before the proper magistrate or court, may place and detain such prisoner in any county jail of this state for one night or longer, as the occasion may require, so as to answer the purposes of the arrest and custody."

As to the contention of plaintiff that the warrant was not produced, when demanded, and was not read to him, it seems, in the absence of controlling statutory provisions, the correct rule on this subject appears to be that a known officer attempting to make an arrest by virtue of a valid warrant, if no resistance is offered by the party arrested, ought always, upon demand made, to show his warrant to the party arrested *or notify him of the substance of his warrant. United States v. Rice,* 27 Fed. Cas. 795; *State v. Phinney,* 42 Me. 384. See, also, *State v. Taylor,* 70 Vt. 1; 5 C. J. 392, 393, and also authorities in note 99 on page 393. But, if the person arrested has actual knowledge of the charge, the reading of the warrant by the sheriff or its actual production by him is unnecessary. *King v. State,* 89 Ala. 43; *State v. Garrett,* 60 N. Car. 144; *Cabell v. Arnold,* 86 Tex. 102; *Bowling v. Commonwealth,* 7 Ky. Law Rep. 821; *State v. Dula,* 100 N. Car. 423; *Rex v. Howarth,* 1 Moody (Eng.) 207. At all events, it appears that no liability is incurred by a regular officer having a warrant in his possession because of his failure to exhibit it on demand. 25 C. J. 489; *Arnold v. Steeves,* 10 Wend. (N. Y.) 514.

It would seem, in the present case, that no recovery can be predicated upon the method followed by the defendant sheriff in making the arrest pursuant to a lawful warrant then in his possession. In addition, the pleadings and the record in this case suggest the applicability of the following principle of pleading: "There should be no material variance between the pleading and proof. Where an arrest void *ab initio* is the alleged basis of the false imprisonment, it is a material variance to prove an arrest lawfully made but which became unlawful imprisonment by an unlawful refusal to receive bail." 3 Bancroft, Code Pleading, sec. 1445.

As to the charge of malicious prosecution, it may be said that there is no evidence in the record which, in any manner, tends to impeach the good faith of the county judge who received and filed the complaint in the case of State v. Martin, or challenges the good faith of the county attorney who made and filed the complaint in that case, or questions the validity of the complaint filed. The conviction of plaintiff, Martin, upon his plea of guilty is unreversed, and is and remains in full force and effect. These facts preclude a recovery of damages by the plaintiff for alleged malicious prosecution under the circumstances of the instant case. 18 R. C. L. 27, sec. 15; *Casebeer v. Drahoble,* 13 Neb. 465; *Murphy v. Ernst,* 46 Neb. 1; *Sudborough v. Pacific Express Co.,* 4 Neb. (Unof.) 518; *Duerr v. Kentucky & Indiana Bridge & R. Co.,* 132 Ky. 228; *Lawrence v. Cleary,* 88 Wis. 473; *Wagstaff v. Schippel,* 27 Kan. 450.

The undisputed evidence in the present case disclosing not only probable cause but ample justification for all steps taken by the defendant sheriff, the trial court rightfully directed a verdict for the defendants on the cause of action alleging malicious prosecution. *Kersenbrock v. Security State Bank,* 120 Neb. 561; *McHugh v. Ridgell,* 105 Neb. 212; *Meyer v. Meese,* 95 Neb. 226; *Talcott v. Rice,* 94 Neb. 539; *Sudborough v. Pacific Express Co.,* 4 Neb. (Unof.) 518; *Bechel v. Pacific Express Co.,* 65 Neb. 826; *Gering v. Leyda,* 91 Neb. 430.

In our opinion, the evidence in the record conclusively establishes that the plea of guilty was entered in State v. Martin and sentence imposed on Martin on Saturday, May 21, 1932. The county judge's positive testimony is that at that time, after the complaint had been read to plaintiff, but before his plea of guilty was accepted, the county judge, in open court, asked plaintiff if he desired the services of an attorney, to which inquiry plaintiff replied he did not. Except as to date, this is nowhere questioned in the record before us. After this reply was received, the plea of guilty was accepted by the court, and sentence imposed. The absolute good faith of the county judge, and

of the county attorney as complainant, is unchallenged, and the force and effect of this judicial record is not in any manner impaired. From and after the sentence, plaintiff's detention was strictly pursuant to its terms. There is no evidence in the record that any complaint was ever made to the sheriff or jailer as to the condition of the county jail, or its appointments, or the food served, during plaintiff's confinement. There is no evidence that plaintiff ever asked to be admitted to bail prior to his sentence, or that it was possible for plaintiff to secure bail if the sheriff or jailer, without request therefor, voluntarily produced him in the county court for that purpose. But such conduct on part of his custodians is not contemplated by the law of the land. The rule is: "If the accused desires to be bailed, he must demand or apply for it, and the magistrate is authorized to commit him unless he does so." 6 C. J. 983.

It follows that, in this case, the county judge rightfully exercised his judicial powers, the sheriff properly performed the duties of his office, and the district court correctly disposed of the case. Its judgment is, therefore,

AFFIRMED.

ALLIE R. MANN, APPELLEE, V. STANDARD OIL COMPANY, APPELLANT.

FILED MAY 31, 1935. No. 29311.

1. **Automobiles:** SIGNALS. The statutes of this state provide that the driver of a motor vehicle upon a highway shall indicate an intention to turn to the left by extending the arm horizontally to the left and beyond the side of the vehicle and by pointing to the left with the index finger. Comp. St. Supp. 1933, sec. 39-1147.
2. ———: VIOLATION OF STATUTE. The violation of a statute regulating the use of vehicles on a highway is evidence of negligence on the part of the person violating it.
3. ———: ———. In an action for damages for injuries sustained in a collision between an automobile driven by plaintiff and a truck owned by the defendant, a custom or practice of

automobile and truck drivers to signal an intention to turn to the left by holding the left front door open is not binding on the plaintiff so as to excuse defendant's driver from violating the statute in that regard.

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

W. H. Herdman and *Moyer & Moyer,* for appellant.

Jack Koenigstein and *George W. Dittrick, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

CARTER, J.

This suit was commenced by the appellee, Allie R. Mann, on two causes of action to recover damages to person and property caused by a collision between an automobile owned and driven by the appellee and an oil truck owned by the appellant, Standard Oil Company, and operated by one of its drivers. On the trial below, the jury returned a verdict for appellee and judgment was entered thereon. From the overruling of its motion for a new trial, the appellant brings the case to this court on appeal.

The only assignment of error made by the appellant was the giving by the trial court of instruction No. 10½, which is as follows: "Evidence bearing on the question of certain alleged customs has been offered and received in evidence, in this case. You are instructed that the Nebraska statute regulates the matter of the use of motor vehicles on the public highways and defines the rights and duties of such vehicles on such highways and these are controlling in this state. No custom even if established by the evidence could or would supersede the express requirements of the statute and a violation of such a statute, if such you find, would be evidence of negligence regardless of any custom and you are instructed that such evidence of certain customs has been received and may be considered by you only as bearing on the questions of negligence and contributory negligence, to be considered by you along with all the other evi-

dence and circumstances disclosed by the record and bearing on such questions of negligence and contributory negligence."

The evidence upon which this instruction is based is substantially as follows: The driver of the truck testified that he was driving west on the right-hand side of the highway in question at a speed of between 20 and 30 miles an hour; that, when he was approximately 300 yards from the driveway of Mr. Kline's place, he looked through the rear vision glass and saw appellee's car approaching 200 or 300 yards back; that he then opened the left door and held it open, until the collision occurred, as a signal that he was about to turn into the driveway. As he turned across the paved highway, his truck collided with appellee's car. Testimony was produced to the effect that the holding of the left door of a car or truck open was a recognized signal of an intention to turn to the left established by custom and usage. Under this statement of the record, did the trial court err in giving the instruction complained of?

On May 5, 1933, the date of the collision, the statutes of Nebraska provided: "An intention to turn to the left shall be indicated by extending the arm horizontally to the left and beyond the side of the vehicle, and by pointing to the left with the index finger." Comp. St. Supp. 1933, sec. 39-1147.

The general rule in this state is that a violation of a statute, not imposing a mandatory duty upon persons or owners of property, enacted for the safety or protection of persons or property, constitutes evidence of negligence only for the jury to consider with all the other evidence in the case on that issue. *Stevens v. Luther,* 105 Neb. 184. The appellant attempts to avoid the effect of the statute by proving a general custom in lieu thereof. The general rule is: "A custom or usage repugnant to the express provisions of a statute is void, and whenever there is a conflict between a custom or usage and a statutory regulation the statutory regulation must control." 17 C. J. 475. A general custom, even if proved, of holding the left door of an

automobile open as a signal of an intended turn to the left can in no way detract from the express language of the statute. A violation thereof will still be evidence of negligence on the part of the person failing to comply therewith. In *Casey v. Boyer*, 270 Pa. St. 492, the court said in a matter of like nature: "A city ordinance was introduced, that vehicles shall adhere to the ordinary rule of keeping to the right, and the jury were correctly instructed as to the effect of this ordinance—that it expressed the municipal view concerning the proper conduct of drivers on the street under ordinary circumstances. Defendant attempted, however, to introduce evidence that it was customary to drive to the left on Twenty-second street at the point in question; but these offers were properly refused." In *Reinders v. Olsen*, 60 Cal. App. 764, the court said: "As to that part of appellant's objection to the instruction with reference to the failure of the court to include the fact of knowledge on the part of plaintiff relating to the 'custom' or, rather, practice, of automobile drivers using the wrong side of the street, no such practice could be binding on plaintiff so as to excuse defendant from violating the statute in that regard, provided that such act was the proximate cause of the accident." We are of the opinion, however, that the evidence in question was admissible for another purpose. The reason therefor is well expressed in 27 R. C. L. 194, sec. 39, as follows: "It is, however, well settled that the degree of care required of a plaintiff in an action for injuries alleged to have been caused by the negligence of the defendant, in order that he may escape the imputation of fault whereby his action will be defeated, is measured by the diligence that prudent persons generally exercise under the same conditions. Accordingly, on the issue of contributory negligence, evidence of the ordinary practice and of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently, is generally competent evidence, because it presents to the jury a correct standard for the determination of the issue."

The appellant contends that the use of the word "controlling" in the instruction complained of tells the jury that the evidence of the statutory violation outweighs the evidence of the appellant and amounts to an instruction to find for the appellee. The instruction must be considered as a whole, and, in so treating it, we are of the opinion that it instructs the jury that, irrespective of any usage or custom, a violation of the statute would still be evidence of negligence. This is a proper statement of the law. In order to arrive at any other conclusion, it would be necessary to place a strained interpretation on the language used. We therefore conclude that the instruction was without prejudicial error.

There being no other errors assigned, the judgment of the trial court is

AFFIRMED.

IN RE ESTATE OF JOHN W. SHIERMAN.
WILLIAM FRANCIS SHIERMAN ET AL., APPELLANTS, V. NETTIE A. SHEA, APPELLEE.

FILED MAY 31, 1935. No. 29120.

1. Courts: APPEAL. "When an appeal is taken from the county court to the district court the case is to be tried in the appellate court upon the issues that were presented in the court from which the appeal was taken." *Bishop v. Stevens*, 31 Neb. 786.
2. ———: PROBATE JURISDICTION. "The district court has no power in an original action either directly or indirectly to determine whether an instrument proposed for probate is the last will of a deceased person. Original jurisdiction in such matters is conferred by the Constitution upon the county court alone." *Brown v. Webster*, 87 Neb. 788.
3. ———: ———: EQUITY POWERS. "County courts of the state, which are by the Constitution and laws given exclusive original jurisdiction in all matters of probate settlements of estates of deceased persons, etc., have the power and authority, with respect to the subjects mentioned, to try and determine

actions of an equitable character, and grant equitable relief, when proper, to the same extent as a district court regarding other subjects in the exercise of its general equitable jurisdiction." *Williams v. Miles*, 63 Neb. 859.

4. Wills: CONTEST: INFANTS. Where infants have been disinherited or deprived of valuable property rights by the will of a parent deceased, it is proper for a near relative or other person interested in their welfare to institute proceedings in the interest of the minors as next friend to contest such will, negotiate for a compromise of the litigation, execute a contract of settlement thereof if for the benefit of the infants and approved by the court after an examination of the facts, and a judgment thereon for the distribution and division of the estate in accordance therewith after final administration of the estate will be binding upon the infants and all other persons parties thereto.

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

McNeny & Sprague, for appellants.

J. E. Willits, contra.

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

CHAPPELL, District Judge.

John W. Shierman, a widower, and owner of a large estate, shortly before his death executed what is claimed was a will, devising certain specific property absolutely to his sister, Nettie A. Shea, appellee in this court, in which alleged will he gave her unconditional, unlimited and uncontrolled discretion as to the remainder of his property and the income therefrom. The will, by its terms, did not impose or attempt or intend to impose any trust or obligation with reference to this part of the estate in any manner whatsoever. He made suggestions therein that she do certain things with reference to the management and income therefrom for the benefit of his two sons, then but five and six years of age, but she was not required to comply with any of such suggestions or pay any sums thereunder at the instance of any person or legal entity. On

July 27, 1931, this purported will was presented to the county court of Adams county, Nebraska, for probate, and on August 15, 1931, was admitted to probate, and the sister qualified as executrix of the estate without bond, as provided in the will. No guardian or guardian *ad litem* was appointed by the court for the infant sons to protect their interest, and no objections were filed by any one for them to the admission of the will to probate. The only other relative of the minor chldren in that county was their grandmother. Upon learning of the probate of the will and discovery of its contents, the grandmother's husband, R. D. Gaston, appellant in this court, as next friend of the children,. during the May to August term of the Adams county court, filed application to vacate the decree probating the will, setting forth therein proposed objections, to wit: (1) That the testator was of unsound mind when the will was executed; (2) that its execution was obtained by improper and undue influence brought upon him by the sister, appellee. Shortly thereafter L. B. Stiner, as attorney for appellee, made an independent investigation of the facts charged in the suggested objections. He made a trip to Denver, Colorado, for this purpose and, while there, consulted witnesses to determine the truth or falsity of the objections. Thereafter on August 28, 1931, after consultations with and upon advice of her counsel that, in his opinion, they could not sustain the will if a contest were had, the appellee and next friend of the children executed an agreement which was prepared by appellee's counsel disposing of and settling the contest of the will for the purpose of protecting the minor children and avoiding further litigation. Appellant took one copy of the agreement and appellee took the other. This agreement, in substance, gave appellee certain valuable properties absolutely, which she would have lost, had objections to the probate of the will been sustained, withdrew objections to and consented that the probate of the will remain in full force and effect, and provided that appellee, upon final administration of the estate, that is, after the administration of the estate

had been completed in the county court, would convey and transfer the rest of the property to a trustee to be administered by such trustee for the use and benefit of the minor sons. This contract further provided that, should anything occur between the date of the contract and final administration to prevent such transfer, then and in that event the agreement itself should operate as a conveyance and transfer of the property.

There is confusion in the record as to whether the motion to set aside the probate of the will and proposed objections thereto were withdrawn or whether the contract executed by them was ever filed in the county court. The next friend, appellant, and L. B. Stiner, then counsel for appellee, testified that this was done, but the county court records do not disclose the fact. We deem it immaterial. The fact is plain that thereafter no hearing was ever had upon the motion and proposed objections in the county court, and the contract between the parties dismissed and withdrew the objections to the instrument and the probate of it. On November 12, 1931, after the term had ended in which the original judgment of probate had been entered, and after appellant had lost the right to set the probate of the will aside during the term, appellee filed in the county court an alleged revocation of the contract and a dismissal of her attorney, L. B. Stiner, for the reasons that it was not her voluntary judgment, agreement or contract, that her signature thereto was obtained by coercion, restraint, misrepresentation, over-persuasion, intimidation, demand, command, undue influence and fraud upon her rights by appellant and her attorney, L. B. Stiner. Appellant, upon learning of this, filed an application in the county court on behalf of the minors, setting forth the contract of settlement and compromise, and asking that the contract be declared binding on all the parties thereto and entered as a judgment of the court for the purpose of division and distribution of the property after administration of the estate was completed, and that appellee be removed as executrix. Upon hearing this application in the county court on

January 7, 1932, the court made no findings as to the contract, but overruled the motion. Appellant appealed to the district court, wherein he filed a like application called a petition, and appellee filed as answer a general denial. After trial upon these issues the district court entered a decree finding that the parties had entered into the agreement as alleged in the petition; that it was intended to be the basis of a settlement and final judgment, but that it was not delivered to or filed in the county court before the appellee undertook to rescind or revoke it; that before making the agreement appellant had filed objections to the probate of the will within the time in which they were entitled to be heard, and to have the original judgment of probate opened up; that appellant was entitled to contest the probate of the alleged will; that, relying upon the agreement, contestants did not proceed further with the contest, and that the claimed revocation of the agreement was not made or made known to the court or contestants until after expiration of the term in which the original judgment of probate had been entered; that the county court should have either received and acted on the agreement or opened up the case and allowed a contest of the will; that the contestants were misled, had not been negligent and should not lose both the benefits of the contract of settlement and the right to contest. The district court then ordered that appellee make an election within ten days in the district court whether she would accept the contract and have judgment thereon according to its terms, or whether the judgment for probate of the will should be vacated and set aside by the district court and the matter stand for trial in the district court on the proposed will; that is, her petition for probate of the same and the objections of contestants thereto. Thereafter appellee filed an election in the district court to stand upon her attempted revocation and consented to a contest of the will in the district court. Motion for new trial having been overruled, appeal is taken by the next friend of the minors.

The only question presented for our determination is

whether the court erred when it failed to find that the contract of settlement was binding on all the parties thereto and to enter the same as the judgment of the court as to the disposition and division of the estate after administration thereof.

It will be observed that this was not, in the first instance, a hearing as upon the contest of the will. This was originally an application to have the county court approve and enforce a contract of compromise and settlement as a judgment in the distribution and division of the property. The will had already been probated and the term had passed when such matter could ordinarily be opened up because of the conduct of the appellee. The only issue in the county court was the contract. "When an appeal is taken from the county court to the district court the case is to be tried in the appellate court upon the issues that were presented in the court from which the appeal was taken." *Bishop v. Stevens,* 31 Neb. 786. See, also, *Sells v. Haggard & Co.,* 21 Neb. 357; *Fuller & Johnson v. Schroeder,* 20 Neb. 631; *Halbert v. Rosenbalm,* 49 Neb. 498; *Banking House of A. Castetter v. Stewart,* 70 Neb. 815; *Smith v. Spaulding,* 40 Neb. 339; *Carnahan v. Brewster,* 2 Neb. (Unof.) 366; *Bothell v. Miller,* 87 Neb. 835; *In re Estate of Kierstead,* 128 Neb. 654. The district court has no power upon appeal or as an original action to permit an election and hear the contest of a will except on an appeal of such proceedings from the county court. The county court has original exclusive jurisdiction of the probate of wills and the contest thereof in the first instance. Const. art. V, sec. 16; Comp. St. 1929, sec. 27-503; *Brown v. Webster,* 87 Neb. 788; *Williams v. Miles,* 63 Neb. 859; *Reischick v. Rieger,* 68 Neb. 348; *Byron Reed Co. v. Klabunde,* 76 Neb. 801; *State v. O'Connor,* 102 Neb. 187; *Pinn v. Pinn,* 108 Neb. 822; *In re Estate of Kierstead, supra; Genau v. Roderick,* 4 Neb. (Unof.) 436; *Loosemore v. Smith,* 12 Neb. 343; *Andersen v. Andersen,* 69 Neb. 565; *Lydick v. Chaney,* 64 Neb. 288; *Boales v. Ferguson,* 55 Neb. 565; *Fischer v. Sklenar,* 101 Neb. 553.

The county court had jurisdiction in the first instance to hear the application filed by appellant. In *Genau v. Roderick, supra,* this court said: "The district court has no original jurisdiction of a suit in equity for specific performance of a contract entered into by the heirs at law and next of kin of a testator, for the purpose of settling a will contest. * * * The Constitution gives the county court 'original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and the settlement of their accounts.' * * * The statutes provide that its original jurisdiction in these matters shall be exclusive. * * * As to such matters, the county court is a court of general jurisdiction. *Lydick v. Chaney,* 64 Neb. 288. It has full and complete equity powers as to all subjects within its exclusive jurisdiction. *Williams v. Miles,* 63 Neb. 859. Clearly, the district court had no original jurisdiction of the suit as far as it seeks to set aside the order admitting the will to probate. * * * For the same reasons it could not entertain, in the first instance, a suit for specific performance of a contract to administer an estate out of court and divide it in certain proportions among the contracting parties. To carry out this contract, the court would have to settle the estate as a court of probate or by proceedings analogous to suits in equity for administration under the old practice. * * * The whole suit would come within the purview of the statutory and constitutional provisions as to jurisdiction of the county court." See Comp. St. 1929, sec. 30-1302; *Williams v. Miles, supra; Reischick v. Rieger, supra; Genau v. Abbott,* 68 Neb. 117; *Youngson v. Bond,* 69 Neb. 356; *Fischer v. Sklenar, supra; Wilson v. Coburn,* 35 Neb. 530; *Glade v. White,* 42 Neb. 336.

The district court had only the power on the appeal to enforce the contract or to refuse to do so. The court found that it was entered into by the parties as a basis of settlement and final judgment for the distribution and division of the property after administration by the county court. The record is conclusive that the contract is binding and

enforceable. Such contracts are favorites of both law and equity. The parties to the contract are the only persons affected by or interested in the estate. There is no coercion, intimidation, restraint, concealment, duress, fraud, accident, mistake or any other reason urged by appellee in her alleged revocation or appearing in the evidence under the issues presented in the district court or in this court to show that it is not valid and enforceable. Appellee's counsel, L. B. Stiner, acted honorably and in all good faith in the matter, and we find no ground whatsoever for criticism of his professional conduct. Dissatisfaction by her after its execution is all that appellee adduced against the validity of it. That reason makes no appeal to the conscience of this court. See *Grochowski v. Grochowski,* 77 Neb. 506; *Sellers v. Perry,* 191 Mich. 619; *Korte v. O'Neill,* 34 S. Dak. 241; *Brunson v. Henry,* 140 Ind. 455; *Seaman v. Colley,* 178 Mass. 478; *Blount v. Wheeler,* 199 Mass. 330; *Schoonmaker v. Gray,* 208 N. Y. 209; *In re Estate of Kierstead, supra;* 12 C. J. 322, 345, 362.

This is not a stipulation made by the parties or agreed to during the progress of the trial, from the consequences of which a court in its discretion might relieve them in order to do justice between the parties. Cases relied upon by appellee are not in point here. This is a solemn contract of settlement fully executed between the parties to avoid litigation and performed in part to the injury of the appellant. Appellee cannot now avail herself of the contention that she is not bound by the contract of settlement because it was executed by the next friend of the children. Her alleged revocation does not give this as a reason for her attempted withdrawal from it; neither was it an issue in the trial court. She admits the execution of it. It was prepared by her attorney and upon his advice. The attorney for appellant had no part in the preparation or execution of it. The filing of an attempted revocation must, of necessity, recognize its existence. It will be deemed filed in the county court when a proper action is brought therein to enforce the provisions of it. The contract is binding

upon her unless the court relieves her from its enforcement. Appellee's attempted revocation of it could be of no force and effect. *Blount v. Wheeler, supra; Schoonmaker v. Gray, supra.* Neither does the fact that a suggested trustee has gone out of existence affect the contract so as to relieve her from the enforcement of it. The court, upon hearing, may use its discretion and appoint any proper and suitable person or corporation to act as such trustee and fulfil its duty to protect the rights and interests of the minors. See 65 C. J. 233, and notes. After the court approved the settlement, which was the purpose of this action, it would be binding upon the minors as well as the appellee for all time and for all purposes.

Appellant had the right and it was his duty to institute proceedings to contest the will. The minor sons were practically disinherited by the will. The conscience of the aunt was the only barrier to this result. We would not detract or question the confidence so placed in her by the testator. The grandfather of the children did question it and instituted proper proceedings in the county court to insure protection for them. This proceeding was for the benefit of the infants. Comp. St. 1929, secs. 20-307, 38-114; 31 C. J. 1126. In *Everson v. Hurn,* 89 Neb. 716, this court said: "Where an infant son has been disinherited by the will of his father, deceased, it is proper for the mother or other near relative to institute proceedings in the interest of the minor to contest such will and to employ counsel therefor." See, also, *In re Estate of Bayer,* 116 Neb. 670; Dame, Probate and Administration (3d ed.) 142, sec. 132. In the case of *Everson v. Hurn, supra,* this court also put its approval upon a compromise settlement made by such next friend for the infants. It would seem logical, inevitable, that the right to so protect the infant as next friend and officer of the court would give the right to settle and compromise the contest if done for the benefit of the infants and with the court's approval or by judgment thereon in a proper action. See Dame, Probate and Administration (3d ed.) 146, secs. 136, 137; *Metzner v.*

Newman, 224 Mich. 324; *Matthews v. Doner,* 292 Ill. 592; *Williams v. Williams,* 204 Ill. 44; *Thompson v. Maxwell Land Grant & R. Co.,* 168 U. S. 451; 31 C. J. 1112-1115, 1118, 1142; *Wallace v. Boston Elevated R. Co.,* 194 Mass. 328; *Tripp v. Gifford,* 155 Mass. 108; *Minor v. Cecil,* 188 Ky. 157; *McCreary v. Creighton,* 76 Neb. 179; *Sutphen v. Joslyn,* 93 Neb. 34; *Weddle v. Specht,* 97 Neb. 693.

We conclude that this cause should be reversed, with directions that the trial court enter judgment for appellant as prayed, appoint some suitable, upright and true person or corporation to act as trustee to protect the minors, and certify the same to the county court for further proceedings in accordance with the law and this opinion.

REVERSED.

KRUG PARK AMUSEMENT COMPANY ET AL., APPELLEES, V. NEW YORK UNDERWRITERS INSURANCE COMPANY, APPELLANT.

FILED MAY 31, 1935. No. 29024.

1. Insurance: AGENCY: STATUTORY PROVISIONS. Sections 44-213 and 44-307, Comp. St. 1929, construed, and *held*:

   (a) That any agent, solicitor or broker who shall solicit an application for insurance of any kind, or who shall with authority receive any money on any contract of insurance or any renewal thereof, or who shall make or cause to be made any contract of insurance for or on account of any insurance company, shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured, and shall be deemed to all intents and purposes an agent of such company.

   (b) That such statutes do not define the scope of such agency except when the agent is performing or attempting to perform one or more of the acts set forth therein, to wit, soliciting an application for insurance, collecting premiums, or making a contract for insurance.

   (c) When the agent performs or attempts to perform any

of said acts the statutes apply, and the insurance company issuing any policy as a result thereof is bound by all knowledge the agent had regarding the circumstances and situation of the assured and the property which is the subject of the insurance, and all material facts known to the agent affecting the issuance of such policy.

(d) When the policy is issued and delivered, knowledge by the agent of any facts or occurrences regarding the policy and subject of insurance thereafter occurring are not imputed to the insurance company.

(e) After a policy is issued and delivered, the authority of the agent with relation thereto is to be determined by his contract with the insurance company and such apparent authority as may be implied from his conduct of the company's business with its knowledge and consent, and not by the statute, unless he attempts to perform one or more of the acts described in the statute.

(f) A soliciting agent or broker having no authority to issue policies or change or waive any of its terms who undertakes to procure a transfer of the policy is the agent of the insured, and the company is not bound by any knowledge he may have of a change of title of the insured property until it has notice thereof. The mere obtaining of a transfer of the policy is not one of those acts mentioned in the statutes as operating to enlarge the scope of the agency.

2. **Landlord and Tenant:** TERMINATION OF LEASE. The delivery of possession of personal property by a lessee to the lessor to be held and managed as security for delinquent rent until paid does not operate to transfer the title to said property, but is in the nature of a pledge; and delivery of possession of leased real estate for the same purpose will not terminate the lease, unless surrender of the lease is intended by the parties.

3. **Insurance:** POLICY: AVOIDANCE. Termination of a lease of land, whereby title to the buildings and fixtures belonging to lessee becomes the property of the landlord, and a transfer of title to personal property, without notice to the insurer, are such changes in the title as will void a policy of insurance on the property containing a provision to that effect.

4. ———: ———: ASSIGNMENT. "The owner of a policy of insurance, who has parted with the title to the premises, cannot assign the policy, after a fire, and without the knowledge and consent of the insurance company which issued the policy, so as to make it liable to a third person for the loss." *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456.

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

Wells, Martin, Lane & Offutt, for appellant.

Ziegler & Dunn, contra.

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

REDICK, District Judge.

This is an appeal by the defendant, New York Underwriters Insurance Company, from a decree in equity in the district court for Douglas county, reforming an insurance policy issued by the defendant, and awarding judgment to Frank Crawford, as trustee, substitute for the First National Bank.

Plaintiffs in their amended petition allege that on the 21st day of May, 1932, the defendant executed and delivered its policy of insurance whereby it insured against loss by fire certain property, described therein, of the Park Bathing Company, a corporation, for the term of one year, said property consisting of towels and bathing suits used by said company in its business; that on or about September 1, 1932, the bathing company, being largely indebted to plaintiff, Krug Park Amusement Company (hereafter referred to as the park company or plaintiff), as rent for the premises where said personal property described in the policy was located and used, in part payment of its rental indebtedness, transferred all of its right, title and interest in and to said personal property to said plaintiff, and continuously thereafter, up to and including the time of the fire hereinafter mentioned, plaintiff was the owner of said property so insured, and that at all said times said property was in possession and control of the plaintiff; that at the time said policy was issued, and at all times, the insured property was in the building located on property leased by the bathing company from plaintiff and used in connection therewith, and said bathing company had surrendered the use and occupancy of said premises and said

personal property to plaintiff to be held and used as security for the rent indebtedness of the bathing company to plaintiff until such time as said bathing company might be able to pay said indebtedness; that plaintiff was authorized to keep said property insured for the protection of the interests of both parties, and that the agent of said defendant who contracted for and issued said policy and received the premiums thereon was informed, at the time of the issuance of said policy, of the aforesaid arrangement between plaintiffs and the bathing company; that on September 1, 1932, in an action in forcible entry and detainer, plaintiffs recovered judgment against the bathing company for restitution of the leased premises, and that since the 2d or 3d day of September, 1932, plaintiff has been the sole owner and in exclusive possession of said personal property, which was used as a part of the equipment of said bath house and for the purpose for which same was used at the time said policy was issued.

Plaintiffs further allege that on the 2d or 3d day of September, and again on September 26, 1932, after plaintiffs had become the owner of said property, plaintiffs applied to Allan A. Tukey, Inc., who was the authorized agent of said defendant to act for said defendant in the premises and who was in possession of the policy, for a transfer of said policy from the name of the Park Bathing Company to that of the park company, and that said agent agreed to make said transfer and deliver said policy so changed and transferred, said transfer to be effective from the 2d or 3d day of September, 1932, and be binding on said defendant for the remainder of said period of one year from September 1, 1932; that said defendant, by oversight and mistake, neglected to make said changes as agreed upon and to change said policy from bathing company to plaintiff, without the knowledge or consent of the plaintiff; that on September 27, 1932, the property covered by said policy was totally destroyed by fire, whereby plaintiff sustained a loss of $7,800. The petition then alleges that proofs of loss were furnished to and accepted by de-

fendant, and said loss had been adjusted by an adjuster of the defendant; that in July, 1932, the park company executed a trust deed to the First National Company to secure a bond issue of the park company in the sum of $65,000, in which the park company agreed to keep the property described in said trust deed insured against fire for at least 60 per cent. of the value thereof, for the benefit of said trustee; that by oversight and mistake the park company failed to have attached to said insurance policy a rider as provided in said trust deed making any loss payable to the trustee, and that it was the intent and purpose of the park company and said defendant, through its agent aforesaid, to attach such rider to said policy.

As a second cause of action, plaintiff alleges that on November 29, 1932, the bathing company transferred to the park company all its right, title and interest, if any, in and to the above described insurance policy and to all sums due thereunder on account of said fire loss. Plaintiff prayed that the policy be reformed so as to make the Krug Park Amusement Company the assured therein, and to provide that the loss should be first payable to the trustee as its interest may appear, and for a decree in favor of plaintiffs in the sum of $2,500.

The defendant moved to require plaintiffs to elect between the causes of action set forth in the petition, which motion was overruled. Defendant then demurred to the petition on several grounds, which demurrer was overruled. Defendant then answered and admitted the incorporation of all the parties, and the issuance of the policy, and admitted that on or before September 1, 1932, the Park Bathing Company transferred all its right, title and interest in the insured property to the park company, and that said park company was the sole owner and in possession of said property at the time of the loss; admitted that the fire occurred about September 27, 1932, and damaged a part of said personal property, and denied each and every other allegation of the petition. Defendant further denied that Allan A. Tukey, Inc., was the agent of defendant, or

authorized to enter into any contract of insurance on behalf of defendant, or to modify, change or add to any policy of insurance that had been issued by defendant; denied that it entered into any contract of insurance with plaintiffs, or either of them, and alleged that it had no notice or knowledge of the transfer of the property, described in said policy, from the bathing company to plaintiff; and alleged that said policy had not been assigned to the park company prior to the loss, or, if an assignment was made, no notice of the assignment was given to the defendant, and defendant has not consented to any assignment at any time.

Defendant further alleged that said policy provided, among other things: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance, * * * whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss." And defendant alleged, by reason of said transfer of title and the retention of possession and control of said property by the park company, the policy was breached and thereby became null and void and was not in force and effect at the time of the loss.

Plaintiffs reply denying the allegations of new matter in the answer, and alleging that the change in title of the property did not increase the hazards or add to or contribute to the loss caused by destruction of the property of the insured, and that said park company, with the consent of the bathing company, had insured said property in the name of said bathing company and paid the premium thereon.

The decree by the district court found generally in favor of the plaintiffs and against the defendant, and that in the early part of the year 1932 the park company was the owner of a large portion of the capital stock of the bathing company and was procuring the rest of the capital

stock of the bathing company, and was then in possession and control of the property then in the name of the bathing company, including the property covered by the insurance policy involved herein, which property had been in the possession and control of said park company for a long time prior to the issuance of the policy sued on, and that the policy sued on was procured by said park company acting on behalf of the Park Bathing Company, and that Allan A. Tukey, insurance broker, had full knowledge of the acquisition of said bathing company by said park company and of the negotiations through which it was obtained by the park company, and of the possession and control thereof by said park company, and that on the 21st day of May, 1932, the said Allan A. Tukey procured said policy under an agreement with the park company to procure its assignment to said plaintiff whenever the transfer of said property to said park company should be formally completed; that prior to the fire said broker had received instructions from the park company to make said assignment and transfer said policy, which he agreed to do, but had not done so at the time of the loss by fire. The court further found that after the fire said policy was assigned to the park company, and that there had been no change of ownership or possession or increase of hazard on said policy from the time of issuance of said policy until its destruction by fire, and that the insured property was of the value of more than $5,000, and rendered a decree that the plaintiffs were entitled to a reformation of the policy as prayed in their petition, and in favor of the plaintiffs and trustee for the sum of $2,641.26.

There is little dispute in the evidence, which establishes the following facts: The Krug Park Amusement Company was the lessee of about 16 acres of land upon which it conducted an amusement park and sublet to other parties portions of the grounds upon which to conduct various forms of amusement. Among others, it sublet to the Park Bathing Company a part of the premises upon which to construct a bathing pool and bath house and conduct a swim-

ming and bathing establishment in the year 1919, in consideration of certain rentals to be paid by the bathing company. Fire insurance policies were carried by the park company and its lessees in their own names respectively covering their respective interests. The original policy covering the property of the bathing company, of which the policy in suit issued May 21, 1932, was a renewal, was procured from Martin Bros. & Co., the local agents of the defendant, about the year 1928, through the agency of Allan A. Tukey, Inc., an insurance broker having no authority to sign or issue policies for the defendant, all of which were signed and issued by Martin Bros. & Co., Tukey collecting the premiums and accounting therefor to Martin Bros. & Co., who delivered the policies to Tukey, who retained possession of them. The policies were all issued in the name of the Park Bathing Company, the renewals, in the ordinary course, being ordered by Tukey from Martin Bros. & Co. The Krug Park Amusement Company and the Park Bathing Company were separate corporations having their own officers and directors, the amusement company owning all stock in both companies, except $50,000 of the stock of the bathing company which was owned by E. John Brandeis, the bathing company leasing from the amusement company that part of the premises used as a bathing resort, at an annual rental. Some years prior to 1932 the bathing company was seriously in default in payment of rent under its lease, and the amusement company took possession and control of the property of the bathing company until such time as the rentals due from the bathing company were brought up to date, which was never accomplished. No steps were taken to forfeit the lease of the bathing company until September 1, 1932, when by judgment in forcible entry and detention the lease of the bathing company was terminated and the amusement company became the owner of all its assets by transfer from the bathing company. Up to March 31, 1932, the two corporations were conducted as separate institutions, although the management and control of the bathing com-

pany had been in the hands of the park company for a number of years; but the policies of insurance upon the bathing company property had always been carried in the name of the bathing company, the owner, and had never been transferred to the park company prior to the fire which occurred September 27, 1932.

On March 1, 1932, S. M. Fox and his associates acquired all of the stock of the Krug Park Amusement Company and of the Park Bathing Company, except $50,000 thereof owned by E. John Brandeis, and from that time forward operated the park company and bathing company as one institution, and sometime in June or July, 1932, notified Tukey that they were taking title to the bathing company property, and early in September notified him that they had taken title and wanted the policy of insurance transferred to the park company, and on September 26 again inquired of Tukey as to the transfer, and he said he was attending to it, that he would have to see whether the trust deed of the park company covered the property of the bathing company, and, if so, have the policy indorsed payable to the mortgagee as its interest might appear. On that day Tukey communicated with the First National Bank or trustee, but was unable to secure the necessary information, and again on the 27th, when the officer at the bank said they would check up the matter, but the information was not forthcoming until after the fire on the night of the 27th. Tukey at no time prior to the fire gave any notice to Martin Bros. & Co. of the change of possession or title from the bathing company to the park company, nor at any time did he request that the policy be transferred from the bathing company to the park company, and such transfer or consent thereto was never obtained.

Tukey, at least as early as the fall of 1931, knew that the park company was using and operating the properties of the bathing company as a part of the general facilities of the amusement company, but had no knowledge of the arrangements between the two companies by which that

situation was brought about. And while the amusement company had been in possession and operating the bathing company's property as a part of the amusement company's business, it was only doing so until such time as the rental default of the bathing company should be brought up to date. It did not acquire title to the bathing company property until its judgment in the forcible entry and detainer suit about September 1, 1932, whereby the lease of the bathing company was terminated, although the bathing company had ceased to function, so far as the operation of the bath house and pool were concerned, for several years. However, separate accounts were kept for the two companies and their separate entities maintained. The bathing company did not surrender its lease or the title to its property by turning over the management to the park company as security for back rent, as alleged in the petition.

It is conceded that Allan A. Tukey, Inc., was a mere insurance broker so far as defendant is concerned, having no authority to bind the defendant by contract of insurance, nor to sign and issue policies; but on the contrary it appears that Martin Bros. & Co. were the only agents authorized to issue policies or consent to any transfer, and, in fact, the only engagement which Tukey made with the plaintiff was to procure a transfer or assignment of the policy to the plaintiff from Martin Bros. & Co. True, it is now claimed that prior to the renewal of the policy in suit plaintiff and Tukey had an agreement that the renewal policy should be made to the bathing company and transferred to the park company when it acquired title, but there is no allegation in the petition to that effect, and the evidence claimed to support this contention does not exist. Plaintiff relies upon the testimony of Mr. Fox, president of the amusement company, as follows: $30,000 insurance was carried on bathing company property, and before it was renewed witness ordered it cut down to $22,500. (This was accomplished by allowing the excess to expire.) Policy in suit was renewed upon my order.

"Q. State what if any conversation you had with him (Tukey) at that time (renewal) as to who you were representing and in whose behalf you were insuring this property. A. When we discussed the insurance condition of our park we also discussed the indebtedness of the Park Bathing Company to the Krug Park Amusement Company. At that time we canceled some of the policies so that the insurance that was covered would cover the obligation of the Park Bathing Company to the Krug Park Amusement Company. * * * Q. What I am inquiring about now is what conversation you had with him regarding whose interest you people, you, were insuring in this property? A. I stated it right in there, the conversation that I wanted the indebtedness covered to protect Krug Park Amusement Company, and I cut down the insurance to cover that indebtedness. Q. That was to be how much? A. 17 thousand 5 hundred, cut down from 30. Q. What conversation if any did you have with him at that time or later prior to the fire as to the so-called legal title to the Park Bathing Beach property? * * * A. I told him in June at the time we rearranged this insurance that the Krug Park Amusement Company was going to take legal steps for this property."

On cross-examination he testified that the conversation about canceling part of the insurance was in June, 1932; talked with him about insurance before we purchased the property; is not sure he had any conversation after we purchased it, but talked to him in June; knew in March that policies were written in bathing company's name.

Mr. Tukey testified that order to cut the insurance down was in June or July; that his first talk about the amusement company taking title was in June; had previous conversations about insurance, but could not recall them.

All this amounts to is simply that Fox desired the insurance on bathing company property to be cut down to the amount of its indebtedness to the park company, but, as the latter was in possession and control of all the property of the former, the policies were to remain as they

were until the park company acquired title. But, even if given the full effect claimed by plaintiff, Tukey had no authority to change the policy and took no action for that purpose, and the insurance company was not bound by such a contract, if made, the same being beyond the actual or apparent scope of his agency. It is the contention, however, of the plaintiff that Tukey was the agent of the defendant company for the purpose of procuring an assignment of the policy by virtue of two sections of the statutes of Nebraska reading as follows:

Section 44-213. "Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured."

Section 44-307. "Any person, firm or corporation in this state who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or receipt for money from other persons to be transmitted to any such company or individual aforesaid for a policy or policies of insurance, or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed, to all intents and purposes an 'agent' or 'agents' of such company."

There can be no question but at common law Tukey had no authority to bind the defendant insurance company by any contract of insurance, and that any knowledge Tukey may have had prior to and at the time of the issuance of the policy would not be imputed to the insurance company. *Farmers & Merchants Ins. Co. v. Graham*, 50 Neb. 818; *Lowe v. St. Paul Fire & Marine Ins. Co.*, 80 Neb. 499; 32 C. J. 1054. And the only question for our decision

is whether or not by the statutes above quoted Tukey was such an agent of the defendant that his knowledge of the transfer of the possession of or title to the bathing company property could be imputed to the defendant. It will be remembered that no notice of the change of possession or transfer of title was ever given to Martin Bros. & Co., the agents of defendant, nor any request made for a transfer of the policy or the attachment of a rider in favor of the trustee, nor any indorsement made evidencing and consenting to those changes in the policy. If, prior to the loss, Tukey had given such notice or made such request to Martin Bros. & Co., and assuming, as we think the evidence shows, that consent would have been granted as a matter of course, but that before the indorsements were actually made the fire occurred, defendant would have been bound; but, as before stated, no such notice or request was ever made. The precise question, therefore, is whether or not, under the statutes, the agency of an insurance broker terminates with the issuance and delivery of the policy or whether his agency continues for all purposes while the policy is in force.

A careful analysis of these sections must be made for the purpose of determining the intent of the legislature in their enactment. It is quite evident that the purpose was to protect the insured against the fraud, mistake, misrepresentation and negligence of the person whom the insurer appoints as his agent and accepts the results or fruits of the acts of the agent by issuing the policy and accepting a premium therefor. In such cases it is no more than just and right that the insurer should be bound by the statements made to the applicant and by the knowledge of the agent of all facts and circumstances communicated by the assured to the agent, materially affecting the risk and determining and controlling the terms of the contract of insurance to be entered into as the result of the negotiations. The primary purpose is to secure to the insured the protection which he pays for. Section 44-213 refers to "Every agent or broker who shall solicit an application for

insurance of any kind;" and section 44-307 refers to any person "who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them * * * or who shall with authority receive or receipt for money from other persons to be transmitted * * * for a policy or policies of insurance, or any renewal thereof, * * * or who shall in any wise make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed, to all intents and purposes an 'agent' or 'agents' of such company." "When a person does any of the acts enumerated in section 1810 of the Code of Laws, the presumption is that he was the agent of the insurance company." *Madden & Co. v. Phoenix Ins. Co.*, 70 S. Car. 295, 301. Both of these sections deal solely with the procuring and issuance of the contract of insurance. There can be no doubt that in procuring the original policy to the bathing company in 1928, or theretofore, and in procuring each of the subsequent renewals thereof, including the one in suit, Tukey, Inc., though having no authority to issue policies, was the agent of the insurer, who was bound by such knowledge as Tukey had at the time of the issuance of each of the policies respectively; and in any controversy between the insured and the insurer as to the existence, terms and validity of the policy, Tukey must be considered the agent of the insurer, invested with the same powers as a regularly appointed agent. *Echols v. Mutual Life Ins. Co.*, 106 Neb. 409. But after the policy has been issued and contract completed, the statute by its terms ceases to have any application to any future relation between the agent and the insurer, at least until the agent again enters the picture by the performance of some act declared by the statute to constitute him an agent. By the expression "by its terms" we mean that there is nothing in the language of the statute which expressly or by implication indicates an intention upon the part of the legislature to extend the authority of the agent beyond the results to be accomplished by the procuring of an application and the payment

of the premium. To hold otherwise, *i.e.*, that it was the intention of the legislature to extend or continue the authority of the agent during the term of the policy, would put the insurer at the mercy of hundreds or thousands of insurance brokers, whether reliable, or what is termed the curbstone variety, or even a person not a broker who volunteers to act for the insured, without any power of selection or control over them. If such were the correct interpretation of the statutes, the business of insurance, which is now considered one of the safest kind of investments, would become so precarious that few would be found who would invest their capital in it, and no one would feel any assurance when he paid his premium that he would secure the protection promised by his contract. When an insurer appoints an agent, he selects him because of his confidence in his integrity and ability and holds him out to the public as possessing those qualities, and it is no more than just that the insurer be bound by the acts of such agent as his *alter ego* when such acts are performed within the scope of his authority; but to hold the insurer bound by the acts of a mere soliciting agent beyond the point where it has accepted or ratified the same, expressly or by implication, does violence to all our ideas of the confidential relations which exist, or are supposed to exist, between principal and agent.

With regard to the authority of a soliciting agent after issuance of the policy, it was held in *Dohlin v. Dwelling House Mutual Ins. Co.*, 122 Neb. 47, that by an agreement by such an agent to renew a policy at expiration he represented the insured and not the insurer. In *Cobel v. Hartford Fire Ins. Co.*, 154 Minn. 233, it was held: "The knowledge of an agent of an insurer after a policy has been issued that there has been a change of ownership of the property covered, such agent having no authority to consent to an assignment of the policy or to waive its terms, is not knowledge or consent of the insurer to the assignment." In *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, it was held: "While section 2765, Florida Statutes

(practically identical with section 44-307), undertakes to designate as agents of insurance companies certain persons, in fact, acting for such companies in some particulars, it does not fix the scope of their authority as between the company and third persons, and does not raise special agents with limited authority into general ones with unlimited power." See, also, *New York Life Ins. Co. v. McCreary*, 60 Fed. (2d) 355; *Newsom v. New York Life Ins. Co.*, 60 Fed. (2d) 241. That knowledge of an agent of a chattel mortgage executed upon the insured property after issuance of the policy will not be imputed to the insurer is held in *Sun Ins. Office v. Scott*, 284 U. S. 177. In that case section 9586 of the Ohio General Code was relied upon by plaintiff to charge the insurance company with knowledge of a chattel mortgage executed by assured upon the insured property after the issuance of the policy through the knowledge of the agent of that fact. The statute is substantially the same as section 44-213, and riders were attached to the policy by the local agent of the company. The court said: "On its face the statute does not go so far. We have examined the authorities cited and fail to find that they give it any such force and effect. They do not, as respondent claims, define the scope of the agency created by the statute, but leave it to be defined by applicable principles of common law. In the present cases the policy limits its scope, and we think the written contract must control." The Ohio cases cited are *Foster v. Scottish Union & Nat. Ins. Co.*, 101 Ohio St. 180, and *Hartford Fire Ins. Co. v. Glass*, 117 Ohio St. 145. The *Foster* case merely held that the insurance company was bound by the knowledge of its agent of matters existing "at the time the latter procured the insurance." The *Glass* case is to the same effect. In the case at bar the policy provides that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions * * * have such

power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." In *Ohio Farmers Ins. Co. v. Titus,* 82 Ohio St. 161, it was held that knowledge of even a general agent of the execution of a mortgage after the issuance of the policy would not be imputed to the insurer. In *Fredman v. Consolidated Fire & Marine Ins. Co.,* 104 Minn. 76, in construing a similar statute, it was held that it did not define the scope of the agency. The conclusion seems irresistible, both on reason and authority: (1) That the statute creates an agent for the company only when he essays to perform one of the services set forth in the statute as the basis of such agency; (2) that after the policy is issued, the authority of the agent is controlled by the contract and the principles of the common law.

On May 21, 1932, when the policy was renewed, the only knowledge which Tukey had of changed conditions was that the park company was in possession of, or rather, was operating the business of the bathing company. He had no knowledge of the terms of the arrangement between the bathing company and the park company whereby the latter held the property as security for delinquent rentals; and no doubt the insurer was bound at the time by the knowledge of Tukey, when it renewed the policy, of any change in the possession of the subject of the insurance, if there was such a change, so that it could not avoid payment for the breach of the terms of the policy as to a change of possession. But at that time there had been no change of title which under the pleadings and the evidence did not take place until September 1st or 2d after the renewal, and such change of title did not come to the knowledge of the defendant until after the loss some three or four weeks later. The mere surrender of possession by the bathing company to the park company of its property to be held and managed as security for delinquent rentals did not operate to transfer the title.

We are therefore confronted with this situation: At the time of the renewal the policy ran to the bathing company which was the owner of the subject of the insurance; on September 1st or 2d the title to the property was transferred to the park company, and Tukey was requested to secure a transfer to the latter company, but failed to notify the defendant of the change of title or to request of its agents a transfer until after the loss. What was Tukey expected to do which would constitute him an agent of the insurance company under the terms of either of the sections of the statutes referred to? He was not to make any application for insurance nor to collect any premium nor to make any contract of insurance within the terms of the statute. He was simply to procure the transfer of the policy, a contract already existent, from the bathing company to the park company. He had no authority to make the transfer himself, but the contract of insurance upon which recovery is sought contained the provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise."

This provision is contained in practically all fire insurance policies and has been held valid and enforceable. *Kirk v. Fletcher,* 123 Neb. 634; *Home Fire Ins. Co. v. Collins,* 61 Neb. 198; *Farmers & Merchants Ins. Co. v. Jensen,* 56 Neb. 284; *St. Paul Fire & Marine Ins. Co. v. Ruddy,* 299 Fed. 189; *Bassett v. Farmers & Merchants Ins. Co.,* 85 Neb. 85; *Northern Assurance Co. v. Grand View Bldg. Ass'n,* 183 U. S. 308.

The question under consideration has not been passed upon by this court. The only cases placing any construction upon the statutes quoted are those in which the original issuance of the policy was procured by the soliciting agent or the policy was actually changed through the pro-

curement of the agent. Some of these cases may be cited:

Robinson v. Union Automobile Ins. Co., 112 Neb. 32. In this case the insured and soliciting agent of the insurer agreed upon the terms of the policy and that it should cover collision insurance, and it was the intention of both of them that the application and policy include such coverage, and the agent stated that the premium of $100 paid included that item. The policy, when issued, however, did not cover loss by collision, which fact was not discovered by the insured until after the loss. Upon these facts the court held that the policy should be reformed and recovery allowed.

Davis v. Highway Motor Underwriters, 120 Neb. 734. This case holds that when a soliciting agent and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy later issued by the company omits one of the essential elements of the contract, which omission is not discovered until after the loss, the policy should be reformed.

Arendt v. North American Life Ins. Co., 107 Neb. 716. This was a case of a general agent of an insurance company who solicited and procured from the company an indorsement to be made upon a policy of insurance changing it from a "20 payment life" to a "term policy." The original policy was subject to forfeiture because the assured entered the military service contrary to its terms and without the knowledge or consent of the insurer; but the agent who procured the indorsement knew of that fact, and it was held the insurer was bound by his knowledge. The agent came within the precise terms of the statute.

Barrett v. Northwestern Mutual Life Ins. Co., 124 Neb. 864. This case holds that the assistant cashier of an insurance company, to whose desk the general public come to pay premiums and receive receipts, is an agent of the company under section 44-307, and that the insurer was bound by misrepresentations made by such agent as to the conditions requisite to accomplish a waiver of the payment of premiums.

Rubinson v. North American Accident Ins. Co., 124 Neb. 269. The holding in this case is: "The knowledge and information acquired by an insurance agent at the time an application for accident insurance was written was imputed to the company." See, also, *Whitehall v. Commonwealth Casualty Co.*, 125 Neb. 16; *Malm v. State Farmers Ins. Co.*, 125 Neb. 594.

In all of the above cases it will be noted that the agent was performing some of the acts mentioned in the statutes under review, the performance of which is the basis for his being declared the agent of the insurer. He was soliciting insurance, collecting premiums or making a contract of insurance. These cases are not applicable to the present situation because here the soliciting agent is not performing or requested to perform any of the acts mentioned in the statute. The claim that he was procuring a contract of insurance cannot be maintained. In the first place, there is no allegation in the petition to that effect, and if there was there is no evidence to sustain it; and, in the second place, the contract of insurance had already been made and all the agent was requested to do was to have it transferred to the plaintiff. There was no mistake in the original issuance of the policy. Notwithstanding the alleged possession by plaintiff of the subject of the insurance, policies had always been carried in the name of the bathing company as owner, and the policy in suit was renewed in the name of the bathing company May 21, 1932, and no request for a change or transfer was made until September 1, after the plaintiff acquired title. No doubt, as above suggested, if Tukey had requested the transfer and the same had been made, or if, after the request had been made, the agents of the insurance company authorized to make the transfer negligently failed to do so until after the loss, Tukey, Inc., under the statute, would be considered the agent of the insurer to all intents and purposes, and his knowledge of the prior transfer of the title, whereby the policy may have been rendered void, would be imputed to the insurer (*Kor v. American Eagle*

Fire Ins. Co., 104 Neb. 610); but, in the absence of any notice to the insurer or the acceptance by it of the acts of Tukey, we are unable to perceive how it can be held that, under the statute, Tukey became the agent of the insurer, so as to accomplish a waiver of the forfeiture of the policy, which by its terms prohibited a change or waiver by an agent except by indorsement in writing upon the policy.

Plaintiff contends that under section 44-322, Comp. St. 1929, which provides that a breach of a condition of a contract or policy of insurance will not void the contract or permit the insurer to evade liability unless such breach existed at the time of the loss and contributed to the loss, the insurer is liable, even though there has been a change in the title. It is not shown by the evidence that the hazard was increased by the transfer, but this statute has been construed against this contention by this court in *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456, and also in *St. Paul Fire & Marine Ins. Co. v. Ruddy*, 299 Fed. 189. In this latter case, where the insured had conveyed title to the premises, the court said: "We do not see how this section is in any way applicable to this situation. In *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456, it is held by the court that this statute could not apply in the absence of contract relationship between plaintiff and defendant, and such relationship we have held does not exist here." The plaintiff in this case is not a party to the insurance contract, nor has any indorsement been made upon the policy transferring to it the interest of the bathing company. It is quite possible that, in an action brought by the bathing company upon the policy, section 44-322 would be applicable, and the mere transfer of title, not contributing to the loss, would not void the policy. But, there being no contractual relation between the plaintiff and the insurer, we hold that this statute has no application. See *Mayfield v. North River Ins. Co.*, 122 Neb. 63; *Stephenson v. Germania Fire Ins. Co., supra.*

Regarding the second cause of action, the plaintiff is not entitled to recover thereon, for the reason that at the time

of the assignment of the policy the bathing company did not have any insurable interest in the property insured. *Stephenson v. Germania Fire Ins. Co., supra.* Further, the policy was void by reason of the change of title without the knowledge or consent of the insurance company. *Connolly v. Providence Washington Ins. Co.*, 126 Neb. 303.

We think that the finding of the learned district court that the policy in suit was procured under an agreement with plaintiff to procure its assignment to the said plaintiff whenever the transfer of said property to plaintiff should be formally completed is not warranted by the pleadings nor sustained by the evidence; and that Tukey, Inc., was the agent of the plaintiff, and not of the insurance company, in agreeing to procure a transfer of the policy, and that the transfer by the bathing company after the loss to the plaintiff vested the latter with no right of action on the policy. The decree of the district court is reversed and action dismissed.

REVERSED AND DISMISSED.

KRUG PARK AMUSEMENT COMPANY ET AL., APPELLEES, V. NEW BRUNSWICK FIRE INSURANCE COMPANY, APPELLANT.

FILED MAY 31, 1935. No. 29035.

Reversed and dismissed on the authority of *Krug Park Amusement Co. v. New York Underwriters Ins. Co., ante*, p. 239.

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

Wells, Martin, Lane & Offutt, for appellant.

Ziegler & Dunn, contra.

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

REDICK, District Judge.

This is a companion case to *Krug Park Amusement Co.*

v. New York Underwriters Ins. Co., ante, p. 239. The evidence is substantially the same and the principles governing the decision are identical, and in accordance with the principles therein announced the decree of the district court is reversed and case dismissed.

REVERSED AND DISMISSED.

KRUG PARK AMUSEMENT COMPANY ET AL., APPELLEES, V. GREAT AMERICAN INSURANCE COMPANY, APPELLANT: PLATNER LUMBER COMPANY, INTERVENER, APPELLEE.

FILED MAY 31, 1935. No. 29430.

Reversed and dismissed on the authority of *Krug Park Amusement Co. v. New York Underwriters Ins. Co., ante,* p. 239.

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

Wells, Martin, Lane & Offutt, for appellant.

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

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

REDICK, District Judge.

This is another companion case to *Krug Park Amusement Co. v. New York Underwriters Ins. Co., ante,* p. 239. The evidence is substantially the same as in the above case except as noted below. The policy in this case was executed to the Park Bathing Company, and was issued and delivered August 6, 1932, to take effect September 1, thereafter. The evidence for plaintiff is somewhat stronger than in the other cases as the witness Fox, president of the park company, testified positively that, at his interview with Tukey in June, he told Tukey that the Krug Park Amusement Company was the owner of the property covered by the policy (the bathing pavilion), and to issue

the policies to the amusement company. Mr. Fox is not supported in these statements by Mr. Tukey, who testified that he never knew of any change in the title until September 26, although he had known prior to that time that the amusement company was expecting to acquire the title. The weight of Mr. Fox's evidence is entirely destroyed by the fact that he knew the policies had been written in the name of the bathing company, and after judgment in the forcible detainer suit requested Tukey to have them transferred to the amusement company. Furthermore, under the law and the evidence as pointed out in the *New York Underwriters Ins. Co.* case, the amusement company did not become the owner of the subject of insurance until the lease of the bathing company had been forfeited, September 1, 1932.

It is suggested that, inasmuch as the policy was not to go into effect until noon of September 1, three hours after the rendition of the judgment in the forcible detainer suit, a case of mutual mistake is made out. The difficulty with this proposition is that the evidence establishes the policy was written precisely as ordered and intended by the parties, Mr. Fox may have thought that he was protecting the interests of the amusement company, but Tukey testified he had no knowledge of change of title or claim of ownership by the amusement company, and that he would not have issued the policy in the name of any one other than the owner, whom he understood to be the bathing company. Furthermore, if the change of ownership, as has been shown, took place at 9 o'clock September 1, the policy written in the name of the bathing company never went into effect at all, as at the time of its effective date the ownership of the bathing company had been divested.

The intervener in this case claims the proceeds of the policy of insurance sued upon by virtue of an assignment thereof, but his case depends upon the success of the plaintiff and must fall with the defeat of the latter. For reasons stated in *Krug Park Amusement Co. v. New York Underwriters Ins. Co., ante,* p. 239, the decree of the dis-

trict court in favor of the plaintiff and intervener is reversed and the case of plaintiff and the petition of intervener dismissed.

REVERSED AND DISMISSED.

JACOB J. FAST V. STATE OF NEBRASKA.

FILED JUNE 7, 1935. No. 29416.

ERROR to the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Waring & Waring, for plaintiff in error.

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

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

PER CURIAM.

Plaintiff in error (hereinafter designated defendant) was convicted of the unlawful possession of intoxicating liquors and was sentenced to a term of 60 days in the county jail. He prosecutes error to this court to review the record of his conviction.

The assignments of error, in substance, are: The verdict is not sustained by sufficient evidence, and the sentence is excessive.

From the record it appears that defendant was operating a soft drink parlor in the village of Henderson, Nebraska. July 18, 1934, his premises were searched and therein was found alcohol in three containers, a gallon can and two bottles; also a bottle of wine. The premises were not the residence, and the liquors were found concealed behind the counter or bar, where they could be conveniently reached for serving customers.

The sheriff testified: "I asked Mr. Fast what he wanted to do about this liquor, and he said, 'What can I do, you

have it on me.' I said, 'Why do you want to monkey with this stuff, why were you selling alcohol?' He said, 'Well. the other fellows were doing it and I had to.' "

The evidence was sufficient to warrant the jury in finding defendant guilty as charged. The sentence does not appear to be excessive. The record discloses no error. Judgment

AFFIRMED.

ERNST NUNNENKAMP V. STATE OF NEBRASKA.

FILED JUNE 7, 1935. No. 29511.

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

Herbert Smith, for plaintiff in error.

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

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

PER CURIAM.

Plaintiff in error (hereinafter called the defendant) was convicted for the unlawful sale of intoxicating liquor and was sentenced to serve a term of 60 days in the county jail. From the overruling of his motion for a new trial, the defendant prosecutes error to this court to obtain a review of the record of his conviction.

Defendant assigns as error the failure of the trial court to instruct the jury on the subject of circumstantial evidence; the rulings of the trial court in admitting testimony in evidence alleged to be hearsay; and the action of the trial court in overruling defendant's motion for a directed verdict at the close of the state's evidence.

The record discloses that defendant did not request an instruction on the subject of circumstantial evidence. This court is committed to the rule that, in the absence of a re-

quest for an instruction relative to the weighing of circumstantial evidence, there is no requirement on the part of the trial court to give such an instruction. *Fetty v. State,* 121 Neb. 228.

Defendant complains of certain hearsay testimony received in evidence. The record shows that the evidence was subsequently stricken from the record by the trial court and the jury instructed to disregard it. After an examination of the record, we hold that the action of the trial court corrected the error.

The evidence shows that one Earl Mohr went to a filling station and purchased some liquor from the defendant for the sum of one dollar. One witness watched Mohr and the defendant enter a small room and saw defendant come out with the liquor. Mohr testified that defendant was the man from whom the liquor was purchased. Another witness testified that defendant said: "I sold the boy the pint of liquor, * * * I sold it to him, but there was nobody here can prove that."

The evidence was sufficient for submission to the jury and to sustain the verdict of guilty. We find the record free from prejudicial error, and the judgment is

AFFIRMED.

AMELIA GNUSE ET AL., APPELLEES, V. MELVIN C. GARRETT ET AL., APPELLANTS: BEACH HINMAN ET AL., APPELLEES.

FILED JUNE 7, 1935. No. 29237.

Vendor and Purchaser: RESCISSION. Where owners of land enter into a contract to sell it, execute and entrust to the purchasers a deed therefor, and sue for a cancelation of the conveyance for fraud inducing the sale, the return of any part of the purchase price received by grantors should be required in a proper case as a condition of such relief, under the maxim that "He who seeks equity must do equity."

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

Abbott, Dunlap & Corbett, for appellants.

Courtright, Sidner, Lee & Gunderson and *E. L. Mahlin, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

ROSE, J.

This is a suit in equity by Amelia Gnuse and August Gnuse, plaintiffs, to cancel a deed purporting to convey from them to Melvin C. Garrett and Elsie Garrett, defendants, the legal title to 260 acres of land in Washington county on the ground that the deed was procured by fraudulent misrepresentations upon which grantors relied. The deed was dated June 13, 1932, and the land was then encumbered by mortgage to the extent of $19,050.46. Plaintiffs alleged the deed was procured by misrepresentations to the effect that plaintiffs would realize from the transactions $500 at the time and approximately $3,000 in 30 days. Elements of enticing fraud charged were a promise to keep the deed off the record for a time; an option permitting plaintiffs to redeem the land and resell it at a profit; a lease of the premises as a condition of granting plaintiffs the right to remain in possession. The deed included plaintiffs' homestead of 160 acres and was void to that extent because it was acknowledged before Beach Hinman, a notary public, who had an undisclosed interest in the conveyance.

The Garretts, who were named in the deed as grantees, denied the alleged misrepresentations imputed to them, admitted Hinman had an interest in the conveyance, and alleged consummation of the purchase, payment of $1,150 to plaintiffs, delivery of the deed and estoppel of grantors to question its validity.

On motion of grantees, Beach Hinman and Margaret Hinman, his wife, were brought into the case as additional defendants having a property interest involved in the litigation. They first disclaimed any interest in the land de-

scribed in the deed, but later applied for leave to withdraw their disclaimer and plead by answer an interest in the subject-matter of the conveyance.

The facts pleaded by grantees in defense were put in issue by a reply.

Upon a trial of the cause the district court found the issues in favor of plaintiffs, canceled the deed and quieted in grantors title to the land described therein. Defendants appealed.

On appeal defendants argue that the decree below cannot be permitted to stand, because the district court disregarded the maxim that "He who seeks equity must do equity," and canceled the deed without requiring plaintiffs to restore the consideration received by them from grantees. The general theory of the defense seems to be that grantees purchased the 260 acres of land for $100 an acre, or $26,000, and overpaid the purchase price by means of the following payments and credits: Purchase subject to the mortgage indebtedness, $19,050.46; interest paid on mortgage and interest on payment, $668.75; cash paid on delivery of deed, $500; credit by unpaid debt owing to grantees as evidenced by plaintiffs' note secured by a second mortgage on land in Iowa, $4,778.79; other items of interest and taxes, $1,123.39; total, $26,121.39. The evidence tends to prove that, of these enumerated items, plaintiffs received $500 and that the lien of the mortgage on the 260 acres of land was reduced $650 by the payment of interest.

Plaintiffs affirmatively sought relief in equity from the conveyance formally executed by them. Equity required them to do equity as a condition of the relief sought. While seeking affirmative equitable relief, plaintiffs were not entitled to both their land and that portion of the purchase price which they received under the contract of sale. The general rule has been stated as follows:

"If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject-matter of the action in favor of

his adversary." *Bank of Alma v. Hamilton*, 85 Neb. 441.

The maxim that "He who seeks equity must do equity" may be applied in all kinds of litigation and to every species of equitable remedies. *Love v. Park*, 95 Neb. 729. See, also, *Kruger v. Block*, 114 Neb. 839. The judgment, therefore, must be reversed for the error in granting the relief sought by plaintiffs without requiring them to restore what they received under their contract of sale. Since there must be further proceedings in the district court, Beach Hinman will be permitted to withdraw his disclaimer and assert by answer his defense and claim.

The record is unnecessarily encumbered by pleadings and evidence of details of collateral facts. In the further proceedings below, the parties, if so advised, may amend or reform their pleadings.

REVERSED AND REMANDED.

BUFFALO COUNTY, APPELLANT, V. PHELPS COUNTY, APPELLEE.

FILED JUNE 7, 1935. No. 29307.

1. **Bridges**: COST OF CONSTRUCTION: RECOVERY: NOTICE. The foundation for recovery by the state and a county for one-fourth the cost of construction of a bridge over a boundary-line stream from another county is such notice as will afford an opportunity to participate in the location, the adoption of the plans, the letting of the contract, and the construction of the bridge. Comp. St. 1929, sec. 39-1502.
2. ———: ———: ———: ———. In such a case, the notice must be sufficient to apprise the county board that it will be expected to contribute to the cost of construction of the bridge.

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

Thomas F. Hamer, E. G. Reed and *Guy N. Henninger*, for appellant.

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

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

DAY, J.

Buffalo county brought this action to recover from Phelps county one-fourth the cost of the construction of a "state aid bridge" built across the Platte river by the state department of public works and Buffalo county. The river forms the boundary line between the two counties. The bridge was built and one-half of the cost was paid by the state department of public works and one-half by Buffalo county. Buffalo county then filed a claim with Phelps county which was disallowed. From the disallowance of the claim, an appeal was taken to the district court. The district court rendered a judgment against the plaintiff, from which it appeals.

The plaintiff alleges in its petition that the bridge was constructed under the provisions of sections 39-1501 to 39-1509, Comp. St. 1929, and rests its right of recovery thereon. An interpretation of this statute is therefore determinative of the issue presented here. The trial in the district court was upon a stipulation of facts. In April, 1928, the board of commissioners of Buffalo county instructed its bridge committee to confer with a similar committee of Phelps county. Upon May 8, 1928, a group of residents of Phelps county presented a petition to their county board that it cooperate in the construction of a bridge. Members of the county board of Buffalo county and others spoke in favor of the petition before the Phelps county board. Again, on June 5, 1928, a delegation of citizens from both Phelps and Buffalo counties urged the county board of Phelps county to cooperate with the county board of Buffalo county in building a bridge. At this time, the county board of Phelps county made a record that it was "not in favor of building a bridge across the Platte river at the above described place at this time." September 4, 1928, the Buffalo county board sent to Phelps county board a copy of its resolution instructing its highway commissioner "to make an estimate of the cost of a bridge

across the Platte river south of Odessa, of either wood or steel construction to be ready for consideration at the next meeting of the board." October 16, 1928, the board of Buffalo county passed a resolution asking state aid and pledged to pay *its legal share* of the cost. This resolution was filed with the state department of public works which took no action. About one year later, September 24, 1929, the board of Buffalo county again filed a resolution pledging the county to pay *one-half the cost of construction* of the bridge with the state department of public works and asked for state aid. The bridge was constructed by Buffalo county and the state department of public works each paying one-half the cost. The bridge was accepted February 18, 1931, by Buffalo county and the state department of public works. Thereafter, on the 14th day of July, 1931, Buffalo county filed a claim with Phelps county for one-fourth of the cost of the bridge, which was disallowed by the Phelps county board on August 4, 1931.

Buffalo county relies for its right to recover upon that part of section 39-1502, Comp. St. 1929, which is as follows: "Provided, that bridges over streams, which divide counties, either county may make application to the department of public works, and if the application is approved by the department of public works, it shall be lawful for such county and department of public works to build or purchase the same and to recover, by suit, one-fourth of the cost of such bridge from the county failing or refusing to join in such application." It is the contention of Buffalo county that article 15, ch. 39, of which the above section is a portion, is a complete and independent act. Assuming that it is, for the purpose of this case, without deciding, is notice necessary for one county to recover from another its share of the cost of a state aid bridge? Phelps county contends that some notice of the intention to build such a bridge is necessary. We are of the opinion that, in order for one county to compel another county to contribute to the cost of a state aid bridge over a boundary-line stream between the counties, the statute requires that

notice be given to the other county. We are impressed by and adopt the reasoning of the trial judge in the following language: In "section 39-1502, the provisions refer to recovery by suit 'from the county failing or refusing to join.' It seems to me that the necessary inference from these words can only be that prior notice is contemplated. Otherwise there could be no refusal. To 'fail' means to leave unperformed; to omit; to neglect. Bouvier's Law Dictionary; *Widemann Co. v. Digges,* 21 Cal. App. 342. To fail in the performance of some duty, which failure shall impose a penalty or liability, necessarily implies a prior act or condition by which the one failing shall have become aware of the duty. In other words, notice in some reasonable form is necessary. Inaction, thereafter, would be failure, refusal would be a positive act. Both imply a previous notice. It is difficult to conceive that the legislature would be so particular to require, and the court in many instances to enforce, a requirement as to the necessity for notice to fix the responsibility for participation in the expense of repair of an existing bridge and dispense with notice when the contemplated act is the construction of an entirely new bridge." To decline is one of the ordinary definitions of "fail." Webster's New International Dictionary.

Paraphrasing the language of *Saline County v. Gage County,* 66 Neb. 839, in discussing a somewhat similar statute, the foundation of liability in such a case as this is an opportunity to join in formulating the plans, letting the contract for the construction, and determining the location of the bridge. Various sections of this article give the counties the right to participate in all these incidents to the construction of a bridge. It is unthinkable that the legislature intended to permit one county and the state department of public works to construct a bridge and charge one-fourth of the cost to another county, without that county having an opportunity to participate in the construction as provided by statute. We therefore conclude that the foundation for recovery by the state and a county

for one-fourth of the cost of construction of a bridge over a boundary-line stream from another county is such notice as will afford an opportunity to participate in the location; the adoption of the plans; the letting of the contract; and the construction of the bridge. Comp. St. 1929, sec. 39-1502.

The preliminary steps to the building of this bridge and all the communications in which either county board was concerned have been related. On May 8, 1928, residents of Phelps county filed a petition asking their county board to cooperate in the building of a bridge. This was not notice by Buffalo county to Phelps county of an intention to secure a state aid bridge. Neither was the sending of a copy of its resolution of September 4, 1928, instructing its highway commissioner to make an estimate of the cost of a bridge across the Platte. The application to the department of public works which was acted upon was not filed for more than a year later, September 24, 1929. Even if Phelps county had had notice of this second application, it would not have warned them that they would be expected to pay one-fourth of the cost of this bridge. The application pledged Buffalo county to pay one-half, and the state under the provisions for state aid bridges was to pay the other one-half. There are other sections of the statute relating to the construction of bridges over streams that form the boundary line between counties other than those under the provisions of the act for state aid. Section 39-827, Comp. St. 1929, provides for the notice to be given in case of the repair of a bridge. However, assuming that this section is an independent and complete act, which is not decided, we are of the opinion from the stipulated facts in this case that no sufficient notice was given by Buffalo county of its intention to construct a bridge under the state aid act with a contribution from Phelps county of one-fourth of the cost. In such a case, the notice must be sufficient to apprise the county board that it will be expected to contribute to the cost of the construction of the bridge. The county board should have the opportunity to

either comply with the request or unequivocally refuse to do so. *Iske v. State,* 72 Neb. 278.

There are other questions presented by this record, the failure to make the state department of public works a party, and the constitutionality of section 39-1502, Comp. St. 1929, both of which questions are unnecessary to discuss or determine for a decision of this case in view of our conclusions heretofore expressed. The judgment of the district court is

AFFIRMED.

LLOYD DRUM, APPELLEE, V. OMAHA STEEL WORKS, APPELLANT.

FILED JUNE 7, 1935. No. 29529.

Master and Servant: WORKMEN'S COMPENSATION LAW: WAGES: COMPUTATION. Wages under the workmen's compensation act shall be computed ordinarily according to the terms of the "contract of hiring" in force at the time of the accident. Comp. St. 1929, sec. 48-126.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

Clarence T. Spier and *Arthur C. Bailey,* for appellant.

Garlow & Long, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and MESSMORE and RYAN, District Judges.

DAY, J.

This is a compensation case. The employer appeals from the award made by the trial court. The employer was the contractor to construct a bridge over the Loup river south of Columbus. It was a federal aid project and the contract provided that certain provisions of the emergency relief and construction act should be applicable to the work. One of the provisions both of the federal law and the contract was that skilled labor should not be per-

mitted to work more than 30 hours in any one week and that the minimum wage for skilled labor should be 50 cents an hour.

The important consideration here, however, is the contract of employment between the employer and the employee. The only significance to be attached to the construction contract is the help it will give us, if any, to determine the contract of employment. There is no question that the employee was injured in the course of his employment. As a result of the injury, he lost his thumb and injured his index finger on his left hand. The trial court awarded compensation on the basis of a weekly wage of $30. The only complaint registered here is that this finding is erroneous. The employer contends that the weekly wage should be $15 a week and has paid compensation. The employee insists that he was working part time and that his weekly wage for an entire week would be $30. The emergency relief and construction act of 1932 provided that public works constructed under the provisions of the act should employ men only for 30 hours a week. It was the idea that this would provide some employment for a greater number of men. While this federal enactment does not abrogate the provisions of the workmen's compensation law of the state, the federal government could provide that the contract should contain the same conditions. The contract in this case between the state of Nebraska and the Omaha Steel Works did contain these provisions.

The controversy here arises over the method of computing the weekly wage of the employee at the time of the injury. Compensation is awarded solely according to the provisions of the statutes. Section 48-117, Comp. St. 1929, provides: "Compensation shall be calculated with reference to the wage the workman was receiving from the person by whom he was immediately employed at the time of the injury." The wage the employee was receiving at the time is computed under the provisions of section 48-126, Comp. St. 1929, which says: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money

rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." It is necessary to examine the contract of hiring in force at the time of this accident. The plaintiff testifies that he was hired to work on the construction of a bridge which was a federal project; that he was to be paid 50 cents an hour for 30 hours a week; that it was his understanding at the time he was employed that he would not work more than the 30 hours at 50 cents an hour, which would make his weekly earnings $15 a week. Other testimony abundantly supports a finding that the contract of hiring between the employer and employee was for 30 hours of work a week at 50 cents an hour. This would make the employee's weekly wage $15 a week. Wages under the workmen's compensation act shall be computed ordinarily according to the terms of the "contract of hiring" in force at the time of the accident. *Fredrickson Milling Co. v. Faser,* 124 Neb. 531. It is self-evident that if the prevailing wage had been higher the compensation would have been more.

There was a very earnest discussion by the attorney for the appellee relative to the beneficient purposes of the workmen's compensation act. This court has always given the workmen's compensation act a liberal interpretation that it might accomplish the purpose and intention of the legislature. But, after all, the relief available must be provided by the statute. The statute fixes the liability of the employer. The evidence determines the contract of hiring in force at the time of the accident. It was for a thirty-hour week at 50 cents an hour.

Two Nebraska cases are cited by the employee. *Davis v. Lincoln County,* 117 Neb. 148, is not helpful in solving this problem. Davis was employed by the county to do the necessary work to keep some bridges in order, including reparation of damage from floods. There it was said: "The nature and surroundings of the transaction and which were necessarily in contemplation of the parties to the contract were such as to support the further conclusion

that a '7-day week' of labor was within the contemplation of the parties; for only in that way could the exigencies of the situation be met." *Sentor v. City of Lincoln,* 124 Neb. 403, holds an employment for one day not casual under the statute because employed in the regular business of the employer. In this case the employee worked one day and was open for other employment. In *Dietz Club v. Niehaus,* 110 Neb. 154, the questions presented related to casual employment and failure of employer to carry insurance. The opinion is not very helpful here. In the case at bar, the employee was required to work a thirty-hour week. Apparently, from the record, he did not work any given three days a week, but was required to work thirty hours a week as the employer required his services.

Several cases from other jurisdictions have been cited to support the employee's position. In *Modin v. City Land Co.,* 189 Minn. 517, it is apparent that the court applied the Minnesota statute to determine the weekly wage. There the weekly wage was calculated by multiplying the daily wage by five and one-half, as provided by the statute. Our statute does not so provide.

Lastly, we are cited to several Louisiana cases. In *Rylander v. T. Smith & Son,* 177 La. 716, the weekly wage was computed by "adhering to the plain words of the statute and fixing the compensation on the basis of the 'daily rate of pay.'" At the time of the accident the employee was not working full time on account of lack of business, but was subject to work all the time. In *Calhoon v. Meridian Lumber Co.* (1934) 151 So. (La. App.) 778, the employee had been working about half time for several months due to economic conditions. This conclusion was reached with reference to the Louisiana statute. An examination of the statute apparently in effect at the time the above cases were decided reveals that the term "wages" is defined as the daily rate of pay under the contract of hiring in force at the time, instead of the weekly rate under such a contract as here. However, in a later case, also decided in 1934, *Suire v. Union Sulphur Co.,* 155 So. (La.

App.) 517, that court decided that emergency federal legislation to provide relief employment must be taken into consideration in the administration of the workmen's compensation act. See, also, *Durrett v. Unemployment Relief Committee,* 152 So. (La. App.) 138. There it was said: "We believe that his right to recover on that basis (six-day week) exists only where there is no agreement limiting the number of days per week he is engaged to work." Specifically, we do not pass upon the effect, if any, of federal legislation to promote employment upon the compensation law. It seems unnecessary here, since the determining factor is the contract of hiring in force at the time of the accident, under section 48-126, Comp. St. 1929.

The judgment of the district court is reversed and the cause remanded, with directions that the trial court compute the weekly wage at $15 a week and award compensation accordingly.

REVERSED.

GEORGE W. GORHAM, APPELLANT, V. PETER KIEWIT SONS COMPANY, APPELLEE.

FILED JUNE 7, 1935. No. 29535.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: WAGES: COMPUTATION. The weekly wage under the workmen's compensation law will be determined with reference to the "contract of hiring" in force at the time of the accident. Comp. St. 1929, sec. 48-126.
2. ———: ———: SEASONAL OCCUPATION. Under the evidence, bridge building in Nebraska is not "seasonal or dependent upon the weather," within the meaning of the workmen's compensation law. Comp. St. 1929, sec. 48-126.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Craft, Edgerton & Fraizer, for appellant.

T. E. Sullivan, Lowell C. Davis and *Hall, Cline & Williams, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and MESSMORE and RYAN, District Judges.

DAY, J.

This is a compensation case. The plaintiff here was an unskilled laborer employed to work 30 hours per week at 40 cents per hour. Under this employment he actually received $12 per week. The trial court found that the employee's weekly wage under the contract of hiring in force at the time of the accident was $12 per week and awarded compensation accordingly. The employee claims compensation on the basis of a weekly wage of $24. The employer, as contractor, was engaged in building a bridge which was a public works administration project in Hamilton county. The plaintiff was employed by the defendant through the national reemployment service to work for only, and not more than, 30 hours per week. This was his understanding and agreement at the time he entered the employment of defendant. Under this contract of hiring which was in force at the time of the accident, his weekly wage was $12 per week.

In the recent opinion of *Drum v. Omaha Steel Works, ante,* p. 273, it was determined that under the workmen's compensation law the award should be made upon the weekly wage provided by the contract of hiring in force at the time. The discussion will not be repeated, but is adopted here.

An examination of the record reveals that Gorham was employed by the defendant to work not more than 30 hours per week at 40 cents per hour. It is concluded that the weekly wage was $12 per week. The employment was not in an occupation that was seasonal or dependent on the weather, under section 48-126, Comp. St. 1929. *Davis v. Lincoln County,* 117 Neb. 148; *Lincoln Gas & Electric Light Co. v. Watkins,* 113 Neb. 619; *Dietz Club v. Niehaus,* 110 Neb. 154; *Hogsett v. Cinek Coal & Feed Co.,* 127 Neb. 393.

The judgment of the trial court conforms to the provisions of the workmen's compensation act.

AFFIRMED.

JOHN W. NESLUND, APPELLANT, V. J. F. KINNAN, APPELLEE.

FILED JUNE 14, 1935. No. 29289.

1. **Bills and Notes:** ACCOMMODATION NOTE: BURDEN OF PROOF. It is elementary that the burden is upon the defendant to prove that a note made by him is an accommodation note.
2. **Trial:** DIRECTION OF VERDICT. "Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488.

APPEAL from the district court for Dawson county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

D. E. Harper and *R. E. Bannister*, for appellant.

Frank M. Johnson, contra.

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

GOSS, C. J.

Plaintiff sued defendant on a demand note for $250. The defense was that it was an accommodation note for the benefit of plaintiff. At the conclusion of defendant's evidence and at the conclusion of all the evidence, plaintiff's motions for a directed verdict in his favor were overruled. The verdict and judgment were for the defendant. Plaintiff appeals.

The question may be decided by an inquiry as to whether there was sufficient evidence to submit as disputed evidence of fact to the jury. All conventional assignments of error are duly made by appellant.

The defendant's son was engaged in the automobile business as Cozad Auto Company, and had creditors to the amount of about $20,000. He owed his father $6,265 and gave him a chattel mortgage on his garage property for that sum, which was recorded May 13, 1930. Soon thereafter the son's garage property was sold on execution, and defendant bought it to protect his chattel mortgage inter-

est. He conveyed the property to Louis Pollat by bill of sale recorded September 5, 1930, showing a consideration of $2,616.60. He employed T. M. Hewitt, a Lexington lawyer, to represent him in the execution sale and the subsequent sale to Pollat.

September 12, 1930, involuntary proceedings in bankruptcy were commenced in the North Platte division by creditors having claims against Cozad Auto Company. This was within four months of defendant's preference as a creditor, and, if successful, would have avoided the preference. Defendant employed Mr. Hewitt to save his property. Hewitt advised him that it could be done if the petitioning creditors could be induced to withdraw their petition. Pursuant to defendant's instructions, Hewitt went to North Platte to see the attorneys for the petitioning creditors and obtained a tentative agreement to settle for 25 cents on the dollar, which he reported to his client. Defendant had no money. After considerable negotiation with plaintiff, the latter was induced to furnish the money. Defendant owed plaintiff about $400 for services as his family physician, and plaintiff advanced the $250 on the promise of Hewitt that his fees as attorney should be postponed to the repayment of the sum advanced by the plaintiff. Hewitt took the money from plaintiff and made the settlement. Plaintiff testified that he had no interest in the bankruptcy matters, and Hewitt, who assisted defendant in negotiating the loan, testified that he knew of no interest of plaintiff in the bankruptcy matters. The evidence shows no such interest except that, if the defendant could be saved repayment of what he had secured by his preference, the plaintiff stood a better chance to be paid what the defendant owed him for services as his family physician. It shows that he advanced the money only after weeks of negotiation and after the failure of defendant to secure it at the bank, or elsewhere. The note was executed the day after plaintiff, by direction of defendant, paid the money to Hewitt to effect the settlement of the bankruptcy. The bankruptcy case was settled for the $250 furnished by

plaintiff direct to Hewitt, instead of being first paid to defendant, all at the request of defendant. If the matter had not been settled, and Cozad Auto Company had been declared bankrupt, defendant would have had to return his money preferentially received and probably would have received only about 10 cents on the dollar.

The only evidence that the note was an accommodation note is that of defendant, who, at the time of the trial, was in his 79th year. The testimony indicates that his mind does not function normally at times and his memory is not good. He testified that plaintiff asked him to sign the note and plaintiff would get the money at the bank, and defendant would never have to pay the note. "He said Bill Kinnan had some book accounts and had some notes and had some judgments, and he would see that that was applied on his note." But, when asked what plaintiff was going to do with the money, he testified: "He was going to pay off the North Platte affair, the bankruptcy affair. That is what he was going to do with that money. Q. Were you interested in that? A. No, sir." He admits that his attorney, Hewitt, and plaintiff advised him that, if the bankruptcy proceeded to a successful conclusion, his preference would be voided. The witness seemed to be forgetful and incoherent, but he stuck to the proposition that he had no interest in the bankruptcy settlement.

Plaintiff testified that, when the note was made, defendant promised to pay it as soon as his share of alfalfa on his farm was sold. Later, when he did not pay, plaintiff asked C. P. Hord, president and manager of Cozad State Bank, to try to collect the note. Defendant called at the bank, and he and Hord had a conversation about the note. Defendant said he had paid the plaintiff lots of money as a physician and was hard up for funds at present. He did not repudiate the debt and did not mention any agreement that he was not to pay the note or that it was to be paid by other accounts and judgments. The title to the note had never passed out of plaintiff. It had never been indorsed.

It is elementary that the burden is upon the defendant to prove that a note made by him is an accommodation note.

"Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488; *Swanback v. Sovereign Camp, W. O. W.*, 103 Neb. 34.

We do not think the testimony of defendant was sufficient to require the issue of fact to be submitted to the jury. A survey of all the evidence indicates that it raises no doubt in the minds of reasonable men that the defendant borrowed the money for his own purpose, that it was used for the furtherance of his own interests, and that he has failed to sustain the burden of proof that he was an accommodation maker. The cause ought not to have been submitted to the jury in opposition to the motions of the plaintiff. The verdict was the result of a misunderstanding of the evidence by the jury. To approve it would result in manifest injustice. The court should have sustained the motion of plaintiff for a directed verdict.

The judgment of the district court is reversed, with directions to enter judgment for plaintiff on the note sued upon and duly proved on the trial.

REVERSED.

BESS DE PORTE, APPELLEE, V. STATE FURNITURE COMPANY, APPELLANT.

FILED JUNE 14, 1935. No. 29293.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. To be compensable under the workmen's compensation law, an injury to an employee must arise out of and in the course of employment.

2. ———: ———: ———. An injury to an employee, caused by slipping on ice on the public sidewalk in front of the employer's store, at the noon hour, when the employee was leaving for lunch and for a personal errand, on her own time for which she was not paid wages, does not arise out of and in the course of employment.
3. **Negligence**: PROOF. "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of." *Rocha v. Payne*, 108 Neb. 246.
4. **New Trial**: VERDICT: IMPEACHMENT. Affidavits of jurors may not be received to contradict anything essentially inhering in the verdict itself.
5. ———: ———: ———. Affidavits or oral testimony of jurors may be received, for the purpose of avoiding a verdict, to show misconduct of a juror occurring during the trial, or in the jury room, if the matter does not essentially inhere in the verdict itself. *Harris v. State*, 24 Neb. 803.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Gray & Brumbaugh and *Sam E. Klaver, contra.*

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

GOSS, C. J.

Plaintiff had a verdict for $2,500 on her first cause of action and for $2,000 on the second cause. The trial court entered judgment for a total of $4,500, but, on motion for new trial, ordered a remittitur of $500 on the second cause. Plaintiff complied and defendant appealed from the judgment for the resulting $4,000.

Plaintiff was employed by defendant in its furniture store located at the southwest corner of Fourteenth and Dodge streets, Omaha, and was injured by a fall on the sidewalk at a point several feet from the entrance door of the store as she was leaving at the noon hour on February

16, 1932, to get her usual noonday lunch and to do a personal errand. She pleaded, and the evidence was sufficient to support it, that her fall was caused by ice on the sidewalk produced by water dripping from a canopy or roof maintained by the defendant over the sidewalk at its entrance which was on the corner and extended out from its store. She alleged that the proximate cause of her fall was the negligent maintenance by the defendant of this canopy or roof without proper eaves troughs, drain pipes and leaders to convey from the roof the rainfall or water resulting from thawing snow and ice off of and away from the roof, thereby permitting the rainfall or thawing snow and ice to drip down upon the public sidewalk beneath it. Further negligence of defendant was duly pleaded in that defendant, knowing the condition of the canopy and that a heavy snow had fallen from the 13th to the 16th of February and had lodged upon the roof, failed and neglected to remove it, but permitted it to fall and drip upon the sidewalk and then to accumulate and freeze, without removing the ice from the sidewalk within six hours.

As a result of her fall, plaintiff alleged injuries to her left knee, by reason of which she was confined in a hospital from February 17 to April 21, 1932, suffered great pain and underwent four operations. This comprised her first cause of action.

For her second cause of action, plaintiff set out, as a basis for her husband's right of action, past and prospective hospital and medical bills, including all other damages due him by reason of her injury, and pleaded his assignment to her of all his rights under this cause of action.

By answer the defendant mainly denied generally the allegations of the petition, pleaded that the condition of the sidewalk was open and obvious, that plaintiff failed to keep a proper lookout and to take precautions for her own safety, and that her injuries, if any, were due to her own contributory negligence. Defendant's demurrer to the petition had been overruled, but it preserved the same point in its answer and argued it here—to the effect that the pe-

tition showed that plaintiff was at the time and place of the accident alleged an employee upon the defendant's premises and that her injuries, if any, would be compensable under the workmen's compensation law. Eighteen errors are assigned. Such as are deemed necessary of discussion will be treated in order of our own choosing.

If the action came under the workmen's compensation law, this action for damages is not maintainable. So we treat that subject first. Section 48-101, Comp. St. 1929, provides: "When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawful imputed negligence of the employer is the natural and proximate cause, he shall receive compensaton from his employer."

Section 48-152, subd. c, Comp. St. 1929, says: "Without otherwise affecting either the meaning or interpretation of the abridged clause, 'Personal injuries arising out of and in the course of employment,' it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Hence, to be compensable, the accident must have arisen out of and in the course of the employment as limited by the above definition. The plaintiff here, when injured, was not actually engaged in any duty of her employment nor upon the premises where the work of her employer was carried on, unless by construction we can hold that passing over the sidewalk in front of her employer's place of business, on her own time for which she was not paid, at the noon hour to get her lunch and to do a personal errand brings her within the scope of the compensation law. Defendant bases its argument in support of this theory upon cases in our own and other jurisdictions.

In *Speas v. Boone County,* 119 Neb. 58, we held that one who was regularly employed in dragging roads for the county at a definite sum a day suspends his work at the

noon hour when he had reached his home, while he was dragging the road in front of his own farm, for the purpose of feeding his team and eating his dinner, and was kicked by one of his horses, after he had unhitched them and was putting them in their stalls to feed them, was injured in the course of his employment, within the meaning of what is now section 48-101, Comp. St. 1929. It is to be noted, however, that it was only incidental that Speas happened to unhitch his team and feed it at his home. Usually he suspended work wherever he happened to be at the noon hour and fed his horses and ate his dinner by the roadside. The first paragraph of the syllabus says: "Generally it may be said that an injury 'arises out of' an employment when there is a reasonable causal connection between the conditions under which the work is, in all the circumstances, required to be performed and the injury received while the employee is thus engaged; and that the injury is received 'in the course of' the employment when, at the time the injury is received, the workman is engaged at the work he is employed to perform or in some duty incidental to that work. If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant."

Speas v. Boone County, supra, goes as far as we have ever gone in holding an injury compensable when it did not occur during the time the workman was actually employed at his work, or actually within the area where his work was contracted to be performed and during the period when he was employed at his work. But the feeding of his team by Speas was the usual incident of the noon hour and he was injured while preparing to feed them.

In *Tragas v. Cudahy Packing Co.,* 110 Neb. 329, this court affirmed a judgment allowing compensation to Tragas, who at the time of his injury was sharpening a chisel on the employer's grindstone for the purpose of cleaning some pans. It happened at the noon hour, on claimant's own time for which he was not paid, but it was a part of

his duty and was done on the premises in furtherance of the employer's work.

Cases from other jurisdictions are cited by appellant tending to support its theory that the injury here was compensable under the workmen's compensation law. If they are not distinguishable, we do not wish to go so far under our law and decisions and so do not take the space to review them.

The injury in the case at bar occurred on a public sidewalk where the employee was exposed to no other or different hazard than the public. She had made herself a part of the general public by going on her own time for lunch and on a personal errand. While it happened near the place where she was employed, it did not happen at the place of work. It was not incidental to the main character of the business on which the employee was engaged for the employer. We decline to stretch the rule heretofore announced. We therefore hold that the injury here did not come under our workmen's compensation law.

Having held that the injury was not compensable under the workmen's compensation law, this leaves the case to be considered and reviewed, as it was tried, as an action at law for damages for negligence. The facts are in dispute in some phases. There was evidence from which the jury might have inferred that plaintiff was not injured, as she claimed, in front of defendant's store on the day named, but near her home on her way to work the day before. That was a question their verdict resolved in her favor.

There was competent evidence that the circular canopy encroached over the sidewalk more than 7½ feet; that it was not so equipped as to carry off rain, melting snow and ice by means of downspouts, but permitted water to fall upon the sidewalk; that, at the time plaintiff fell on the sidewalk, there was a circular ring of ice several inches wide on the sidewalk underneath the outside edge of the circular canopy. Some of the facts are established by circumstantial evidence. This is permitted by the rule laid down in *Rocha v. Payne,* 108 Neb. 246, which says: "Neg-

ligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of."

Plaintiff is charged with contributory negligence. The jury were duly instructed upon that subject. There was evidence that at the time of the fall the sidewalk was generally free from snow and ice and the strip of ice described was beneath the outside of the canopy; that water was at the time dripping from the edge of the canopy. Whether a pedestrian is guilty of contributory negligence in not looking at the sidewalk at her feet when the sidewalk, except for a narrow strip a few inches wide, is clear of ice, and whether the failure to look is the cause of the fall, when the presence of the ice is obscured by the water falling upon it, is a question of fact for the jury. *Todd v. City of Troy,* 61 N. Y. 506; *City of Lebanon v. Graves,* 178 Ky. 749; *Steck v. City of Allegheny,* 213 Pa. St. 573; *Slife v. Borough of Dorranceton,* 262 Pa. St. 182.

Another error assigned relates to misconduct of a juror, Knott. The trial court, over the objections of plaintiff, on the hearing of the motion for new trial, admitted the affidavits of three of the jurors who had sat in the case. The objections were that the affidavits were incompetent, irrelevant and immaterial, an attempt to impeach the verdict of a jury by affidavits of jurors, involving hearsay evidence and *ex parte* in form, denying plaintiff any inquiry into the circumstances and conditions. The trial court evidently was uninfluenced by the affidavits, but defendant argues that the conduct of the juror, Knott, as shown by the affidavits, entitles defendant to a new trial. The affidavits of the three jurors state that, during the trial and after the submission to the jury, Knott compared the injury to plaintiff's knee to one Knott had received in the world war, and stated to the jury that if he had to choose between a normal leg and $1,000 a month he would take the normal

leg; that Knott told the jury that during the trial he had gone to defendant's store, examined the canopy, describing to the jury what his examination disclosed; that he, Knott, had gone to the records, discovered that on a former trial a verdict in favor of plaintiff for $3,000 had been set aside by Judge Redick because, as Knott inferred, the verdict was not large enough; that Knott was insistent that a large verdict should be rendered and that his argument greatly influenced the jury in arriving at a verdict in this case.

It may be noted that these affidavits relate entirely to what Knott is sworn by affiants to have said in the jury room. They constitute an attempt to impeach the verdict by that means. There is no sworn statement by any juror that, while Knott was a juror, he went either to the scene of the fall of plaintiff, or went to the office of the clerk of the district court to examine the records. These facts are not established, unless by this hearsay evidence set out in these *ex parte* affidavits, with no opportunity for plaintiff to cross-examine the affiants or Knott as to their truth or falsity.

Considerable was said in the argument about the United States rule. An interesting case, illustrative of the rules laid down by the United States supreme court, is *McDonald v. Pless* (1915) 238 U. S. 264. The case was tried in North Carolina. In a motion to set aside the verdict, it was alleged that it was a quotient verdict and the amounts and details by which it was reached were set out. It was alleged that the jurors refused to make affidavits, but stated they were willing to testify to the facts alleged, provided the court thought it proper that they should do so. At the hearing of the motion, one of the jurors was sworn as a witness, but the court refused to allow him to testify on the ground that a juror was incompetent to impeach his own verdict. The ruling was affirmed by the court of appeals and was brought to the supreme court by writ of error. The opinion discusses the hardship on a private party whose wrongs may not be redressed if jurors may not

testify to misconduct, and the public injury which would result if jurors were permitted to testify as to what happened in the jury room. It reviews briefly the English cases and a few United States cases. It affirms the judgment and lays down these rules:

"The courts of each jurisdiction, state and federal, must be in a position to adopt and enforce their own self-preserving rules.

"While Rev. Stat., sec. 914, does not apply in this case, this court recognizes the same policy that has been declared by that court and by the courts in England and in most of the states of the Union, that the testimony of a juror may not be received to prove the misconduct of himself or his colleagues in reaching a verdict.

"The rule, indorsed by this court in this case, that a juror may not impeach his own verdict is based upon controlling considerations of public policy which in such cases chooses the lesser of two evils."

It has long been the rule in this state that affidavits of jurors are not admissible to show any matter inhering in the verdict, but it has been the rule and practice to admit affidavits of jurors as to evidence of misconduct seen and heard by all or a considerable portion of the jury during their deliberations. In *Harris v. State,* 24 Neb. 803, it was shown that a juror procured a copy of the statutes and repeatedly read to the jury a part of the statute upon which he claimed the offense charged against the defendant was based, read to the jury the statutes upon new trials of criminal cases, and argued that, if the part of the statute read did not apply, a new trial would be granted by the court. The opinion by Chief Justice Reese reversed the judgment, saying in the syllabus: "Affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself, as where a verdict for damages is ascertained by aggregation and average without subsequent ratification, or where it is made to depend upon chance, or where a part

of the jury become so intoxicated as to destroy their ability to deliberate and exercise their reason and judgment, or where witnesses are surreptitiously called before the jury and permitted to detail the principal facts, or any other matter concerning which all or any considerable portion of the jury may testify with equal knowledge, by having seen or heard the misconduct which is alleged to have occurred."

There is no rule preventing either party or the court from examining jurors orally in open court as to what was said and done showing misconduct of jurors.

So far as we are advised, the rule laid down in *Harris v. State, supra,* has not been changed. The conduct of the juror, Knott, either in going to the scene of the accident for observation of the canopy, if he went, or in stating to the jury that he had observed it and what he saw, whether he went or not, his argument to the jury comparing his own injury to that of plaintiff, and his statement as to his examination of the record, constituted misconduct prejudicial to defendant.

It is to be noted that, in resistance to the affidavits of the jurors quoted, plaintiff offered and the court received the affidavit of juror Knott. Therein he merely denies that he ever examined the records and states that he does not know what they show as to the action taken by the jury or judge at the former trial. He does not deny that he told the jury during their deliberations what the other jurors swear he told them in his arguments for a large verdict against the defendant.

Other errors are assigned, but are not insisted upon so vigorously as those we have discussed. What we have already said calls for a decision reversing the judgment and we omit further discussion.

The judgment of the district court is

REVERSED.

WALLA WALLA LODGE NO. 56, INDEPENDENT ORDER OF ODD FELLOWS, APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.*

FILED JUNE 14, 1935. No. 29417.

Taxation. Cause reviewed and *held* to be ruled by *Masonic Temple Craft v. Board of Equalization*, p. 293, *post;* judgment modified as to assessable value of taxable property.

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

Hoagland, Carr & Hoagland, for appellant.

S. S. Diedrichs, E. H. Evans, Urban Simon and *C. S. Beck, contra.*

William H. Wright, Attorney General, Edwin Vail, John J. Ledwith, Edward C. Fisher, Edward F. Leary, Joseph O. Burger, Francis P. Matthews, William Ritchie, Oscar T. Doerr and *C. J. Baird, amici curiæ.*

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

GOSS, C. J.

This is a companion case to *Masonic Temple Craft v. Board of Equalization,* p. 293, *post.* The cases were previously here when they were argued together and, with other cases, treated in one opinion. *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841. They were retried together, were argued here together, but to some extent briefed separately. It seemed desirable to have separate opinions. Though the issues were similar, the facts differed as to the property, amounts, values, and the like.

This cause involved the assessment for 1931 of plaintiff's lot and building in North Platte. Plaintiff asked the board of equalization to strike its property from the lists as exempt. From an adverse ruling it appealed to the district court. Its property consists of a two-story building.

Plaintiff's building of two stories was assessed at $8,000

*Opinion modified. See p. 827, *post.*

and the lot at $5,675, or a total of $13,675. There was a mortgage for $2,000 on the property, which was not assessed and is not considered here, for the same reason the mortgage was not considered in the *Masonic Temple Craft* case. The lower floor of the building was rented for secular uses and was taxable. The upper floor was used for lodge purposes, educational, charitable and religious in character, and was therefore exempt. The court decreed the lower floor to be subject to taxation, the upper floor to be exempt, and valued the lower floor at $10,000, "this being the *pro rata* valuation of the building and grounds for taxing purposes."

The effect of the testimony of witnesses was to value the lower floor of the building at $3,600. They did not value the lot. Considering one-half of the assessed value of the lot or $2,837.50 as taxable, because the whole building rests upon it, and adding it to the assessed value of the lower floor, produces $6,437.50, which we think a fair valuation of the assessed proportion of the entire property. Our valuation seems a reasonable and logical conclusion from the evidence.

The assignments of error of both parties seem identical with those made in the *Masonic Temple Craft* case, *supra.* They are ruled by the decision in that case without repetition here.

The judgment of the district court is reversed, with instructions to modify the judgment so as to direct the entry of the assessable value of plaintiff's interest in its property at $6,437.50.

REVERSED.

MASONIC TEMPLE CRAFT, TRUSTEE, APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.*

FILED JUNE 14, 1935. No. 29418.

1. **Taxation.** The ownership and exclusive use of property determine whether or not it is entitled to exemption from taxation.
2. **Record** examined and judgment of the district court modified.

*Opinion modified. See p. 827, *post.*

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

Hoagland, Carr & Hoagland, for appellant.

S. S. Diedrichs, E. H. Evans, Urban Simon and *C. S. Beck, contra.*

William H. Wright, Attorney General, Edwin Vail, John J. Ledwith and *Edward C. Fisher, amici curiæ.*

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

GOSS, C. J.

This cause, seeking exemption of real property from taxation, was heard here before, with other causes. *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841. The judgment there reviewed was reversed and this cause was remanded for further proceedings in harmony with the opinion of the court, with directions to the district court to permit amendments to the pleadings and to permit the introduction of further competent evidence in support thereof. The opinion suggested a disclosure of the amount, nature and terms of a real estate mortgage on the premises, as well as the terms of an existing lien, so that the exact extent of plaintiff's taxable interest in the property might be fixed.

On a retrial the district court found: (1) That the mortgage against the property in no manner affects the determination of the issues; (2) that plaintiff is a religious, charitable and educational institution and its property, except as hereafter stated, is owned and used for its purposes exclusively; (3) that the two lower floors are rented by plaintiff for commercial purposes, are not exempt from taxation and should be valued for taxation purposes at $25,000; and (4) that the two upper floors are exempt from taxation.

Plaintiff appealed, assigning errors of the court (1) in finding the two lower floors subject to taxation; (2) in

valuing the two floors at "$25,000 when all of the building, worth three times the part leased, was valued at $26,500" (by the board of equalization); (3) that such valuation, in such circumstances, is contrary to the evidence and contrary to law.

Defendant cross-appealed. It alleges 12 different errors on the part of the court, some of which will be discussed forthwith because they refer to the pleadings and rulings thereon; (a) that the court overruled defendant's motion to require plaintiff to set forth the part of the building rented and the terms and conditions of the lease, as well as the amount and terms of the mortgage. The answer to this is that the case was tried in large part as if these things had been done. The evidence showed that the two lower floors of the building were rented to Montgomery Ward & Company for $11,550 a year and that no mortgage on the property was assessed for 1931, which is the year involved; (b) that the court overruled defendant's motion to make the lessee a party defendant. It does not appear that the lessee had any interest in the assessment or payment of taxes and it was not necessary to make it a party; (c) that the court erred in refusing to strike the allegations of the petition relative to equalization and comparative values. These allegations seem to have been in the original petition upon which the case was heard here; (d) that the court overruled defendant's demurrer. The petition seems to state a cause of action. No such objection was made to it before. It was not changed on this trial, though the opinion in the case when here before, and the mandate sent to the district court in pursuance to the judgment, authorized amendments to the pleadings. Plaintiff, not having amended its petition on a retrial, took chances on any penalty that might result from its failure to amend.

The assessed valuation of the Masonic property for 1931 was $8,500 for the lot and $26,500 for the building, or a total of $35,000 for both, as shown without dispute in the evidence; this as fixed by the evidence and without allow-

ing any exemptions. The valuation was made in 1930. There was no new valuation made in 1931. There is no record of the assessment of any mortgage on this property in 1931, as the county clerk testified on this trial.

Section 2, art. VIII of the Constitution, provides that the legislature may, by general law, exempt property "owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

In section 77-202, Comp. St. 1929, the legislature has provided for exemptions in the exact language quoted in the above paragraph.

The use of property determines whether or not it is entitled to be exempt from taxation. *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105; *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489; *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106; *St. Elizabeth Hospital v. Lancaster County,* 109 Neb. 104.

That part of a building owned by a religious, charitable and educational institution, but leased and used by the tenant for business purposes, is not exempt from taxation. *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642; *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105. In this last case cited it was said: "No reason appears why the taxing authorities cannot arrive at a just valuation of that portion of the building which is taxable, in its relation to the entire property, and assess the property in that amount."

In the case before us no attempt was made by the board of equalization to make any deductions from the assessed valuation. The trial court cut the assessed valuation from $35,000, on the entire property, to $25,000, not from $26,500 to $25,000, as suggested in the assignment of errors and argument by plaintiff. We are of the opinion that we should take the board of equalization's assessed valuation of the whole property as ascertained from the

evidence, the value of the part of the property leased by plaintiff and not actually used by it, rather than to estimate the value from the cost of the building and other elements upon which much time was spent. This valuation of the entire property cannot be complained of by plaintiff, because it seems reasonable; and the valuation ought not to be objected to by defendant because it deliberately fixed it, probably in comparison with the values it fixed on other property in full contemplation, not only of the need for revenue, but of the financial conditions of the time. The evidence shows the valuation not to be unreasonably excessive when compared with others in the neighborhood.

The evidence shows that no mortgage on plaintiff's property was assessed for the year 1931. Indeed, it shows that no mortgages on any real estate in that county were assessed. It was the practice in all instances to fix the entire tax upon the real estate, with no separation of the taxable interest. This applied to all mortgaged real estate, whether owned and used by one ostensibly capable of claiming exemption or not. Further, the holder and owner of the mortgage on this property, originally for $105,000, was not made a party to this suit. On the whole, we are of the opinion the trial court did not err in holding that the mortgage did not affect the determination of the issues.

The evidence is very lacking to allow a comparison of the rental value of the upper two floors and the lower two floors. Probably because the upper floors were not rented, the evidence did not show their rental values. The effect of the testimony of Howard R. McMichael, the contractor who erected the building, of A. F. Beeler, a ward assessor for the county and for the ward, and of E. W. Cross, who was the building inspector when the building was erected, is that the lower two floors should be valued at $9,275. This is based upon the total assessed value of the building and upon the comparative plainness of the construction of the two lower floors, upon the expensive steel construction for the roof, with arched ceilings, and upon the steel and

other construction for the elevators and stairs not a part of the lower floors.

These opinions as to values of the two floors do not, of course, take into consideration the assessed value of the lot. This seems indisputably to be $8,500. It seems reasonable to attribute half of that value or $4,250 to each of the two floors, as the land was equally necessary to both units. This certainly cannot be objected to by the county as it gets more revenue that way, and we find no evidence and see no equity favoring the owner and calling for a greater percentage of the assessed value of the lot as an exempt item to be considered.

Taking $26,500 as the total assessed valuation of the building and considering the testimony of the witnesses as producing $9,275 as the taxable value of the building; adding to this $4,250, as the taxable value of the lot, makes the total assessed value of the property $13,525. Under the record this seems reasonable and equitable to all parties.

Other questions raised are overruled without express discussion. We expressly state that we do not pass upon the taxability of mortgages upon charitable, religious or educational institutions, because not properly presented here.

The judgment of the district court is reversed, with instructions to modify the judgment so as to direct the entry of the assessable value of plaintiff's interest in its property at $13,525.

REVERSED.

THELMA ROBERTS, APPELLANT, V. GEORGE H. ROGERS, APPELLEE.

FILED JUNE 14, 1935. No. 29263.

1. **Landlord and Tenant:** CAVEAT EMPTOR. In the absence of express contract to the contrary, a tenant takes demised premises as he finds them, and there is no implied warranty by the landlord

that they are safe or fit for occupancy. The rule of *caveat emptor* applies.

2. ———: "LATENT DEFECT." The term "latent defect" may be properly defined as "a defect which reasonably careful inspection will not reveal; one which could not have been discovered by inspection." 36 C. J. 956.
3. ———: DUTY OF LANDLORD. A landlord ordinarily is under no duty to change the visible form and mode of simple construction of leased premises in order to make them safe for his tenant, nor is he bound to remove obvious sources of danger; as to these the tenant assumes the risk.
4. Evidence examined, and *held* to support the order of the trial court directing a verdict for defendant, and the judgment entered thereon.

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

Chambers & Holland, for appellant.

Peterson & Devoe, contra.

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

EBERLY, J.

This is an action brought by Thelma Roberts to recover damages for personal injuries sustained by her on or about November 17, 1932, when, as alleged in her petition, she was struck by a falling trapdoor in a house owned by defendant Rogers, and in which she was a tenant. She further alleged that, on the day referred to, she "had occasion to descend a stairway leading into the cellar of said house, and which is reached by means of a trapdoor located in the floor of said house just off the dining room; that before descending, plaintiff raised said trapdoor as far as was possible and commenced her descent into said basement; that * * * said trapdoor fell over upon her," causing the injuries of which she complains. Plaintiff also charged that this accident was due to the following defects in the leased premises: "A wabbly and unsteady stairway which shook when persons walked upon it, causing said trapdoor

to fall from the vibration from said stairs; that said trapdoor was defective in that no hook for it was maintained to prevent it from falling;" and as to the alleged defects in said premises, of which the defendant was thus charged with actual knowledge, the language of the petition is that the defendant, "at the time of the accident, was aware and for some time had been aware of the defective condition of the trapdoor and the steps, and particularly the first two steps above the basement floor, which were broken completely out."

On the other hand, the defendant's answer, admitting the ownership and leasing of the premises involved, by general denial traverses all of plaintiff's allegations of fact not specifically admitted; and, as an affirmative defense, pleads contributory negligence on the part of plaintiff.

Upon the trial, at the conclusion of plaintiff's evidence, the defendant moved for an instructed verdict in his behalf, on the following grounds, in substance: (1) That the evidence was insufficient; (2) that the defects in the premises, complained of, were as obvious and evident to plaintiff as to defendant, and were not "latent;" (3) contributory negligence on part of the plaintiff. This motion was sustained, and from the order of the trial court overruling her motion for a new trial, plaintiff appeals.

All parties to this appeal concede the applicable legal principles to be, in part: "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel,* 124 Neb. 40. See, also, *In re Estate of Hoagland,* 126 Neb. 377.

That this jurisdiction is committed to the following

view: "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor." *Davis v. Manning,* 98 Neb. 707.

It may be said that this pronouncement was reaffirmed in *Rankin v. Kountze Real Estate Co.,* 101 Neb. 174. The gist of the opinion in the *Rankin* case emphasizes the conclusion that, in an action against the landlord for injuries sustained by the tenant, the latter must show that the former had actual knowledge of the defects.

In *Davis v. Manning, supra,* Sedgwick, J., dissenting, states his views, as follows: "In this country the courts have generally applied the rule of *caveat emptor* between landlord and tenant about the same as the rule is applied between vendor and purchaser. That rule is that the landlord is not liable for 'latent' defects which the tenant has equal opportunity to observe. 'It is not his duty to search for defects, and if the defect is easily discoverable he need not mention it.' But 'if he knows of a defect which is likely to produce injury, the nature of which is such that careful examination by the tenant would not disclose it, he must notify the tenant of it.' Note to *Hines v. Willcox,* 96 Tenn. 148, in 34 L. R. A. 824, 827. This seems to be the universal rule, as it is between vendor and purchaser. When can it be said that the landlord *knows* of defects? Does this mean that he must have personally seen and examined the defect? I think that the majority opinion goes so far as to so hold. If some one else had seen and examined the defect and had suggested it to the landlord, the landlord could not have been said to *know* of it, as defined in the majority opinion."

In this connection, it will be noted that in *Davis v. Manning,* 98 Neb. 707, this court expressly overruled paragraph 3 of the syllabus of the same case reported in 97 Neb. 658, which declared the rule, as to latent defects in

leased premises, to be that liability attached "if a landlord rents a house in a dangerous condition, and knows at the time, *or ought to know from facts within his knowledge, that it is dangerous,* and such dangerous condition is not known to the tenant." (Italics ours.)

In other words, in this jurisdiction, by legislative action (Comp. St. 1929, sec. 49-101), we have adopted the common law of England as governing the relation of landlord and tenant.

As applicable and not inconsistent with the federal Constitution, with the organic laws of this state, or with subsequent legislative enactments, the common-law rules here controlling, as applied to the facts in the instant case, are as follows:

In the absence of express contract to the contrary, a tenant takes demised premises as he finds them, and there is no implied warranty by the landlord that they are safe or fit for occupancy. The rule of *caveat emptor* applies. 16 R. C. L. 777, sec. 271; 36 C. J. 204; *Hatzis v. United States Fuel Co.*, 82 Utah, 38; *Miller v. Vance Lumber Co.*, 167 Wash. 348; *Gray v. Pearline,* 328 Mo. 1192; *Davis v. Manning*, 98 Neb. 707; *Rankin v. Kountze Real Estate Co.*, 101 Neb. 174.

In the absence of contract, no duty to repair leased premises devolves upon the landlord, but, on the contrary, the relation of landlord and tenant devolves that duty upon the tenant. *Whitehead v. Comstock & Co.*, 25 R. I. 423; 16 R. C. L. 1030, sec. 552.

A landlord is under no duty to change the visible form and mode of construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger; as to these the tenant assumes the risk. *Andrews v. Williamson,* 193 Mass. 92; *Miller v. Hooper,* 119 Me. 527.

A landlord is not liable to his tenant for any defects existing in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination. *Doyle v. Union*

P. R. Co., 147 U. S. 413; *Keates v. Earl of Cadogan*, 10 C. B. (Eng.) 591; *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357; *Berlin v. Wall*, 122 Va. 425; *Hines v. Willcox*, 96 Tenn. 148; *Booth v. Merriam*, 155 Mass. 521; *Bowe v. Hunking*, 135 Mass. 380.

The facts set forth in the evidence now before us, viewed in the light of the principles thus outlined, further limit the present inquiry to the question of whether or not the defects complained of are latent defects, or are obvious, patent defects.

A "defect" may be defined as "a want or absence of something necessary for completeness or perfection; a lack or absence of something essential to completeness; * * * a deficiency in something essential to the proper use for the purpose for which a thing is to be used." 18 C. J. 458.

The term "latent defect," in the light of the foregoing definition of "defect," may be properly defined as "a defect which reasonably careful inspection will not reveal; one which could not have been discovered by inspection." 36 C. J. 956.

As to the evidence in the instant case: Benjamin B. Gardner, called as a witness for plaintiff, testified, on cross-examination, on the subject of this cellar-way, as follows: "Q. Did you, when you talked with Mr. Rogers about the condition of that stairway, point out to him what you considered the trouble was? A. No. Q. Did you consider the thing you had in mind in making the stairway defective evident to any one who would look to see? A. I always knew those steps were originally constructed faulty, contrary to the rules of good carpentering. * * * Q. Whatever was wrong there you considered Mr. Rogers could see without it being pointed out to him, didn't you? A. Yes, sir. Q. Or any one else could see and observe for themselves the condition of that entire cellar-way? A. Yes, sir. * * * Q. As far as you know there has been no change? A. I saw that door about six months ago and I did not see any changes. * * * Q. Do you remember telling him you could not account for the way that door had fallen down

unless something behind it after you made the test Mr. Rogers asked you to make. A. I told him a draft would possibly do it or slight vibration, and then I told him the door stood too straight up. The door stood just,—well, when it is leaned clear back against that south wall it stands at an angle, I presume, of about 90 degrees." This witness also testified that, when the trapdoor was opened up and pushed back, "it didn't go more than six inches out of perpendicular to reach the wall." And further: "Q. And when this door is open and leaned up against the south wall of that room it is standing at an angle of how many degrees? A. Well, I don't want to pretend to be so exact about it, but I should say about 90 degrees. You take the average angle roof, it is about 45 degrees, and then double that and that gives an idea about how straight it stands up and down."

Deacon R. Gardner, a witness produced by plaintiff, testified on direct examination, with reference to the condition of the trapdoor and stairway leading to the basement of the house, that he was familiar with it, and, "Q. Gone up and down it several times in your life? A. Yes, sir; I have been up and down it many times. I was always careful. I was aware that door was always faulty." And, on cross-examination: "Q. Do you know what the distance is between the south edge of the trapdoor and the south wall of the closet? A. I would say it was about five inches; it is not very much. Q. So that when the door was laid back against the south wall it would be off perpendicular at least four and a half or five inches; that would be true, wouldn't it? A. It would be off a little. It would not go over far enough to give it enough advantage to stay there. Q. Now in order for that door to fall it would have to be left so that the upper part of the door was not over against the south wall of the closet, that is true, isn't it? A. Well, I could not hardly say to that because I was always sure that I had it over and it almost hit me a couple of times."

Expert witness Taylor, a contractor and builder, produced by plaintiff, testified, after an examination of the

pictures of the trapdoor and stairway, that they were of simple construction, but not built according to the accepted manner, and were dangerous, and that any individual with fairly good eyesight could see just exactly how the trapdoor opened and how it leaned against the wall of the building.

As indicated by the foregoing excerpts, the evidence in the record, as an entirety, discloses that, so far as defects alleged in the petition were concerned, the dangerous condition actually inhered in the construction of the trapdoor, and became such as and when subjected to the natural law of gravitation. As leaned against the wall, in an almost vertical position, this trapdoor with the supporting wall formed an unstable figure with a base of approximately five inches. It was thus apparent to any observer that whenever the center of gravity of the trapdoor, by a movement thereof, no matter how occasioned, fell without the five-inch base, the trapdoor was bound to descend. The fact that there had been no hook provided to secure it was equally obvious.

The inspection of the exhibits in the record leads to the same conclusion, which is reinforced by the evidence set out herein, viz., that the defects occasioning the accident were obvious and discoverable by a proper inspection. Therefore, they may not be considered as "latent defects," but rather as defects due wholly to apparent errors in the original construction.

The controlling principle in this case appears to be the following: A landlord is ordinarily under no duty to change the visible form and mode of simple construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger; as to these the tenant assumes the risk.

It follows that the order of the trial court directing a verdict for the defendant was correct, and its judgment thereon is

AFFIRMED.

LEONARD A. REEDER, APPELLEE, V. KIMBALL LAUNDRY ET AL., APPELLANTS.

FILED JUNE 14, 1935. No. 29526.

1. **Master and Servant:** INDEPENDENT CONTRACTOR. An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished.
2. ———: ———. "There is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that relation must be determined from all the facts in each particular case." *Showers v. Lund*, 123 Neb. 56.
3. ———: ———. One who contracts to haul coal from railroad cars to the employer's coalbins, furnishing his own truck, appliances and labor, at 55 cents a ton payable after each car-load is hauled; who may perform the work himself or hire others to do it; who has a right to hire and discharge his assistants, fix their wages and hours of labor and is liable for their compensation; and who has the power to direct when, where and how the detail of the work shall be performed is, within the meaning of the workmen's compensation law, an independent contractor, and not an employee.

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

Sackett & Brewster and *Dean R. Sackett*, for appellants.

Killen & Van Borkum, contra.

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

CARTER, J.

This is a suit under the workmen's compensation law. The plaintiff, Leonard A. Reeder, recovered an award before the compensation commissioner from which an appeal was taken to the district court. From a decree in favor of the plaintiff, the defendant brings the case to this court on appeal.

The only question involved is whether the plaintiff was an employee of the defendant or an independent contractor.

The plaintiff sustained a broken wrist in cranking his truck while hauling coal for the defendant. The evidence shows that for eight or nine years prior to the injury the plaintiff had done general draying and hauling for the defendant, including the hauling of coal, salt and trash. Plaintiff received 55 cents a ton for hauling coal, he furnishing his own truck and employing what extra help he required. The evidence was that whenever a car of coal arrived on track the plaintiff was called, informed of that fact and told where to put the coal. When the car was unloaded plaintiff was given a check for the full amount due him. The testimony shows that plaintiff hauled for other persons when not doing dray work for the defendant. Plaintiff contends that he was at all times under the absolute control of defendant while doing the work. We think that a fair interpretation of the evidence is that defendant directed plaintiff where to put the coal and saw to it that the contract was carried out as agreed. The plaintiff controlled all the details of the work. He determined the hours he should work, selected and paid his own helpers, he could haul the coal himself or employ others, and could work for others whenever he desired. After a car of coal was unloaded the defendant was under no obligation to give him work and he was under no obligation to work for the defendant. After plaintiff was employed to unload a car of coal, we believe, after a reading of the evidence, that he could not be discharged without liability on the part of the defendant. The only recourse defendant had was to refrain from engaging him in further jobs.

"The true test of a 'contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. * * * In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own

employees, furnishes his own material and directs and controls the execution of the work. Where these conditions concur there is, of course, no difficulty in determining his character as such. It is only where one or more of them is lacking that a question arises. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it." 1 Shearman and Redfield, Law of Negligence (6th ed.) 395, sec. 164.

In *Potter v. Scotts Bluff County*, 112 Neb. 318, this court said: "In the instant case it will be observed that the contract did not require the work to be performed by the contractors, but they might employ others to perform the work. No particular time was stipulated within which the work should be performed. The contractors or their employees could work to suit their own convenience; keep their own time; determine during what hours they should perform the work; determine what days they should or should not work; determine whether the gravel should be hauled by teams or motor trucks; determine the size of the loads and have control over all of the details of performing the labor. They were at liberty to hire as many men as they saw fit. They might have completed the work within a week or might have taken 60 to 90 days in which to do it. They were at liberty to determine the wages they would pay to the hired men, the price they would pay for teams, and were to furnish their own tools and equipment. On the other hand, while the contract specified that the work should be done subject to the instruction of the county highway commissioner, it is apparent that his only concern, or the county's concern, was in seeing that the proper kind and amount of gravel was evenly distributed over the highway. The county had no control over the men; could not hire or discharge them; could not determine the number who should be employed; could not determine how many teams should be operated; could not determine the hours of labor, the size of loads, or any of the other de-

tails. Under the circumstances, we are clearly of the opinion that plaintiff was not an employee of the county, but was an independent contractor." While we realize that the issue as to whether a workman is an employee, as distinguished from an independent contractor, should be determined from all the evidence, rather than from any particular feature of the employment, yet we feel that the above case has particular force in its application to the case at bar.

The rule that the relationship should be determined from all the evidence was well expressed in *Showers v. Lund,* 123 Neb. 56, as follows: "There is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that relation must be determined from all the facts in each particular case."

The plaintiff contends that the defendant, in instructing the plaintiff where to get the coal, where to put it and how to approach the coalbins, exercised such control as would make plaintiff an employee. In the case of *Petrow & Giannou v. Shewan,* 108 Neb. 466, this court said: "The giving of such instructions by the defendants, however, would not be inconsistent with the relationship of the plaintiff toward them as an independent contractor, since, were he an independent contractor, the defendants would have had the right to instruct him as to what had to be done, so as to secure the fulfilment of their contract. This could be and was done in this case, without in any way interfering with the plaintiff's right to perform the contract in whatsoever manner or by what method he chose." The evidence in this case clearly sustains the claim of the defendant that the instructions given were those necessary only to secure the fulfilment of the contract.

In *Norton v. Day Coal Co.,* 192 Ia. 160, the applicant owned a team and wagon with which he carried on a hauling business; the defendant, a coal company, engaged the applicant on such occasions as he applied for work and the company had coal to haul; the applicant was paid by the load, could discontinue work whenever he liked, could haul

coal for competitors of the company, and the company could not discharge him, but could merely decline to give him further employment; the applicant had complete control over the manner of doing the work, being responsible only for the ultimate result of properly delivering the coal to such consignees as the foreman of the company directed. The court held the applicant to be an independent contractor, and not an employee, the court saying: "Norton is not an employee, within the act, because there was no right to discharge him, and the right to discharge for misconduct or disobedience is an essential test. * * * There was no right to discharge, because, as said, claimant had virtually the status of a drayman. Plaintiff could not tell, when he came, whether he would get any work. He was not obliged to accept any that was offered. He was at all times at liberty to haul for others, rather than defendant. The most that could be done was to refrain from giving him coal to deliver. The only power the defendant had was to elect whether he should be given work, and how long it should continue. There was the right to interrupt or terminate the contract, but not to discharge." The plaintiff in the case at bar was a drayman engaged in an independent occupation as such. Under all the evidence and circumstances of this case, we are of the opinion, and so hold, that plaintiff was an independent contractor, rather than an employee.

The plaintiff relies upon *Showers v. Lund, supra,* and *Cole v. Minnick,* 123 Neb. 871. In *Showers v. Lund, supra,* it is clear that the employer had full control over the detail of the work and that plaintiff was devoting his entire time to the business of the employer. The fact that plaintiff in that case was paid by the number of yards of gravel that he hauled becomes less important when it appears that the details of the method of accomplishing the purpose of the employment were under the control of the employer. It is also apparent that the plaintiff in that case did not agree to perform a specific piece of work or to complete a specific job. In *Cole v. Minnick, supra,* the court in the

opinion concluded that the right to supervise and direct the work remained with the employer and that the employer had the right to terminate the employment without liability. These tests, if supported by the evidence, would sustain the finding that the workman was an employee. The court, however, in their opinion say that the case upon its facts is a border line case. To say the least, from the facts set out in the opinion, this case has extended the rules of law of this state to the very maximum in holding the plaintiff to be an employee, instead of an independent contractor. Under the evidence in the case at bar, neither of these cases can sustain the contention of plaintiff. In the final analysis, the plaintiff was a drayman, engaged in an independent occupation as such. His contract was to perform a certain specific job, using his own equipment, hiring his own assistants, and directing the detail of the work. After the job was completed, he was paid for the whole job, irrespective of the time taken or the number of men hired to complete it. In carrying out this arrangement, his status is fixed as that of an independent contractor.

In our opinion, no other finding than that the plaintiff was an independent contractor can be sustained. Where the evidence clearly shows, without question, that the claimant under the workmen's compensation law is in fact an independent contractor, and not an employee, a contrary finding by the trial court cannot be sustained.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LOUIS C. D. STORK ET AL., APPELLEES, V. EVANGELICAL LUTHERAN SYNOD ET AL., APPELLANTS.

FILED JUNE 14, 1935. No. 29094.

1. **Corporations:** TRUSTS. Under section 76-502, Comp. St. 1929, corporations not incorporated under the law of Nebraska are prohibited from taking or holding any real estate in this state in trust for the use and benefit of another.

2. Charities: DEVISE: CHARITABLE TRUST. The will under consideration devised real estate to the Evangelical Lutheran Synod of Ohio, a nonresident corporation, to be used as follows: "One-third of this gift shall be used for the education of students of theology at its schools, who have no money to pay for their attendance at school; one-third for the repairs of its schools, and the other third for foreign missionary work." *Held*, that the will created a valid charitable trust.
3. ———: ———: ———. A court of equity will not permit a religious or charitable trust, created by will, to fail because the trustee named is incompetent to take title to real estate in this state, but will appoint a competent trustee to administer the trust.

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

Fradenburg, Stalmaster & Beber, O. T. Doerr and *P. M. Klutznick*, for appellants.

Courtright, Sidner, Lee & Gunderson, contra.

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

MUNDAY, District Judge.

Frederic W. Smith died testate in 1931, leaving a widow, Emma M. C. N. Smith, and brothers, sisters, nieces and nephews, as his heirs. He owned a considerable estate, and the title to his real estate is in dispute in this action. The widow died intestate in 1932, leaving as her heirs her brothers and sisters, who are plaintiffs in this action. The will of Frederic W. Smith has been duly probated and all debts, allowances and expenses of administration of his estate have been paid, and the estate is now ready for distribution and for partition.

The will of Frederic W. Smith provided in part as follows:

"All the residue of my estate, real, personal and mixed property, wherever it may be found, and of whatsoever it may consist, I give, devise and bequeath unto the German Evangelical Lutheran Synod of St. Louis, Ohio, and other states, and its heirs, to be used by said society as

follows: One-third of this gift shall be used for the education of students of theology at its schools, who have no money to pay for their attendance at school; one-third for the repairs to its schools and the other third for foreign missionary work."

The plaintiffs bring this action to quiet title to said real estate in them and the heirs of Frederic W. Smith and ask for an accounting and partition of said real estate and for general equitable relief. The plaintiffs allege in their petition that said Synod was at the time the will was made and at all times a foreign corporation and not incorporated under the laws of Nebraska, and is incompetent to take the title or the beneficial interest in said real estate, and that said attempted devise is a nullity and the title to said real estate belongs to plaintiffs and the heirs of Frederic W. Smith as an undevised estate.

For answer to the petition, the appellant Synod alleges that said Frederic W. Smith devised in said will his real estate in trust for certain religious and charitable purposes, and that it is a corporation not incorporated under the laws of Nebraska, and that it is organized for religious purposes to carry on a religious work, including the maintaining of schools for the education of candidates to the ministry and students of theology, and that some of such students are indigent and that the expense of their education must be paid by the defendant or persons interested in the work of the Synod, and that said defendant maintains schools for the education of teachers of parochial schools, and to carry out this purpose that defendant erects, maintains and operates schools, and that said defendant supervises and conducts a missionary work in this country and in foreign countries and carries on generally the work of church organizations, and that the beneficiaries of the service and the work of said Synod are an uncertain and indefinite class until they have been selected by the board in charge of such work or services, or by the triennial meeting of the Synod, to be such beneficiaries. The defendant prays that the court find and decree

that said will established a charitable trust for the above purpose, and that the court find and decree that the Synod is incompetent to take as a trustee for said purposes and trust, and that the court name a trustee to carry out said purposes and trust.

Trial was had to the court and evidence was introduced showing the amount of funds in the hands of the executor, and the articles of incorporation, constitution and by-laws of the Synod.

The objects of the Synod are stated in article 2 of the articles of incorporation filed in the state of Missouri as follows:

"The object of this association shall be to unite in a corporate body the members of the Evangelical Lutheran Church who remain true to, and acknowledge as a true exhibition of sound Christian doctrine, the Book of Concord of the year of our Lord fifteen hundred and eighty; to receive, acquire, hold, manage, and control the real and personal property and franchises which may hereafter be acquired by this corporation and such as have heretofore been obtained and are now held by different educational corporations, under its direction and for its advancement, and to continue and perpetuate the good work of disseminating the Gospel throughout the world."

In the constitution of the Synod the objects are stated as follows:

"1. The conservation and promotion of the unity of the true faith (Eph. 4, 3-6; 1 Cor. 1, 10) and a united defense against schism and sectarianism (Rom. 16, 17);

"2. The joint extension of the Kingdom of God;

"3. The training of ministers and teachers for service in the Evangelical Lutheran Church;

"4. The publication and distribution of Bibles, church-books, school-books, religious periodicals, and other books and literature;

"5. The endeavor to bring about the largest possible uniformity in church-practice, church-customs, and, in general, in congregational affairs;

"6. The furtherance of Christian parochial schools, and of a thorough instruction for confirmation;

"7. The supervision of the ministers and teachers of the Synod with regard to the performance of their official duties;

"8. The protection of pastors, teachers, and congregations in the performance of their duties and the maintenance of their rights."

The trial court found that the appellant Synod had no interest in the real estate and quieted the title of the same against the appellant and in the plaintiff and appointed a referee to sell the real estate. This appeal was taken by the Synod from said decree.

It is an established principle of the courts of this state to carry out the intent and purpose of the testator where the same are within the rules of law. In this case the intention of the testator is plain and undisputed and ought to be carried out, unless to do so would violate some positive rule of law.

The appellant Synod contends:

1. That the will establishes a religious and charitable trust.

2. That, if the trustee is incompetent to take such a trust, a court of equity will appoint a trustee to carry out the purposes of the trust.

3. That the beneficiary of the trust is not the Synod, but those mentioned in the will who are ultimately to recover the benefits, and that section 76-502, Comp. St. 1929, has no effect on such a beneficiary of a charitable devise.

The appellees contend:

1. That under the will the Synod is the title holder and beneficiary, and that said statute prohibits it from receiving the devise, and that the heirs take the same.

2. That, when a devise is devised to a corporation for the objects for which the corporation is organized, it is then a devise to the corporation itself, and that there is in such a case no separation of the legal from the beneficial enjoyment of the estate, and that such a separation is

necessary in a public or charitable trust in order that the beneficiary may demand its performance.

In the instant case a charitable or religious trust is established. 5 R. C. L. 291, sec. 2, defines such trust:

"But it is certain that in legal parlance the word 'charity' has a much wider significance than in common speech. Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their heirs under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

At 11 C. J. 316, is the following language:

"Gifts for schools and scholars * * * and gifts for the advancement of learning and science * * * are regarded as charities. Gifts of this nature * * * have been regarded by the courts of this country with special favor." Also, at page 320: "Both before and since the enactment of the statute of 43 Elizabeth, it has been and is a general rule that a gift for a religious purpose is one for a charitable purpose."

In *De Camp v. Dobbins,* 29 N. J. Eq. 36, the definition is given as follows: "A religious purpose is a charitable purpose."

In *Hitchcock v. Board of Home Missions,* 259 Ill. 288, the gift was to "Home Missions and Foreign Mission and for education of poor children," and was held by the Illinois court to be a charitable trust, and the selection of the particular beneficiaries should be left to the trustee appointed by the court, since none was appointed in the will.

In *In re Estate of Douglass,* 94 Neb. 280, real estate was devised to the First Congregational Church at Seward,

Nebraska, to be used by said church society as a parsonage. This court held that the gift by will of a parsonage, together with the lots upon which it is situated, is a donation to a public charity and was a gift to a charitable purpose.

In *Elliott v. Quinn,* 109 Neb. 5, the testator by will provided that his real estate should become a part of the school fund of Clay county. The contestants argued that there is no fund in which the proceeds of the sale of the land might be placed, and that the devise is vague, uncertain and impossible of performance. It was also argued that the will lacked a fixed beneficiary and the use is indefinite. This court said: "We do not think defendants' argument is sound. The object of the devise is charitable, and the property devised is certain and definite and the beneficiary is certain and definite as to the class."

In *In re Estate of Secrest,* 109 Neb. 431, the will left certain property to his executor for the purpose of building and maintaining a public library in Hebron, Nebraska, and directed that certain funds be paid to the directors of the city public library association. In the opinion this court said: "Such an institution falls within the class of public charities, which are favorites of the court (citing authorities). To hold otherwise would defeat the beneficent intention and desire of the maker of the will. This we will not do unless compelled thereto by manifest defects in the will, or illegality in its execution."

In *In re Estate of Nilson,* 81 Neb. 809, there was a bequest by a testator, who was a native of an island of Norway, to a church congregation of the island, which body is by the laws of that Kingdom capable of receiving such bequest, of a sum of money to be invested, and the income therefrom distributed annually "to worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge," and appointing three parish officers to carry out the provisions of the bequest. This court held that the will created a charitable trust, and is sufficiently definite as to its object, the trustee and beneficiary, so that it would be upheld.

Section 6273, Rev. St. 1913, before it was amended, read as follows: "Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise."

In 1921 (Laws 1921, ch. 142) the above section was amended and is now as follows: "Aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise." Comp. St. 1929, sec. 76-502.

It is the public policy of this state under the above statute that it is unlawful for either a private or charitable corporation not organized in this state to take the fee title or to act as trustee for another.

In 1918 this court had before it the case of *Gould v. Board of Home Missions,* 102 Neb. 526, wherein the testatrix devised to a foreign corporation certain real estate "to be appropriated and applied for the use and benefit of the Woman's Board of Home Missions of the Presbyterian Church in the United States of America." The lower court held this provision in the will void, and the title was quieted in the heir at law to the real estate devised. On appeal to this court this decree was reversed. The heir contended, as is contended by the appellees here, that the statute prohibited such foreign corporation from taking or holding real estate in Nebraska, and that the title vested in the heir, and that a charitable trust was not created. The syllabi of this court in that case on this question are clear and unequivocal and we can do no better than to quote part of them:

"Under section 6273, Rev. St. 1913 (section 76-502, Comp. St. 1929), corporations not incorporated under the law of the state of Nebraska are prohibited from taking

or holding lands in this state in trust for the use and benefit of another."

"The will under consideration devised to the defendant, a foreign corporation, the real estate in controversy 'to be appropriated and applied for the use and benefit of the Woman's Board of Home Missions of the Presbyterian Church in the United States of America.' *Held,* that the quoted words denote a charitable trust or use for a religious purpose, the beneficiaries of which are uncertain and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being.

"A valid charitable trust created by will will not be permitted to fail because the trustee named therein is incompetent to take title to the real estate, but the court will appoint a competent trustee."

So it is clear that in this state a foreign corporation cannot take title to real estate, nor act as trustee. After reaching the above conclusion the court in the *Gould* case states as follows: "It follows that the trustee cannot take. Does it also follow that the will is void, and that the trust or use intended must fail?" This question was answered in the negative. It is now for us to determine what, if any, is the effect of the amendment to the statute in 1921 as to whether or not the court shall appoint a trustee to carry out the purpose of a charitable and religious trust, when the trustee is a foreign corporation, and therefore incompetent to act. The appellees urge in their brief that said amendment to the statute overcame the effect of the decision in the *Gould* case, where the court appointed a trustee to carry out such devise. In the *Gould* case there was no attempt to give the foreign corporation beneficial use, but only the legal title as trustee. This was prohibited under the statute. By the amendment to the statute, a foreign corporation was prohibited from holding, not only the fee title, but any interest greater than a five-year lease or any other greater interest less than fee title. But in the instant case the Synod does not receive any title or interest of any kind. There is no attempt to give the bene-

ficial interest to the Synod, the disqualified corporation, but the testator attempted to give the Synod the legal title, as trustee to hold and administer it for the *cestuis que trustent,* who in this case are an indefinite number of persons, who own the beneficial interest or use. So we think that the amendment of the statute in no way changed the force of the holding of this court in the *Gould* case. The ultimate beneficiaries of a charitable or religious trust are not affected by the amendment to the statute. If the testator had given the real estate to the Synod without impressing upon it a charitable trust, the heirs would have taken it. But since the testator did not give the real estate in fee to the Synod, nor did it give the beneficial use to the Synod, but gave the legal title to the Synod to hold as a charitable trust, and the Synod is disqualified to act as such trustee, then this court is bound to follow the *Gould* case and provide for the appointment of a trustee.

This holding of this court that equity will not permit a charitable trust to fail for want of a competent trustee, but will appoint a trustee to administer it, is in line with the great majority of holdings in other jurisdictions.

Thus, in *Burke v. Burke,* 259 Ill. 262, the Illinois supreme court held that a charitable trust was not invalidated by reason of the fact that an unincorporated religious society was made the trustee. In this case the gift was to a Catholic parish for the erection and support of a school to be erected and maintained by the parish, and a court of equity named a trustee to carry out the trust. In the opinion the following language applies with force to the instant case: "The original and inherent jurisdiction of courts of equity over charities, independent of the statute, is now recognized in most of the states. Virginia, Maryland and North Carolina are exceptions. In this state deeds made to a rector, church wardens and vestrymen of an unincorporated church for church purposes and to pay the salary of the rector were held not void for want of a grantee capable of taking the deed. * * * Where a gift is made to a charitable use and no donee is named or the

donee named is incapable of taking the property the gift will not fail, but a court of equity may appoint a trustee to carry out the charitable purposes."

5 R. C. L. 309, sec. 23, thus states the rule: "The validity of a charitable trust is not affected by the inability or incapacity of the trustee to act, or by his refusal to do so. Thus when a charitable trust is repugnant to, or inconsistent with, the proper purposes for which the corporation appointed as trustee was created, this furnishes no ground upon which to declare an otherwise unexceptionable trust void. The corporation cannot be compelled to execute it, and the intervention of the proper court may be required to appoint a new trustee in order to enforce and perfect the trust; but a court of equity will enforce it, nevertheless."

In *Hitchcock v. Board of Home Missions,* 259 Ill. 288, there was a devise of the residue of the estate "to be equally divided between Home Missions and Foreign Mission and for education of poor children." The contestants, among other things, objected that the gifts are invalid because no scheme or plan for carrying out the charity is presented by the testatrix, no trustee appointed by her, and no trust declared by the will; that the courts of that state have no power to exercise the prerogative rights of the king or *parens patriæ,* and cannot, under the *cy pres* doctrine, appoint a trustee to receive gifts. The court in a well-reasoned opinion, citing many cases, held that, although no trustee is appointed with power to select the beneficiary from the class so designated, the trust will not for that reason fail, but will be administered by a trustee appointed by a court of chancery. The court also held that to sustain the gift to a charity does not require the exercise of any prerogative power of the nature sometimes exercised in England, but requires only the exercise of the ordinary jurisdiction of a court of chancery. This is the law of this state. *In re Estate of Nilson, supra.*

The supreme court of Massachusetts in a comparatively late case reviews the authorities in *Chase v. Dickey,* 212

Mass. 555, in construing the will of Mary Baker Eddy, the founder of Christian Science. Mrs. Eddy devised the greater part of her estate in trust to the Northern Church so that the income could be used to repair certain buildings and to promote the extending of Christian Science as taught by herself, and directed that the "Mother Church—the First Church of Christ, Scientist, in Boston, Massachusetts, in trust for the following general purposes * * * more effectually promoting and extending the religion of Christian Science as taught by me." The devisee was not permitted under its charter to accept that amount of money, and the heirs claimed the devise was void. The court in overruling this contention say:

"The facts disclosed on the record and appearing in the will do not lead to the conclusion that the intent of the testatrix was fixed on the donee named so profoundly that, if the donee fails, the gift fails. The purpose of the gift and the trustee are not so inextricably combined that they must stand or fall together. The support of a branch of the Christian religion being the declared purpose of the trust and this being a public charity, the gift will stand unless it appears that the discretion of the particular trustee named is of its essence. There is disclosed no exceptional reliance upon the particular corporation named beyond that which appears commonly. The establishment of the trust does not seem to depend upon the particular instrument or execution nominated in the will. It is the not unusual case of a plain charitable intent, where the legatee is incapable of taking, and the trust is not permitted to fail for lack of a trustee. * * * *Winslow v. Cummings,* 3 Cush. 358; *Richardson v. Mullery,* 200 Mass. 247. It does not fall within the class of cases where the administration of the trust is of its essence, and where it cannot be administered in any other way than that pointed out in the will."

In *Chapin v. School District,* 35 N. H. 445, Horace Chapin devised, "for and in consideration of helping to support and maintain a school for the purpose of teaching the art

of reading, writing and arithmetic, in the second school district in the town of Winchester," conveyed "unto that part of the inhabitants of Winchester aforesaid * * * for the sole purpose of supporting a school, as above said," 40 acres of real estate. The heirs of the testator sought to declare this devise void on the ground that said inhabitants could not act as trustee for the school district. The court held the grant was for charitable purposes and was good.

In a late case the supreme court of Colorado, in *Haggin v. International Trust Co.,* 69 Colo. 135, had before it a will that devised to the city of Denver to act as trustee in the erection of a memorial arch. The city of Denver under the charter could not so act as trustee. At the outset of the opinion Judge Scott said he approved a former opinion of the Colorado court wherein it stated: "The decisions in the United States * * * cannot be reconciled." *Clayton v. Hallett,* 30 Colo. 231. He also stated that courts had original inherent jurisdiction over charitable gifts and trusts, and that a devise to a charity is not rendered invalid because trustees are not named, nor because a trustee who is incapable of taking it is named. The decision reviews the authorities extensively.

In *Lightfoot v. Poindexter,* 199 S. W. (Tex. Civ. App.) 1152, the court considers this question: The testatrix made a bequest to Daniel Baker College of Brownwood, Texas, and after several bequests she devised the residue of her estate to Daniel Baker College to be used for the education of the youth of Brown county, Texas. It was contended that the bequest was void for the reason that Daniel Baker College could not under its charter act as trustee of a religious trust, and that it would be difficult to determine which college was meant. The court followed the rule announced in the foregoing cases in the following language:

"But at last it could profit the appellants in the case nothing, and they would not be heard to complain, if it should be held that the gift to Daniel Baker College is void for any reason, because the gift in the will is a charity,

for the reason that it is made for the purpose of giving education to the youth of Brown county, and the manner in which this purpose shall be carried out is specifically stated in the will, and Daniel Baker College is merely the medium, under the provisions of the will, by which the charity is to be dispensed, or, in other words, Daniel Baker College is merely the trustee, and the youths of Brown county are the beneficiaries. Therefore the will creates a charitable trust, and if for any reason Daniel Baker College cannot take as trustee, the trust will not fail, because equity will not suffer it to fail for want of a trustee. Under the universal rule in this country and in England, when a charitable trust has been created and there is a failure of the trustee for any reason, a court of equity, having jurisdiction, will take charge of the trust and administer the same under a trustee appointed by it."

The supreme court of Iowa has taken the same view. In *In re Estate of Crawford,* 148 Ia. 60, there was a gift for the Salvation Army. That body was given no power or authority to take it out of the state and the trustee named was the Burlington, Iowa, branch of the Salvation Army.

So it is a rule of this court, as well as the majority of other state courts, that a charitable trust will not fail because the trustee is incompetent to take charge of it.

However, it is urged that where the will bequeaths title directly to a corporation there is no trust, even though the will provides that title is given in trust, if the directions for the use of the trust estate are within the legitimate scope of the purposes of the grantee, and that the devise or conveyance vests title absolutely free from any trust. Undoubtedly this is true where the devise is for private purposes or gain or a business trust. If a devise is made for a private purpose to a corporation, incompetent to take, the same is void under our statute, and the heir at law would take the devise as undevised real estate. But this rule does not apply to charitable or religious trusts, where an incompetent corporation is made trustee, by the holdings of the large majority of courts. The

Maryland court seems to hold the contrary, but this holding seems to be based on the early decisions of the Maryland court holding that the devisees or beneficial holders must be definite and certain in a charitable trust as well as in a private trust. The result of these holdings was in most cases that when a charitable trust was created it was held void for being indefinite as to beneficiaries who could demand execution of the trust. But the Maryland courts desired to carry out the intent of the testator, the same as the courts of other states, and, it seems, that in order to avoid these early decisions, held that such devises were not in trust, but on condition. So the same purpose was attained as in other states in permitting the intention of the testator to be carried out. But in most of the cases where it was declared not to be a trust, the intention of the testator was carried out, but by another name than in Nebraska and a large number of other states. In the instant case the appellees do not desire the intention of the testator carried out, but in order to defeat the intention of the testator contend for only that part of the Maryland rule which declares the devise not a charitable trust.

The fact that Maryland and a few other courts hold that a charitable trust is not enforceable because the beneficiary is not definite is not approved in this state. This court with a majority of the courts recognizes that the decisions of Maryland are the exception. In the case of *St. James Orphan Asylum v. Shelby,* 60 Neb. 796, this court, after discussing the opinion of an early New York case (*Tilden v. Green,* 130 N. Y. 29), which holds that the beneficiaries of a charitable trust must be definite, does not approve the Maryland rule, and says:

"The opinions of the courts of Virginia, Maryland and perhaps some other states, are in the main in harmony with those of New York. * * * The bequest is sanctioned by law and contravenes no public policy. Its invalidity can be declared only by the adoption of a doctrine at variance with the great weight of authority, to wit, that the beneficiaries shall be so certain that they may come into

court claiming the benefits of the trust, and demand its execution. We do not think this doctrine should be adopted in this state, and hence hold to the view that where a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee who is empowered to select the object of the charity, and who is willing to or has accepted the trust, the will will not be declared invalid because of the general nature of the object or objects of the charity."

The supreme court of Missouri in 1927 in *In re Estate of Rahn,* 316 Mo. 492, holds to the majority rule. Jacob Rahn made a bequest "to the German Red Cross Society, of the Empire of Germany, in Europe, * * * to be by said German Red Cross Society received and by it applied and paid out for the then immediate relief, use and benefit of the then widows, orphans, and invalids, * * * under the then care and charge of said German Red Cross Society, aforesaid, resulting from the war now going on in Europe; * * * to be * * * paid * * * to the then * * * Imperial German Consul, of Germany * * * at St. Louis." There was in Germany, at the time of testator's death, a national organization known as the Central Committee of the German Society of the Red Cross, one of whose expressed purposes was to render aid to needy widows, orphans and invalids who might become objects of charity as a result of the war, said Central Committee after his death and before his express intention could be carried out being succeeded by a corporation named the German Red Cross. The court held that a bequest was created, not only to a sufficiently identified donee or trustee, but was one which falls within the exact definition of a public charity, and in both respects is valid according to the established rules governing charitable trusts, and is to be paid to and administered by the succeeding corporation.

The following cases also sustain these principles: *Eccles v. Rhode Island Hospital Trust Co.,* 90 Conn. 592; *Sheldon v. Chappell,* 47 Hun (N. Y.) 59; *Hagen v. Sacrison,* 19 N. Dak. 160.

It may be asked who is intended as the beneficiary. This may be determined from the context of the will, or by parol evidence of the surrounding circumstances and from the Synod. The question is answered in 11 C. J. 343, as follows: "In case of * * * ambiguity in the description of the beneficiaries of a charitable gift or trust, making it difficult to ascertain and identify them, the court may consider the whole instrument, and may admit parol evidence as to the surrounding circumstances."

In *American Bible Society v. American Tract Society,* 62 N. J. Eq. 219, is the following language: "It is contended, however, that a devise of realty differs from a bequest of personalty—first, because, in the case of a devise, there is no person in whom the legal title may vest. * * * The first point seems to be without substance, for the reason that, assuming the devise to be in other respects valid, the legal title, if it cannot vest in the society, descends to the heir-at-law charged with the charitable use." And further in the opinion it states: "But, by necessary implication, a gift to the society is a gift in trust for its proper objects."

In *Glover v. Baker,* 76 N. H. 393, a gift of property to a church in trust for the repair of the church and church buildings and other church purposes was held to be a gift for religious purposes, and not a gift to the church.

The following pertinent language is used in the *Gould* case, *supra*: "True, as stated in plaintiff's brief, the board mentioned 'are not persons or individuals that cannot be pointed out,' and hence, it is argued, the requirement of uncertainty for a charitable trust is wanting. But would it not be strained construction of this language to hold that it means the individuals constituting the board are to be the beneficiaries? Must we not, in the absence of any allegation to the contrary, presume from this language that there is such a board in existence, and that the members of it are not the actual beneficiaries of funds coming into their hands?"

Nor is it necessary that there be a beneficiary named in

the will who can demand a performance of the charitable trust created by the will. The case of *Woman's Foreign Missionary Society v. Mitchell,* 93 Md. 199, and some other Maryland cases, cited by appellees, announcing the principle that a charitable trust is invalid where the objects were uncertain and indefinite, are considered in the late case of *Hobbs v. Board of Education,* 126 Neb. 416, and not upheld. Also therein the same contention was made that a gift to a corporation conditioned upon the use for which said corporation is incorporated makes such a gift absolute, and not a trust. The court held the rule, if correct, did not apply to the charitable trust therein under consideration. In the opinion in the *Hobbs* case the following clear language answers the contention that there is a merger in the instant case:

"This is in its very nature a charitable trust, and to put any other construction upon the instruments evidencing the donations would destroy and render nugatory the benevolent intentions of the donor.

"While it is said in general terms that to create a trust requires the existence of a donor, a trustee, and a *cestui que trust,* there are many cases where charitable trusts have been declared and enforced, notwithstanding the fact that the trustee and the *cestui* may be the same entity, but where the estate has been received by the trustee under certain conditions for certain purposes, on the ground that equity will require the conditions upon which the trustee received the estate be complied with. Among those cases we call attention to *Curtis & Barker v. Central University,* 188 Ia. 300. In that case about $52,000 was given to the university. * * * After saying 'The donation clearly creates a trust, which required that the principal should be held intact, and the interest used. It was to be held as a permanent fund'—the court held against the contention of appellant that where the trustee and *cestui que trust* are the same, the title merges, saying: 'But it does not necessarily follow that, under all circumstances, the union of the two estates, even if there is such a union in this case, works

a merger. If there is a reason for keeping the estates separate, or if it is necessary to do so to carry out the purposes and intentions of the donors, equity will prevent a merger. *Sherlock v. Thompson,* 167 Ia. 1. Here the instrument making the donation and stating the conditions thereof reserved in the donors an interest and created a trust for the benefit of the college and for their own benefit. To hold that there was a merger would nullify the purposes and intentions of the donors, and destroy the power to create conditions or a reversion.' "

This court views favorably donations by will for charitable purposes and will carry them into effect where there is no violation of the rules of law. *St. James Orphan Asylum v. Shelby, supra; In re Estate of Nilson, supra.*

It follows that the district court erred in entering a decree for the plaintiff. The judgment of the district court is reversed and set aside and the cause remanded and the court instructed to enter a decree in accordance with this opinion, declaring that a charitable trust was created by paragraph 18 of said will and appointing a trustee to carry out the same under the direction of the court.

REVERSED.

WINIFRED M. MCNEIL, APPELLANT, V. OMAHA FLOUR MILLS COMPANY, APPELLEE.

FILED JUNE 28, 1935. No. 29557.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: APPEAL. An employer, against whom an award of compensation is allowed by the commissioner, is not required on appeal to reverse the title of the case, but may appear as defendant therein and file the petition demanded on appeal by the terms of section 48-139, Comp. St. 1929.
2. ———: ———: COMPENSABLE INJURY. "Heat prostration may be a compensable accident, under the workmen's compensation law, if the workman is subjected to a greater hazard from the heat than that to which the public generally in that locality is subject." *Herbert v. State,* 124 Neb. 312.

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

Wright & Kennedy and *Peter & Peter,* for appellant.

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

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

GOSS, C. J.

Plaintiff sued for compensation because of the death of her husband, Michael W. McNeil, while employed by defendant. She claimed the death was by reason of a heatstroke or sunstroke. The compensation commissioner made an award in her favor. On appeal the district court denied compensation on the ground that the employee was not subjected to a greater hazard from the heat than that to which the public in general or workmen in the locality were subject. Plaintiff appealed. The case is for trial *de novo* here.

Plaintiff's first assignment is that the district court erred in not dismissing defendant's petition on appeal from the award of the compensation commissioner. The basis for this assignment is that the district court had no jurisdiction to entertain the appeal for reasons set forth at great length in her brief. The most important of these, in our judgment, is that, in its petition on appeal, defendant did not reverse the title and designate the party filing such petition on appeal as plaintiff and the party upon whom it was served as defendant. Counsel for plaintiff base this and other reasons upon their interpretation of section 48-139, Comp. St. 1929. We find no such requirement in that section. It says: "In case either party refuses to accept the recommendation or awards of the compensation commissioner, either party may submit to the district court a verified petition," etc. We find no direction there or elsewhere that, when an employer has an award rendered against him, he must on appeal allocate himself as plain-

tiff and his adversary as a defendant. Observation shows the practice has followed both methods, but usually that pursued here. It preserves the natural and logical arrangement of the parties and saves confusion of their identity, especially when appeals are taken to the supreme court. It seems to have been the consistent practice, particularly since the law was amended in 1929, to designate the parties on appeal both to the district court and to the supreme court as they were designated before the compensation commissioner. An examination of the pleadings in the district court shows that defendant filed its petition in due time setting forth the issue before the compensation commissioner and the award. Plaintiff did not make a special appearance, but appeared generally and moved to dismiss the appeal and to affirm the award on about the same grounds as are set up here. When the motion was overruled, plaintiff answered generally the petition of defendant. We are unable to find any merit in the assignment that jurisdiction of the appeal was lacking in the district court. We are of the opinion that the appeal to the district court shows appellant took every step required by the statutes to be taken to perfect the appeal.

The evidence shows that plaintiff is the widow of Michael W. McNeil, who was about 58 years of age when he died on the 19th day of July, 1934, while employed by the Omaha Flour Mills Company as a watchman at its plant on the railroad tracks at about the foot of B, C and D streets at Twenty-ninth street, Omaha (South Side, formerly South Omaha). He had been employed as a watchman for defendant for about eight months. This service had been interrupted in the spring of 1934 by a few days' illness, when he had pleurisy, resulting from a cold. The doctor, who attended him then, testified that he examined his heart and there was nothing wrong with it. This was the only illness he had suffered for five years. He was apparently a strong man, nearly six feet tall, and weighing about 210 pounds. At the period when he was stricken, his hours as a watchman were from 3 p. m. to 11 p. m.

From 3 to 6 p. m. his duties allowed him to be in what was termed the mill-yard or courtyard, or required him to be watching for the safety of children who came to cars on the track running east of the plant to seek wheat that had been left in cars unloaded there. The mill-yard was protected from movements of air by buildings on the south, west and north and was open only at the east. After 2 or 3 o'clock in the afternoon it was shaded. When watching for children on the right of way, he had either to be in the sun or get under a one-story building with an iron roof, where it was rather hot in warm weather.

Deceased was stricken at about 5:30 p. m. of July 19, 1934. He was found by a witness, offered by plaintiff, at about 5:30, approximately 18 feet from a chair in which he often sat. He was "slumped against" the wall of one of the buildings. A doctor who was called and paid by defendant arrived at the plant and found the patient in the boiler-room, unconscious. He administered strychnine by hypodermic and had the patient removed to the hospital. He died on the way. The doctor did not take the patient's temperature, but estimated it was 104 or more. He had had about 9 years' experience in hospitals of the best repute in the country and in practice. In the opinion of the doctor, McNeil died of a "heat-stroke or heat exhaustion." Two internes who were present when he was received at the hospital testified that, in their opinion, his body temperature was 108.

Shade temperature and wind observations at the weather bureau, high in the air at the place of recording in Omaha, several miles away, showed the temperature on that day to have been 108 degrees at 3 o'clock, with a south wind of 14 miles an hour; 110 degrees at 4 and 5 o'clock, and 108 degrees at 6 o'clock, with a south wind of 11 miles an hour from 4 to 6 o'clock.

Defendant's plant was down quite a grade running several blocks west from the residence district west of which it was built. When McNeil was in the mill-yard he was almost entirely cut off from any movement of the air.

When he was on the right of way he was in the sun and in a much higher temperature naturally than when in the shade of the mill-yard. If he sat under the shed on a bench to watch and keep the children of the neighborhood from trespassing, he was, of course, out of any beneficial influence of the prevailing breeze of that afternoon from the south. We do not know, as a proved positive fact, just what the temperature on the ground in McNeil's area of duty was, but it is a fair inference that it was several degrees higher than it was where the weather bureau records were made, in the shade and 200 feet above the ground, with free access to the breeze. The conditions where he worked were quite different from those of other workmen in that "locality" because of the lower location of the plant and the physical obstructions to the breeze, which is quite a factor in the heat conditioning of the human body.

The evidence shows that deceased was apparently a healthy man, free from any habits that would make him more susceptible to the heat than others in similar circumstances. It proves that he came to his death by heat exhaustion or heat prostration. The rule is: "Heat prostration may be a compensable accident, under the workmen's compensation law, if the workman is subjected to a greater hazard from the heat than that to which the public generally in that locality is subject." *Herbert v. State,* 124 Neb. 312.

On consideration *de novo* of the whole evidence, we are of the opinion that McNeil's death arose out of and in the course of his employment. The award of the compensation commissioner was right. The trial court erred in not adopting the same theory and awarding the same compensation. The judgment of the district court is reversed, with instructions to enter a judgment in the same terms as the award of the compensation commissioner.

REVERSED.

H. B. MUFFLY V. STATE OF NEBRASKA.

FILED JUNE 28, 1935. No. 29521.

1. **Contempt.** Where contempt has not been committed in the presence of the court, punishment therefor cannot be imposed without an accusation in some form, notice and an opportunity for a defense.
2. ———: APPEAL: MOTION FOR NEW TRIAL. Where punishment of a person for contempt not committed in the presence of the court is imposed by a void order without accusation, notice or an opportunity to make a defense, and without evidence or trial, such order may be reviewed without a motion for a new trial.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Beghtol, Foe & Rankin, Chambers & Holland, Lester L. Dunn, H. B. Evnen, Leonard A. Flansburg, Foster & Baird, Bernard S. Gradwohl, Richard O. Johnson, Sterling F. Mutz, Frank A. Peterson, Peterson & Devoe and *Robert S. Stauffer,* for plaintiff in error.

William H. Wright, Attorney General, and *George W. Ayres, contra.*

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

ROSE, J.

In a civil action in the district court for Clay county, the state of Nebraska, plaintiff, sued Adolph Eckhardt, defendant, on claims for unpaid gasoline taxes in the sum of $1,027.32. Eckhardt resided in Clay county, and his attorney, H. B. Muffly, who had entered his appearance for defendant, resided in Lincoln. Muffly withdrew his appearance pursuant to instructions from his client and was not present in the district court for Clay county when the case was called for trial. A judgment by default against Eckhardt in favor of the state for $933.97 was introduced by the following recitals and order:

"On this 3d day of December, 1934, the same being one of the days of the adjourned session of the September, 1934, term of the district court within and for Clay county, Nebraska, this case came on for hearing and at 10 o'clock a. m. was called for trial pursuant to assignment of cases made November 26, 1934, and the defendant or his attorney, H. B. Muffly, failing to appear and Mr. Muffly having without notice or leave of court filed a withdrawal herein this date, stating therein it was pursuant to telephone conversation of December 2d with the defendant, this case is temporarily withdrawn from the trial list and held for further order, and Mr. Muffly is assessed $25 in this case to be paid to the clerk forthwith."

Viewing this order as a punishment for contempt of court, Muffly prosecuted a proceeding in error to the supreme court, assailing the assessment of $25, payable forthwith, as erroneous and void, because imposed when he was not present in court, without any accusation in any form or notice or trial or evidence or any opportunity to be heard in defense.

Procedure in imposing punishment for contempt is definitely pointed out by statute as follows:

"Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." Comp. St. 1929, sec. 20-2122.

The order of the district court assessing the fine of $25 shows on its face that Muffly was not "in the presence of the court" at the time. The record as a whole discloses the same fact. There could therefore be no valid imposition of a fine or assessment for contempt without an accusation in some form, notice and an opportunity for a defense. This imperative requirement of statute has been scrupulously observed as shown by uniform rulings of the supreme court. *Gandy v. State,* 13 Neb. 445; *Ludden v. State,* 31 Neb. 429; *Hawthorne v. State,* 45 Neb. 871; *Beckett v. State,* 49 Neb. 210; *Herdman v. State,* 54 Neb. 626;

Finegold v. State, 112 Neb. 64; *Gonzalez v. State,* 119 Neb. 13.

In the civil action Muffly was not a party. There was no civil pleading therein stating that he owed the state or any individual $25 or any other sum. There was no indictment or complaint or information or affidavit accusing him of contempt. He had no notice of a proceeding in contempt. No one testified against him. He was absent and had no time or opportunity to make a defense. The assessment was erroneous and void on its face. There was no trial and a motion by Muffly for a new trial under the circumstances was unnecessary for the purposes of review. *Crites v. State,* 74 Neb. 687.

The assessment is therefore reversed and the contempt proceeding resulting in such punishment is dismissed at the cost of the state of Nebraska.

REVERSED AND CONTEMPT PROCEEDING DISMISSED.

FRANK A. HICK, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED JUNE 28, 1935. No. 29336.

Master and Servant: INJURY TO EMPLOYEE: RIGHT OF RECOVERY. A plaintiff, to recover damages for personal injuries under the federal employers' liability act, must allege and prove some act of negligence on the part of defendant which was the proximate cause of his injury.

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

Frank A. Dutton, John F. Rohn and *Foster & Yates,* for appellant.

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

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

GOOD, J.

This is a personal injury action in which plaintiff seeks recovery pursuant to the provisions of the federal employers' liability act. At the conclusion of plaintiff's evidence, the court, on motion of defendant, discharged the jury and entered a judgment of dismissal, on the grounds that the evidence was insufficient to prove actionable negligence and that plaintiff had assumed the risk of injury. Plaintiff has appealed.

June 6, 1932, while plaintiff was standing on the platform of a hand-truck, lifting cans of cream from the truck into a baggage car, he slipped upon the truck platform and received the injuries of which he complains. It is his contention that cream had either been spilled or had leaked from the cans upon the truck platform; that other employees of defendant had negligently spilled the cream upon the truck platform, or had placed the cans of cream over the spot where the cream had been spilled or had leaked; that, because of the fact that cream on the truck platform was concealed from his view, he had no knowledge of its presence and had not been warned thereof, and that, when he was lifting one of the cans of cream from the truck into the car, he stepped on the place where the cream was located on the platform of the truck, which caused him to slip and fall.

There is no evidence in the record as to when or how the cream came to be upon the truck platform. Plaintiff's evidence is to the effect that in warm weather the heat causes the cream in cans to expand and sometimes to overflow; also that sometimes a cream can will leak. It is a matter of conjecture and speculation as to when or how the cream came to be on the truck platform. There is no evidence that it was spilled there by any other employee, agent or servant of the defendant. There is no evidence that any employee, agent or servant of the defendant knew of its presence prior to the time of the accident. There is no evidence that the cream cans belonged to the defendant, and the presumption is that the cans of cream belonged

to some shipper and were simply being carried by the defendant.

In order to recover damages under the federal employers' liability act, plaintiff must allege and prove some act of negligence which is the proximate cause of his injury. In the instant case, clearly there is no evidence of any negligent act on the part of the defendant. There is no claim of any defect in the platform of the truck itself, other than that cream was upon it.

In this view of the case, the trial court was justified either in directing a verdict for defendant, or in discharging the jury and entering a judgment of dismissal. The conclusion reached upon this question renders it unnecessary to consider other questions presented and argued.

The record discloses no error prejudicial to plaintiff. Judgment

AFFIRMED.

EDWARD PLANTZ, APPELLEE, V. PEONY PARK ET AL., APPELLANTS.

FILED JUNE 28, 1935. No. 29337.

Appeal. In the absence of a bill of exceptions or special findings, the only question that this court will consider is the sufficiency of the pleadings to sustain the verdict and judgment thereon.

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

James E. Bednar, for appellants.

O'Sullivan & Southard, contra.

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

PAINE, J.

Plaintiff brought an action for personal injuries, alleging that several defendants conspired together and as-

saulted and injured him. Jury returned verdict of $3,500 for plaintiff. Defendants appeal.

The assignments of error relate to overruling motions and demurrers to the giving of instructions Nos. 1, 4 and 6, and that the verdict is excessive and contrary to law. The defendants have only brought to this court a transcript, and having no bill of exceptions before us, the only question that we can consider is the sufficiency of the pleadings to sustain the judgment. *Reigle v. Cavey*, 107 Neb. 446.

The petition alleged that the first defendant, Peony Park, was a corporation, operating a dance hall near Omaha, and that the other defendants were officers or employees of that corporation, and that all of the defendants conspired together and made a brutal, vicious, and unprovoked assault upon the plaintiff, causing the fracture of the bones of his face, and many other injuries set out in the petition. Separate answers were filed by all of the defendants, in which it is admitted that the last-named defendants are officers or employees of the said corporation, and that the defendants used no more force than was necessary to put plaintiff out of the ballroom when he refused to leave.

We will assume that the evidence was sufficient to support all of the allegations of the petition, and find that the verdict of the jury was not excessive, considering the serious nature of the injuries detailed in the petition.

In the absence of a bill of exceptions or special finding, there is no way for this court to determine whether the instructions were prejudicial, and finding the pleadings sufficient to sustain the judgment, the same is hereby

AFFIRMED.

JOHN W. NESLUND, APPELLEE, V. J. F. KINNAN, APPELLANT.

FILED JUNE 28, 1935. No. 29290.

Judgment: RES JUDICATA. A judgment for defendant in an action upon an account stated, defended on the ground that no account

had been stated between the parties, will not, in a subsequent action by plaintiff upon open account to recover the reasonable value of the items comprising the original account, support the plea of *res judicata.*

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

Frank M. Johnson, for appellant.

D. E. Harper and *R. E. Bannister, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

In this, an appeal from the district court for Dawson county, the action originated upon petition of the plaintiff to recover upon an open account for professional services and medical supplies furnished to the defendant. The district court entered judgment for the plaintiff in the sum of $251.09 and costs including an attorney's fee of $60.

The defendant alleged in his answer, and established at the trial, that prior to the institution of the instant suit the plaintiff had instituted another suit in the county court of the county to recover upon an account stated, which in fact involved the same items as are included in the account which was the plaintiff's cause of action in this case. The contention of the defendant is that the judgment in the county court action upon the account stated, which was against the plaintiff, became a bar to the present action and was an adjudication of the whole matter of the account.

As part of the defense argument it is asserted that the answer in the original case of the account stated contained a plea of payment to which no reply had been filed and that consequently that allegation stood admitted and that the defendant was therein entitled to judgment. Such answer contained allegations to the effect that the defendant admitted that some medical services were performed for the defendant by the plaintiff during the period of time

between 1929 and 1931, but alleged that the plaintiff has been fully paid for all services performed or materials furnished, and for further answer denied that an account was stated between the parties and that it was determined that there was due the plaintiff from the defendant the sum of $227.81, and that the defendant agreed to pay the same.

The plaintiff had in such original action sued upon an account stated. The defendant did not then, and does not now, claim to have paid it or to have so pleaded. He denied it and the part of his answer having reference to payment amounted to no more than a statement in aid or explanation of the denial of the plaintiff's cause of action on the account stated. There was but one issue tendered by the petition, which was the account stated. The defendant specifically denied the same. He could not inconsistently be at the same time pleading payment of such account. The action was in no sense upon the items which may have primarily constituted an account between the parties. Therefore, the only license these allegations of the answer could have for being present therein was their explanatory nature in reference to the demand of the alleged stated account. Otherwise they were surplusage. "Pleading affirmative matters in an answer, which amount to no more than a denial of plaintiff's cause of action, will not necessitate a reply." *Peaks v. Lord,* 42 Neb. 15. "The defense of *res judicata* is only available as to matters actually in issue and determined in the former suit." *Douglas v. Smith,* 75 Neb. 169.

The rule as applied to the instant case does not run counter to that expressed in *Moffitt v. Reed,* 124 Neb. 410, or *State v. Nemaha County Bank,* 124 Neb. 883, but recognizes the same. The question of the existence of an account stated between the parties is "a sealed and closed question."

An account stated is a distinct and independent cause of action and in a suit thereon it is not necessary to plead or prove the original items of indebtedness. *In re Estate of Black,* 125 Neb. 75; *McKinster v. Hitchcock,* 19 Neb. 100.

The action upon an account stated is based upon the agreement, the consideration of which is the original account, and the agreement has the force of a contract. This contract is the cause of action and the plaintiff must recover on it or fail in the action. In the trial it is not necessary or even permissible to prove the items of the original account. *Martin v. Heinze,* 31 Mont. 68; *O'Hanlon Co. v. Jess,* 58 Mont. 415, 14 A. L. R. 237. To constitute *res judicata* the former suit must be founded on the same cause of action as the latter. *Rossman v. Tilleny,* 80 Minn. 160, 81 Am. St. Rep. 247. One test is to inquire whether the same evidence will support both. If it will not, they are not identical and judgment upon one will not be conclusive upon the other. *Bell v. Merrifield,* 109 N. Y. 202, 4 Am. St. Rep. 436.

The application of these rules clearly demonstrates the fact that in the action upon an account stated, defended on the ground that no account had been stated between the parties, a judgment for defendant does not become a bar to a subsequent action by the plaintiff upon the original account to recover the reasonable value of the items included therein.

The case was tried to the court without the intervention of a jury. The findings of the court, therefore, have the force of a verdict and are supported by the evidence. We find no prejudicial error in the record and the judgment of the trial court is

AFFIRMED.

FLOYD L. BOLLEN, APPELLANT, V. WILLIAM B. PRICE, STATE AUDITOR, APPELLEE.

FILED JUNE 28, 1935. No. 29559.

1. **States:** WAREHOUSE FEES. The funds produced by the operation of a regulatory statute providing for the storage of grain and issuance of certificates thereon (Laws 1933, ch. 4) when covered into the state treasury become a part of the state's

funds, for the withdrawal of which specific appropriation is necessary and to which the constitutional provisions and legislative enactments in regard to drawing of warrants apply.

2. ———: STATE FUNDS. Within the limitations of constitutional provisions, the general authority of the legislature over the funds of the state is paramount and it may prescribe by law the disposition thereof; as to which it has a wide latitude in extending or restricting the duties and powers of state agencies.

3. ———: ———. The legislature having in consideration a particular part of the state's funds, arising from the collection of fees in the administration of a regulatory measure, may determine a sum on hand as in excess of the amount reasonably necessary to the administration of the measure, and provide for the return of such excess to the persons who paid it, through the state agency for the use of which the fund was created.

4. ———: WAREHOUSE FEES. In providing for such return of funds, where the act provides a manner of verifying and vouchering the same and submission thereof to the state auditor, in detailed and specific form, without any attempt to limit the functions or authority of the auditor in examination or adjustment as to any part or item thereof, and for the issuing of a warrant thereon, it is a sufficient compliance with section 9, art. VIII of the Constitution.

5. ———: ———: REFUNDING ACT: CONSTITUTIONALITY. H. R. 131, Laws 1935 (Laws 1935, ch. 190), as supplemented by H. R. 689, Laws 1935 (Laws 1935, ch. 192), concerning appropriation, *held* not to violate section 25, art. III, section 25, art. IV, nor section 9, art. VIII, of the Nebraska Constitution.

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

Floyd L. Bollen, pro se.

William H. Wright, Attorney General, and *Paul P. Chaney, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

The plaintiff, Bollen, member of the Nebraska state railway commission, sought an injunction against Price,

state auditor, to prevent his carrying out the mandate of H. R. 131, Laws 1935, and issuing a warrant to the Nebraska state railway commission for such sum as shall be determined to be due to applicants who had paid in moneys under the provisions of the farm warehouse law (Laws 1933, ch. 4) by reason of the fact that the fees produced by the operation of said law were more than required for the reasonable cost of the inspection of grain and the enforcement of the act and resulted in a surplus of approximately $130,000, remaining on hand in the grain warehouse fund. The judgment was on the pleadings in the trial court and dismissed the plaintiff's cause.

The act of 1933 places the administration of the law in the hands of the Nebraska state railway commission. The fees to be collected as provided by the act for the inspection of grain and issuance of certificates of storage were one-half cent a bushel with a minimum of $5 on each application. There came the nation-wide corn loan program of the national administration. This law fitted well into the plan and was at once put into use. Under it many thousands of certificates of storage were issued and loans made thereon. The volume of business so far exceeded any expectations entertained in the enactment of the law that what at the time seemed a reasonable provision for necessary expenses of enforcement of the act produced a fund largely in excess of the necessities, to the amount named. These facts being apparent to the railway commission and the legislature that convened in January, 1935, they determined that, considering the business theretofore actually transacted, a fee of $3.80 per application, instead of $5 fixed by the act, would have been sufficient, and that this excess amount ought in justice to be returned respectively to those who had paid it.

The result was the enactment of H. R. 131, Laws 1935, which recites these and other facts in the preamble and enacts that the persons paying such fees shall have returned to them the excess over $3.80, and that the railway commission shall from its records determine the several

amounts due to such persons and prepare and certify such list under its seal in the form of a voucher to the state auditor. Thus far everything seems to all parties to be agreeable and constitutional.

The senate added a provision to the act to the effect that the auditor should thereupon issue a warrant to the railway commission for the gross sum so represented and that the railway commission should distribute the funds to the parties so entitled—and thereby precipitated this lawsuit.

It is urged on behalf of appellant that the act is violative of three provisions of the Constitution designated as section 25, art. III, which provides: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon;" and section 25, art. IV, which provides: "All fees that may hereafter be payable by law for services performed, or received by an officer provided for in this article, by virtue of his office shall be paid forthwith into the state treasury;" and section 9, art. VIII, which provides: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn."

This act, H. R. 131, provides:

"The Nebraska state railway commission shall, from its books and records, determine the amount due, if any, to every person who has paid or may pay the fee required by section 88-323, Comp. St. Supp. 1933. The commission shall prepare a list of the names of such persons, their post office addresses and the amount due each of such persons, and shall certify such list in the form of voucher, under the seal of the commission, to the state auditor of Nebraska. The state auditor, upon receipt of such list, shall issue a warrant to the Nebraska state railway commission for the total sum certified in said voucher payable from the grain warehouse fund in the state treasury.

"When such warrant has been issued and properly signed by the proper state officers, the state auditor shall deliver the same to the Nebraska state railway commission, and upon receipt of the same the Nebraska state railway commission shall disburse the said funds to the parties entitled thereto and according to said list as shown by the records and files of said commission."

The last two paragraphs as have been quoted from H. R. 131, Laws 1935, furnish the basis for the contentions of plaintiff herein.

In argument as to rules of construction proper to be applied, reference has been made to certain propositions heretofore announced by this court to which attention had perhaps better first be given.

There is argument as to the proper designation to be given this fund, which it is conceded is properly in the state treasury, whether it consists of excess fees or whether it is a trust fund without a name. We do not think it is material by what name it shall be designated. The facts are it was paid and collected as fees under the provisions of the act of 1933 and, under the rule of *State v. Moore,* 46 Neb. 373, was not merely entrusted to the state treasurer as custodian, but was actually in the treasury and became a part of the state's funds entrusted to the treasurer in his official capacity as such officer.

It is further suggested upon the authority of *State v. Standard Oil Co.,* 100 Neb. 826, *Century Oil Co. v. Department of Agriculture,* 110 Neb. 100, and *Century Oil Co. v. Department of Agriculture,* 112 Neb. 73, that the fund is unconstitutionally held or that on some theory this act of 1933 has been smitten with unconstitutionality. We fear there have been some rather loose expressions in reference to this matter of unconstitutionality. The theory of the oil cases, which is the settled doctrine of this court, is that, the measure having been enacted as a proper measure of control and not as a revenue measure, the extent of its authority is to provide such fund as shall be reasonably necessary and sufficient to the accomplishment of the pur-

pose of the act and that there is no authority for the collection of a greater sum. In the oil cases there was no controversy as to the funds already collected and in the hands of the state treasurer and that controversy was limited to the fund collected or to be collected from the time of the institution of the action. Therein the court determined that the statutory rate fixed was in excess of the reasonable requirements of the act and directed a refund of such excess, but not of the whole sum. The act we are now considering seeks to look both ways and cover the disposition of funds already collected and in the treasury and those that may be paid in under the act. It cannot reasonably be said that an act, lawful and constitutional when it is enacted, became unconstitutional overnight. The act of 1933, under the situation as it was when adopted, appeared to be reasonable and to provide no more than was reasonably necessary for the administration of the act. To that extent all parties concede it to be lawful. The legislature had the right and power to determine in advance what it considered a reasonable provision for that purpose and it cannot be said that, because of the unforeseen circumstances which developed a fund very much larger than could have been beforehand reasonably anticipated, the act itself was inflicted with any infirmity. It simply by reason of those unforeseen conditions produced more money than was necessary for the purpose intended. Any collections thereof under like conditions, in so far as concerned the excess, might have been enjoined as was done in the oil cases. The legislature might, in the light of later developments, with propriety determine what would be a reasonable charge and make provision for the refunding of that which circumstances have shown to be an excess in collection over the amount necessary for the purpose intended. No objection is here made to the manner of prorating the amounts to be returned and it seems equitable. But none of these furnishes a basis for the application of the term "unconstitutional." It must be admitted that the fund as first collected was lawful and con-

tinued so to be up to the point where sufficient had been accumulated in it to accomplish the purpose of the act. At what particular time or place such condition was reached, we are not informed by the record and perhaps could not be; so we have here simply and only a fund collected as fees which in the aggregate amounts to more than was necessary for the purpose intended, which the state is not entitled to take over as revenue, which should in justice be returned to those who paid it, and which is a part of the state's fund in the state treasury. Again referring to *State v. Moore, supra,* the logical conclusion is that constitutional provisions and legislative enactments in regard to the drawing of warrants by the auditor must apply.

Considering now the further argument as to the matter of whether the act of 1935, H. R. 131, constituted a sufficiently definite and specific appropriation of the fund to the purpose intended, while we are constrained to the opinion that the designation of the return of $1.20 out of each $5 that had been paid into this fund by the respective applicants is sufficiently definite to meet all constitutional requirements, the matter may be set at rest so far as this case is concerned for the reason that the legislature still in session at the time this case was submitted enacted an additional appropriation measure with the emergency clause (H. R. 689) specifically appropriating the sum of $127,000, to the purpose designated by the prior act (H. R. 131.) The act further provides an appropriation of $4,326.44, for the purpose of paying extra expenses of the railway commission in determining the amount due the several persons and the making of refunds, thus indicating rather clearly the intention and purpose of the legislature that the refunding of these amounts to the several beneficiaries should be accomplished, in its final details, by the railway commission. The argument, therefore, as to the sufficiency of the appropriation under section 25, art. III of the Constitution, may be dismissed without further consideration.

The argument as to section 25, art. IV of the Constitu-

tion, in reference to the requirement that all such moneys shall be paid forthwith into the state treasury does not raise any material question. The payment, it is conceded by all, was made and the money is there. There is suggested the question whether, upon receipt by the commission of such warrant representing a part of these fees collected, it might be the duty of the commission to immediately repay the same, as fees collected, into the state treasury. The statement of the proposition is sufficient to require a negative answer.

We proceed then to consideration of the third constitutional question, namely, whether the procedure as prescribed by this act covering the distribution of the money is a sufficient compliance with section 9, art. VIII of the Constitution. The argument of the plaintiff is to the effect that this section of the Constitution requires the issuance of a particular warrant to each of the beneficiaries by the state auditor and that it may not be accomplished by the issuance of one warrant to the railway commission which is charged with thereupon making the distribution according to its records as made and certified to the auditor. The legislature has full authority to provide for the proper vouchering of claims which are to be examined and adjusted by the auditor and has done so in the provisions of sections 77-2612, 77-2613, 77-2614, Comp. St. 1929. It is obvious that the legislature has and must have a wide latitude in providing for the appropriation and disbursement of funds, and that in so doing its authority is paramount, subject only to the requirement that the provisions shall be within the requirements of the Constitution. This provision of the Constitution does not undertake to specify the details of the manner in which claims shall be presented or vouchered. It requires only that the legislature provide by law that the same shall be presented that they may be examined and adjusted by the auditor and approved by the secretary of state before any warrants shall be drawn. The argument presented assumes that the method prescribed by the act under consideration is not in

conformity to the requirements of this section of the Constitution, but the reasoning in support of it is not convincing. The original act placed the conduct of this business and the use of the fund so collected in the hands of the railway commission. It is apparent that there in the books and records of the commission may be found the most authoritative record that exists of just what was done, by whom and in what amounts these fees have been contributed. The act of 1935 requires that the commission prepare from its records and certify to the auditor a complete list of those persons, with names, post office addresses, and the respective amounts accruing to each. It does not purport to relieve the auditor from his ordinary official duties to examine and adjust the claims so presented; on the contrary, it seems to present a rather extensive and easily complicated matter in a simple and businesslike form, so that the auditor in his official business might more readily examine and adjust the several items and have before him the official evidence upon which the same rest in a much more businesslike and accurate manner than would be the case if he were required to examine so many separate claims and vouchers. In fact, the argument of the appellant proves too much; for, although it objects to the issuance of the warrant in this consolidated form, appellant concedes in his brief that the presentation and vouchering of the claim in accordance with the provisions of this act is sufficient, and his only objection is that, when the point of issuing the warrant is reached, instead of it being issued in one warrant to the railway commission and the latter being charged with the distribution of the fund, the final individual distribution must be made by the auditor instead. We perceive no good reason why this should be the case. Whether it is a good business custom, or whether the procedure might be properly or constitutionally adopted as a general course of conduct for any of the executive departments, is not the present question and is not determined. The legislature has not undertaken to set up any general rule of procedure for any department. It had be-

fore it a specific instance of a specific fund of which it has undertaken to direct the disposal in a particular manner. It seems clearly within the authority of the legislature and no sufficient reason is presented why any officer whose duties are involved may not perform his full duty in connection with the allowance of this claim. The added duty of making the distribution of the fund and furnishing to the auditor evidence under which such distribution is to be made is placed upon the railway commission which has at all times had charge of the activities resulting in the fund, is the body for whose use the fund was created, and, it seems, has properly been designated as the department to make the final distribution. This procedure, as we view it, allows the application of every constitutional provision and every statutory enactment in its full force, and reserves to the legislature the authority belonging to it to, within constitutional limits, direct and control the disposition of state funds.

The judgment of the district court was therefore right and it is

AFFIRMED.

THOMAS W. MOFFITT, APPELLEE, V. GERTRUDE D. REED ET AL., APPELLEES: VERNETTA MARIE HANSEN ET AL., APPELLANTS.

FILED JUNE 28, 1935. No. 29161.

1. **Judicial Sales:** APPEAL. On appeal from an order confirming a judicial sale, only such objections as were urged in the court below can be considered in this court.
2. **Evidence** examined, and *held* sufficient to support judgment.

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

Walton B. Roberts, Guardian ad litem, and *Sorensen, Kyle, Newkirk & Rein,* for appellants.

Robert E. Dickman, T. R. P. Stocker and *William Niklaus, contra.*

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

CHASE, District Judge.

This suit was originally instituted for the purpose of foreclosing a tax lien. Decree of foreclosure was rendered, the premises sold, and objections were urged to the confirmation of the sale, which objections were overruled and the sale confirmed. This case is an appeal from the order of the trial court overruling the objections and confirming the sale.

The premises involved consist of 80 acres of land in Lancaster county. The defendant Gertrude D. Reed is the owner of a life estate and the defendants Vernetta Marie Hansen, Emma Lois Ryan, Merle Warren Rasmussen and Victor Reed Rasmussen, all of whom are minors, are the owners of the remainder in fee. The minors are represented by a guardian *ad litem* and are the parties mainly interested in the prosecution of this appeal.

The trial court, by its decree, ordered the life estate sold first, and if the proceeds of the sale should be insufficient to discharge the amount due under the decree, then the remainder interest should be sold. From the officer's return it appears that the sale was held on the 1st day of August, 1933, and according to the command of the decree he offered the interest of Gertrude D. Reed for sale and sold the same to Mary E. Reed for $415. This sum not being sufficient to satisfy the decree, he sold the remainder interest to the said Mary E. Reed for $1,505, making the total $1,920.

The guardian *ad litem* filed objections to the confirmation of the sale. The guardian *ad litem* in his brief argues that the amount bid at the sale was grossly disproportionate to the value of the land. No objection below was predicated on that proposition by the objectors. This not being before the lower court for consideration, it cannot be considered here.

The only ground raised by the objections that could be considered is that there was sufficient money in the hands

of the receiver resulting from the collection of rents and profits of the land, plus the amount bid for the life estate, to satisfy the decree. Evidence was taken upon this subject and the trial court resolved that fact against the objectors.

After consideration of the entire record, we are unable to find error committed by the trial court in its disposition of the objections. The judgment is therefore

AFFIRMED.

HARRY A. TUKEY, PLAINTIFF, V. DOUGLAS COUNTY ET AL., DEFENDANTS: WOODS BROTHERS REALTY COMPANY AND STATE OF NEBRASKA, INTERVENERS.

FILED JUNE 29, 1935. No. 29613.

Statutes: AMENDMENT. House Roll No. 78, relating to payment of delinquent taxes in certain circumstances, enacted at the fiftieth session of the Nebraska legislature, violates that part of section 14, art. III of the state Constitution, which provides: "And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

Original action by Harry A. Tukey against county of Douglas seeking a declaratory judgment to determine the constitutionality of a legislative act relating to revenue. *Act held unconstitutional.*

S. L. Winters, for plaintiff.

James T. English, Jack W. Marer, Seymour L. Smith, Frank H. Woodland and *Dana Van Dusen,* for defendants.

William H. Wright, Attorney General, Milton C. Murphy and *Lester A. Danielson,* for the state.

Woods, Woods & Aitken, for Woods Brothers Realty Company.

John J. Ledwith and *Crofoot, Fraser, Connolly & Stryker, amici curiæ.*

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

GOOD, J.

This action is brought in this court in its original jurisdiction by plaintiff, seeking a declaratory judgment to determine the constitutionality of House Roll No. 78, which was enacted by the Nebraska legislature at its fiftieth session. Since Nebraska session laws for the 1935 session of the legislature have not been published, we will, for convenience, refer to the act as H. R. 78. (Laws 1935, ch. 156.)

The title to H. R. 78 reads: "A Bill for an Act relating to revenue: to provide methods for accelerating the payment of real property taxes and personal property taxes delinquent for more than one year prior to September 1, 1935, and for each current year up to and including September 1, 1944, without interest, penalties or other charges added thereto; to provide penalties; to provide certain foreclosure procedure; to repeal all acts and parts of acts in conflict therewith; and to declare an emergency."

Section 1 of H. R. 78, if valid, will permit a taxpayer, whose real or personal property tax has become delinquent before September 1, 1935, and who has neglected to pay the same for more than one year subsequent to the date of its delinquency, to pay the same on or before September 1, 1944, without interest, penalties or other charges added thereto, provided the provision shall not apply to real property taxes for which sale certificate shall have heretofore been issued.

Section 2 of H. R. 78 provides that any taxpayer, whose taxes are delinquent for more than one year, may, on or before September 1, 1935, pay to the county treasurer one-tenth of his total tax, whether on realty or personalty, and may make a like payment of one-tenth on or before the 1st of September of each succeeding year until the whole is paid; such payment to be without any interest, penalties or other charges added thereto. By its terms said section does not apply to taxes on realty, where tax sale certificate

has been previously issued, nor to taxes where the assessment was for special purposes or levied as a special assessment. Said section contains other provisions which need not be here considered.

Section 3 of H. R. 78 requires the county treasurer to compile separate tax records of both real and personal property taxes of those taxpayers who accept or agree to the provisions of the act. Section 4, H. R. 78, provides that cancelation of interest and penalties on delinquent taxes, provided for by the act, shall not apply to interest and penalties on delinquent taxes where the assessment was for special purposes or levied as a special assessment.

Section 5 of H. R. 78 provides, where a taxpayer has accepted the provisions of the act and then defaults, for certification by the county treasurer of all such delinquencies to the county attorney, with directions to him to commence foreclosure proceedings for the collection of such delinquent taxes. Section 6 of H. R. 78 limits time of operation of the act to midnight of September 1, 1944. Section 7 provides: "All acts and parts of acts in conflict with this act are hereby repealed." Section 8 is an emergency clause, requiring the act to become operative upon its approval by the governor.

Plaintiff is a taxpayer, owing taxes delinquent for more than a year, and, if H. R. 78 is valid, is entitled to make payment of one-tenth of such taxes without interest, penalties or costs on or before September 1, 1935, and one-tenth thereof before the 1st of September of each succeeding year. Plaintiff has tendered to the defendant, county treasurer of Douglas county, one-tenth of such delinquent taxes, without interest or other penalties. The treasurer refused, on the ground that H. R. 78 was unconstitutional. The attorney general, in the name and on behalf of the state, has intervened, and Woods Brothers Realty Company, a taxpayer owing taxes delinquent for more than a year, has intervened.

Plaintiff and interveners all contend that H. R. 78 is constitutional, while defendants, county of Douglas, city

of Omaha, School District of Omaha, Metropolitan Utilities District, and the treasurer of Douglas county, who is also treasurer *ex officio* of the other defendants, assert that H. R. 78 is essentially an amendatory act and contravenes that portion of section 14, art. III of the state Constitution, which provides: "And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." The cause is submitted on the pleadings.

Plaintiff and interveners, in effect, concede that H. R. 78 does modify and amend preexisting sections of the revenue law of the state, but contend that H. R. 78 is an act independent and complete in itself, and hence, by implication, may repeal or modify other sections or parts of sections of the revenue law, without specifically referring to the same, and without formally amending or repealing such sections.

The rule contended for by plaintiff and interveners is stated in *State v. Miller,* 104 Neb. 838, in this language: "An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them."

In *State v. Lehmkuhl,* 127 Neb. 812, this court held:

"An independent legislative act covering the entire subject of legislation may change or repeal former enactments in conflict with new provisions."

"A legislative act complete in itself is not within the mischief to be remedied by the constitutional provisions relating to the amendment of statutes."

Among the many decisions of this court announcing the same rule, in substance, are the following: *Drew v. Mumford,* 114 Neb. 100; *State v. Bauman,* 126 Neb. 566.

The rule announced in the cases above cited is not applicable to nor controlling in the instant case, unless H. R. 78 is an independent act, complete in itself and covering the entire subject of legislation. Counsel for plaintiff and interveners have not enlightened us as to what they contend is the subject of legislation which is completely covered by H. R. 78. Certainly, it is not the subject of

revenue, because it does not cover that field completely; certainly, it is not the subject of delinquent taxes, because it does not purport to cover that field completely; and we are unable to discern any particular subject of legislation that is completely covered by the act. We are constrained to hold, therefore, that the rule announced above is not applicable to and does not control in the instant case.

An examination of the provisions of H. R. 78 and chapter 77, Comp. St. 1929, being the revenue law of the state, discloses that the former modifies or is in conflict with many of the provisions of the latter. Among those sections which H. R. 78 seems to modify to a greater or less extent are the following numbered sections of chapter 77, Comp. St. 1929, namely: 1910, 1915, 2002, 2006, 2007, 2008, 2014, 2039, 2105, 2106, 2117 and 2120. Apparently, each of said sections is either modified or suspended in its operation for a term of years if H. R. 78 is valid.

Even though the act professes to be independent and complete in itself, yet if it is clearly not such, but is one amendatory in character, the court must so hold. In *State v. Bauman, supra,* it was held: "Even though an act of the legislature professes to be an independent act, and does not formally purport to amend any prior act or acts, yet if, in fact, the legislative intent is to, and it clearly appears that the act does, make changes in an existing act or acts by adding new provisions or changing existing ones therein and mingling the new and the changed with the old on the same subject, so as to make of the old, the changed, and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former act or acts and within the constitutional prohibition." In fact, by reference to section 2, H. R. 78, we find a provision that, if a taxpayer has started to make payments of delinquent taxes under the provisions of this act and thereafter defaults in making the instalment payments, "the property of said taxpayer shall be subject to the provisions of all the relevant sections of articles 19, 20 and 21, chapter 77, Compiled Statutes of Nebraska, 1929."

It thus appears that the legislature must have known that H. R. 78 was suspending or modifying several relevant provisions of the revenue law without amending and repealing the original sections amended.

This court has frequently held that a legislative act which is amendatory of existing laws is unconstitutional where such act does not contain the section or sections amended and does not repeal said original sections. *Smails v. White,* 4 Neb. 353; *Sovereign v. State,* 7 Neb. 409; *Stricklett v. State,* 31 Neb. 674; *Van Horn v. State,* 46 Neb. 62; *Board of Education v. Moses,* 51 Neb. 288; *Haverly v. State,* 63 Neb. 83; *Minier v. Burt County,* 95 Neb. 473.

We are forced to the conclusion that H. R. 78 is an amendatory act and violates the quoted provisions in section 14, art. III of the Constitution, and is, therefore, invalid.

In view of the conclusion above set forth, it is unnecessary to consider other propositions raised and discussed in the briefs and on oral argument.

JUDGMENT ACCORDINGLY.

PAINE, J., dissenting.

I respectfully dissent from the opinion adopted in this case, and will state my reasons therefor.

It is of interest to ascertain who first objected to this law. It was the county treasurer of Douglas county, who refused to accept payments made in strict accord with the terms of the law, on the ground that he thought the law was unconstitutional and void. Section 3 of H. R. 78 provides that the county treasurer of each county shall each year compile a separate tax record, setting out the property of those taxpayers who accepted relief under the act. It is further provided in section 5 of the act: "No public officer for any service rendered or act performed in connection with said action shall receive any compensation other than his salary." It is quite evident that this law will make additional work for some county officers, but the legislature decided that the end justified the means.

The other defendants, aside from the county treasurer of

Douglas county, are the county of Douglas, the city of Omaha, the School District of Omaha, and the Metropolitan Utilities District of Omaha. These last-named defendants claim that H. R. 78 does not place the tax burden uniformly upon taxpayers, and discriminates between taxpayers who have paid their delinquent taxes and those who have been unable up to the present time to pay their delinquent taxes.

In my opinion these last-named defendants, instead of being harmed by this law, would benefit greatly by the enactment of the law. Counties and cities and school districts levy the amount of the taxes they need, without consideration of the penalty interest upon such taxes, but levy what they consider adequate for their needs in the face amount of the total tax assessed against the property of the taxpayer. H. R. 78 does not take from these defendants a single dollar of the taxes they have levied, but will, in the opinion of the legislature, bring in the face amount of delinquent taxes, some of which have been delinquent for many years, and the collection of which is hopeless; for it is plainly to be seen that, if the real estate was of sufficient value, tax sale certificates would have been purchased against this property before this time; therefore, in my judgment, H. R. 78 would within a few months bring in to these last-named defendants thousands of dollars of taxes that they would never receive under the laws in force before H. R. 78 was passed.

"Taxation always has been, is now, and probably always will be, a matter of grave concern to all people, rich and poor alike. The tax dollar is hard to part with for all of us. Taxation takes with a heavy hand and places burdens upon thrift, economy, and savings. * * * The subject is one of daily conversation and almost universal condemnation. No citizen is satisfied with present conditions. Those who seek public office talk about taxes and tax relief as the vital and supreme question." *State v. Luecke,* 260 N. W. (Minn.) 206.

It is important that we grasp the problem that our legis-

lature had to contend with in facing the mountain of delinquent taxes in the various counties of our state, and from the facts ascertain the intent of our legislature in drafting and passing this law.

In the petition of the intervener, Woods Brothers Realty Company, it is alleged that there are unpaid delinquent city, state and county taxes in Nebraska aggregating millions of dollars; that in the county of Lancaster alone the unpaid and delinquent taxes for the year 1933 is in excess of $375,000; that to keep up the expenses of the state the assessments made against property where the taxes are paid must necessarily be increased to meet the expense of government.

It is clear that, unless some such plan as this may be devised, by which the owner of property having against it large amounts of unpaid delinquent taxes may be allowed to pay up for the current year and thereby get back in good standing on the treasurer's books so far as the current year is concerned, and then be permitted to pay the accumulation of back taxes in small annual payments, the cities, counties, school districts, and our state will be paralyzed to raise money for actual expenses, to say nothing of meeting the burden of pressing relief problems.

By its terms this emergency act expires for all purposes at midnight, September 1, 1944.

The tax assessed against a man's property defines the measure of his duty in the support of his city, county and state, but the tax thus imposed is not founded upon a contract and does not establish the relation of debtor and creditor between the taxpayer and the state. A debt is a sum of money due by contract, express or implied, while a tax is a charge upon persons or property to raise money for public purposes. *State v. Rowe,* 108 Neb. 232; *War Finance Corporation v. Thornton,* 118 Neb. 797; 61 C. J. 70.

The payment of taxes cannot be enforced in a suit by a state or county to obtain a judgment for the amount of taxes, but the remedy for nonpayment of taxes is limited

to the seizure and the sale of the property itself, showing that a tax is not a debt.

Chief Justice White, in *Billings v. United States,* 232 U. S. 261, quoting from 37 Cyc. 1165, says: "Delinquent taxes do not bear interest unless it is expressly so provided by statute. But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes and to regulate its rate."

Justice Holmes, in *New York v. Jersawit,* 263 U. S. 493, refused to allow the claim of the state of New York for interest on a tax in a bankruptcy proceeding, on the ground that such interest was just a penalty.

In a similar act passed by the legislature of Oregon in 1925, remitting penalty and interest on certain taxes, it was declared in the act that, whereas farmers and agricultural interests had been suffering under severe handicaps, due to the general depression in agriculture, therefore it was enacted that under certain conditions the officials might remit the interest, penalty and costs on delinquent taxes. This act was brought to the Oregon supreme court on a writ of mandamus, and its constitutionality was sustained, that court holding that the interest was not a part of the taxes, and that what the statute had imposed by way of penalty the statute could remit. *State v. Coos County,* 115 Or. 300. From this Oregon decision we make the following quotation: "We do not regard this, however, as an act regulating taxation, but merely as an act remitting certain penalties, which would otherwise have accrued but for its passing. The act of taxation had already been performed when the tax was properly levied by the authorities in Coos county, and this did not authorize the levying of any taxes, or regulate the manner in which they should be paid, but was an act of grace remitting certain penalties, but for which the parties named in the act would have been liable."

In examining the General Laws of Oregon for 1925 (ch. 314), I find that this act under discussion is similar in many provisions to the Nebraska act, although much

shorter, and is entitled, *"An act to remit penalty and interest on certain taxes, and declaring an emergency."* It will be seen at a glance that the members who drafted the bill, H. R. 78, in Nebraska took the precaution to make the title of our bill far more complete than the Oregon drafters did. The full title of our H. R. 78 is set out in the main opinion.

In an exhaustive article by Professor M. H. Merrill, 13 Neb. Law Bulletin, 95, we find a very complete and helpful discussion of section 14, art. III of the Nebraska Constitution, for the violation of the provisions of which H. R. 78 is held void in the main opinion. This article cites, as the first case in which this section was involved, *People v. McCallum,* 1 Neb. 182, in which Judge Crounse said: "The purpose of this provision is to prevent surprise in legislation, by leaving matter of one nature embraced in a bill whose title expresses another. * * * It is only in cases clearly involving the mischief provided against, that this court should be called upon to declare void the acts of the legislature." And in *White v. City of Lincoln,* 5 Neb. 505, it was held: "The object of this constitutional provision is to prevent surreptitious legislation by incorporating into bills obnoxious provisions, which have no connection with the general object of the bill and of which the title gives no indication."

Many decisions of our court have held that the subject of an act is not to be interpreted in a narrow or captious spirit, but the subject in an act may be comprehensive, and if the court can see that the legislature has reference to one general topic which is capable of treatment as a unit the constitutional requisites are satisfied.

The act in the case at bar has been criticized in the briefs as providing a new manner of foreclosure for delinquent taxes, but one who reads the act carefully will see that it is all a harmonious whole, enacted for the sole purpose of collecting much-needed delinquent taxes.

In *Sheridan County v. Hand,* 114 Neb. 813, it was held that an act to adopt and establish a code of laws and pro-

vide for their administration and enforcement, known as the civil administrative code, contained but one subject, although it consisted of eight grand divisions or titles and covered 430 pages in the Session Laws, and covered such diverse matters as the six code departments, dairy standards, insurance, state highways, and licensing of physicians.

Chief Justice Sullivan, in *Rosenbloom v. State,* 64 Neb. 342, had before him a law relating to the licensing of pedlers, and in a very short opinion he considered the same questions as are before us in this case. He said it was the settled doctrine that courts will not declare an act of the legislature unconstitutional unless it is manifestly so. In this opinion Chief Justice Sullivan declared that the increased rate of interest provided for the nonpayment of taxes was a penalty.

In the main opinion this H. R. 78 is held void because it does not contain sections of the laws amended. It was clearly the intention of the legislature not to amend any of our laws, but if at any time in the future this act is found to be in conflict with any other law it is elementary that the last enactment by implication repeals all prior and inconsistent regulations. *Johnson v. Hahn,* 4 Neb. 139.

As I read the title to H. R. 78, it is an act relating to revenue, and providing that taxes which are delinquent for more than one year prior to September 1, 1935, may be paid without interest or penalties, and in certain instances the property may be foreclosed. It further declares what is known by every citizen of Nebraska, that an emergency exists, and it is my opinion that the prompt administration of this law would bring in thousands of dollars of delinquent taxes in the next few months. A simple reading of this H. R. 78 clearly shows that it does not amend the provisions of our law allowing property to be sold for delinquent taxes at public sale upon the first Monday in November, or at private tax sale later on, for it provides that it does not affect any property upon which a certificate of tax sale has been issued, nor does it affect any property

upon which the owner has promptly paid the taxes, or affect any property upon which the owner has allowed taxes to become delinquent and has later paid the taxes with interest, and section 4 of H. R. 78 provides specifically that the act shall not apply to any special assessments, so the act cannot affect any obligations outstanding of sewer or paving districts. This is a wise provision.

Thus, we see that the provisions of H. R. 78 were carefully drawn to cover just one subject, and that subject was the collection of long-delinquent taxes, together with the taxes for the current year upon such property, either by payment in full at once, or by payment of a series of annual payments, holding out to the owner thereof the one legitimate bait which the legislature has the right to hold out, viz., that by payment under the rules of this act of such delinquent taxes the state would waive the payment of the interest on such delinquent taxes, and this interest, I have endeavored to show in this dissent, is clearly a penalty which the legislature enacted to assist in getting prompt payments, and this penalty may legally be dropped in case the legislature decides, as it did by H. R. 78, that it is proper to do in the present emergency.

In *State v. Lehmkuhl,* 127 Neb. 812, it is stated, in discussing section 14, art. III of the Constitution, that a more liberal interpretation of the constitutional provision relating to amendments has been favored in later cases, and cites from 59 C. J. 866: "They should receive a reasonable and liberal construction, with the view of upholding the acts of the legislature, and not unnecessarily hampering or embarrassing it in its work; and the courts will not extend the construction of the prohibition beyond the mischief it was designed to prevent."

In this case Judge Rose refers to the recent case of *State v. Bauman,* 126 Neb. 566, and says the court held in that case that the act was strictly amendatory, containing nothing of an independent nature, but evincing a legislative intent to mingle new changes with old provisions—an inhibited evil.

In conclusion, may we glance at the simple rules which should guide courts in passing upon such questions as are set out in 6 R. C. L. 74-78, secs. 72-77, generally, as follows: Courts should approach constitutional questions with great deliberation, exercising their power in this respect with the greatest possible caution and reluctance, and they should never declare a statute void unless its invalidity is, in their judgment, beyond reasonable doubt, because it is but respect to the wisdom, the integrity, and the patriotism of the legislative body by which the law is passed to presume in favor of its validity until the contrary is shown beyond reasonable doubt. It is further provided that, where there are two possible interpretations, by one of which the law would be void and by the other valid, the court should adopt the construction which would uphold it.

H. R. 78 does not modify or alter the application of any tax law now in existence, but, on the other hand, it provides a new method to add to existing tax laws; the two systems might exist side by side with no confusion whatever. As Professor Merrill says in 13 Neb. Law Bulletin, 130: "The logical corollary to this would be that statutes setting up systems which may coexist with prior legislation are not amendatory and do not fall within the purview of this section of the Constitution." See *State v. Moore,* 48 Neb. 870; *Wenham v. State,* 65 Neb. 394; *Peterson v. Anderson,* 100 Neb. 149; *Bartels v. State,* 91 Neb. 575; *McKenzie v. State,* 113 Neb. 576.

In *Woodrough v. Douglas County,* 71 Neb. 354, in holding an act for collection of delinquent taxes valid, our court said that the act was a complete act, providing for a cumulative method for the collection of delinquent taxes; that it in no manner conflicts with the Constitution, and is not open to the objection that it was amendatory of other laws, and there was no valid reason why it should not be enforced.

I regret that I cannot view this law from the same standpoint as the majority of the court, but from the study which I have been able to give it in the few days it has

been pending before us, I am convinced in my own mind that it is a complete act in itself, easily capable of being carried out by our county officers, and provides a simple method by which cities, counties and school districts would soon be in receipt of hundreds of thousands of dollars of much-needed money from delinquent taxes, which taxes they will doubtless never receive under the present laws. As it is an independent act, designed for a single purpose clearly expressed, it is, in my opinion, not void, but a valid and meritorious law.

WILLIAM C. BEER V. STATE OF NEBRASKA.

FILED JULY 2, 1935. No. 29460.

1. **Rape**: TESTIMONY OF PROSECUTRIX: CORROBORATION. "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332.
2. **Criminal Law**: RAPE: INSTRUCTIONS. In a prosecution against a male, 76 years of age, for rape of a female, 11 years of age, where it is not charged that it was accomplished against her will or by force, error cannot be predicated upon the failure to instruct the jury as to a simple assault, in the absence of a request so to instruct.
3. ———: INSTRUCTIONS: REASONABLE DOUBT. An instruction upon reasonable doubt, containing the statement that the jurors are not at liberty to disbelieve as jurors, if they believe as men, while not to be commended, does not authorize a reversal.
4. **Rape**: IMPOTENCY: QUESTION FOR JURY. Whether the defendant was impotent was, under the evidence, a question of fact for the jury.
5. **Instructions** examined and *held* not prejudicial.

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

Waring & Waring and *Walter C. Weiss,* for plaintiff in error.

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

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

GOSS, C. J.

Defendant, age 76, was convicted of assault with intent to commit rape upon a female child, not his wife or daughter, age 11, on August 27, 1934. His sentence was for three years. He brings proceedings in error here.

The girl testified to intercourse between them on the evening of the day named and that it took place in the village library where defendant, who was caretaker, had met her by appointment. The library was open to the public on two nights a week, but this was not one of the nights in question. He had preceded her, by appointment, to the library and opened the back door by which she entered. Examination by a physician the same evening showed that her vagina was larger than usual in girls of her age, that it was capable of penetration by a male organ, though in the absence of any evidence of injury it was not possible to determine whether she had been penetrated on that particular occasion. She testified to previous similar acts with defendant, and the doctor testified that the original penetration of the hymen must have occurred at some time prior to the night of the physical examination.

Certain witnesses who had suspected defendant of clandestine meetings with the girl had followed him and her to the library and came upon them while there. There were no lights in the library and the front door was locked. Defendant's grandson had a key and unlocked the door. The town marshal, by aid of his flashlight, found the girl behind a bookcase, where, she testified, defendant had told her to run and hide when they discovered searchers outside of the building. It is unnecessary to detail further circumstances which, while not directly proving the offense,

are sufficiently corroborative of the testimony of the prosecutrix.

"In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State,* 22 Neb. 332. See *Kotouc v. State,* 104 Neb. 580; *Robbins v. State,* 106 Neb. 423; *Mayo v. State,* 127 Neb. 227.

So we find the evidence amply sufficient to support the charge of assault to commit rape. Rape, as applied to parties of the ages here, is defined by section 28-408, Comp. St. 1929, and assault with intent to commit rape is defined by section 28-409, Comp. St. 1929.

While the charge was that of rape, without charging that it was against the will of the female or that it was by force, the court submitted to the jury the alternative of assault to commit rape, and of the latter defendant was found guilty. It is complained of that the court did not submit to the jury the question of simple assault. No such instruction was requested and no proper instruction was requested on assault and battery. Even if he could have been found guilty of a simple assault, it was not error of the court to charge this offense in absence of a request. *Williams v. State,* 113 Neb. 606; *McIntyre v. State,* 116 Neb. 600.

Complaint is made of an instruction in which the court told the jury: "You are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men." We have criticized this instruction several times and hope trial judges will discard it from their forms of instructions. But we hold that, while it is not to be commended, we cannot reverse a judgment of conviction solely for the giving of this instruction. *Clements v. State,* 80 Neb. 313; *Mays v. State,* 72 Neb. 723; *Lillie v. State,* 72 Neb. 228.

Error is assigned to an instruction which told the jury that, if not convinced by the evidence beyond a reasonable doubt that defendant raped the girl, but if so satisfied that he assaulted her with the "intent to commit a rape," they should return a verdict of assault with intent to commit rape; and to the next instruction, which told the jury that, if one with the power of copulation "touches or handles, or takes hold of the person of a female under the age of consent with the present intention of having sexual intercourse with her then and there, he commits the offense of assault with intent to rape." The objection is made that the court did not explain the definition of "intent." The meaning of the word is so patent in connection with the other specific instructions of the court that we do not think any juror could have misunderstood its meaning or have been prejudiced by the failure to define it; besides, defendant offered no instruction on the subject.

In his instruction upon corroboration the court told the jury: "The defendant cannot be convicted upon the uncorroborated testimony alone of the injured female, if you find it is without corroboration by the facts and circumstances shown in the evidence." Criticism is made of the term "injured female." There was no doubt from the evidence that she had been injured by some one, either by defendant or by some one else, either at the time charged or before. It would have been better if she had been referred to as the prosecutrix, but, in the light of all the instructions, we think the jury were not at all prejudiced by this phrase which was merely descriptive of the identity of the prosecutrix. It in no manner could be interpreted as holding, as a matter of law, that the prosecutrix had actually been "injured" by defendant.

Defendant assigns error because the court refused his instruction embodying "that the mere opportunity to commit the crime is not sufficient corroboration" and that if, in consideration of all the facts and circumstances, they find "that the prosecuting witness is not corroborated as to the main fact and issue in this case you will acquit the

defendant." The court gave a proper instruction as to the corroborating effect of circumstantial evidence and no prejudice resulted from the refusal of the requested instruction, which might have been prejudicial to the state in influencing the jury to acquit defendant, if there was no evidence specifically corroborating the testimony of the prosecutrix as to the exact fact of copulation or directed to the exact fact of attempted copulation.

The chief defense, as we consider the record, evidence and brief of defendant, is that he was sexually impotent. There was evidence on his behalf tending to show that he had no capacity to perform the sexual act.

A Lincoln physician, who had made a specialty of genito-urinary surgery, operated defendant on December 21, 1932, and removed his prostate gland by resection through the natural channels. The patient was discharged from the hospital on January 8, 1933. He had been operated under the new method, called the trans-urethra resection, whereby, with electrical cutting instruments, the prostate is removed from its obstructing bed through the natural channel, the urethra, without resort to radical open surgery as was formerly the method used. The doctor had not seen defendant since that time. He expressed the opinion that defendant was, when he last saw him, and still is, sexually impotent. He defined that term as meaning an "inability to carry out the sexual act with an erect penis." A Hebron physician, who had about 30 years practice, expressed the opinion that it would be possible for a man 76 years old, whose prostate gland had been removed, to have such an erection, but it would not be probable. The prosecutrix testified that there was insertion by defendant. We think the evidence was competent to establish what the jury found, namely, that defendant assaulted the girl with intent to commit a rape upon her.

We have considered all the errors assigned and find none of them to be prejudicial and to warrant a reversal. The judgment of the district court is

AFFIRMED.

ROBERT MCGAFFEY, APPELLANT, V. LLOYD BLOSSER, APPELLEE.

FILED JULY 2, 1935. No. 29275.

1. **Automobiles:** EQUIPMENT: LIGHTS. Under the provisions of the Nebraska uniform motor vehicle act, including sections 39-1174 and 39-1182, Comp. St. Supp. 1933, a red, rear light (tail-light) formed no part of the statutory prescribed equipment of the 1933 Chevrolet sedan of defendant at the time it was involved in the collision here in suit, and there was then and there no statutory requirement directing a display of lights, front or rear, on such vehicle when "parked."
2. **Evidence** in the record examined, in the light of section 39-1182, Comp. St. Supp. 1933, and sections 5 and 6 of article 3 of the Municipal Code of Superior, Nebraska, and *held* wholly insufficient to support a recovery by plaintiff.

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

McNeny & Sprague, for appellant.

Ziegler & Dunn and *J. W. Boyd, contra.*

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

EBERLY, J.

This is an appeal from a judgment rendered against the plaintiff, in the district court for Nuckolls county, in an action for damages arising from the collision of two automobiles on a well-lighted business and residence street in the city of Superior about midnight on July 22, 1933.

It appears that one Gingrich, the owner of one of the cars involved, together with Schlitt and plaintiff, McGaffey, had started from Superior and gone to a dance some distance from that town in Gingrich's automobile. On arrival of the party at the place of entertainment, Gingrich and Schlitt went into the dance hall. McGaffey remained in the car in which he had arrived. About thirty minutes later Schlitt returned to the automobile, of which McGaffey was then the sole occupant, and the latter then requested

Schlitt to drive him to Superior. This Schlitt then proceeded to do. After arrival at this city they were driving south on Commercial avenue or Main street, which is one of the principal business streets in Superior. It runs north and south. En route they crossed intersecting streets, Eighth, Seventh, and Sixth, and were continuing south to the intersection of Fifth street on their right side of the street when they crashed into defendant Blosser's parked car, and thereby the damages in suit were sustained. The Blosser car, at the time of the collision, was upon the street pavement, in front of defendant's home, at approximately the center of the block, within a few inches of the west curb. It had been raining immediately prior to the collision, and was still drizzling when it happened. The street was wet and the view of plaintiff and his companion was much obstructed by the moisture on the windshield of their car, which, together with the illumination of the street in its then wet condition, operated to produce glaring lights which were blinding in their effect. Defendant Blosser's car, involved in this suit, was a 1933 Chevrolet sedan, weighing about 3,000 pounds, and having a width over all of 5 feet, 9 inches. As it was parked it was within a few inches of the west curb, and more than 15 feet upon the main traveled highway opposite such standing vehicle was left for free passage of other vehicles thereon. It was also provided with two Gladd reflectors, one in each rear fender, the same being standard equipment of Chevrolet cars of that model. At the time of leaving his car, after parking it, defendant had put it "in reverse" and it was still in reverse at the time of the accident. But all of its lights had been turned off, and there was no red tail-light showing at the moment of impact, save and except as created by the reflectors referred to. At the intersection of Fifth street and Commercial avenue, south of the place where the collision occurred, there was an electrolier which had 250-watt light bulbs; at the intersection on the north of Blosser's home at Sixth street and Commercial avenue, there was a street light containing

a 125-watt bulb; the principal hotel of the city was located at the corner of Fifth street and Commercial avenue, and across the street from the hotel was a filling station having lights in front thereof; also, on the same street between Fifth and Sixth there were two churches.

Both plaintiff and the driver of his car had practically spent their entire lives in Superior, and plaintiff testified that he knew that it was the custom, at various times, to park cars on both sides of Commercial avenue, and it appears that he was an experienced driver. The uncontradicted evidence is that the scene of the collision was well lighted at the time the accident occurred. A disinterested witness testified that he heard the impact, and saw, from his bedroom window, a distance of 85 feet, the plaintiff in the middle of the street, and saw the roadster, from which plaintiff had been thrown, as it came to a stop. Another witness, "sitting in her car" in front of the Nebraskan hotel, more than 200 feet away, was able to see the approaching car in which plaintiff was riding, and to observe his movements after the collision. A mail carrier, who lived on Commercial avenue just north of the Fifth street intersection, testifies as to the lighting of Commercial avenue at the scene of the accident, and states that objects were visible that night on that street from his residence as far as the north end of the block in which the Blosser residence was located.

Plaintiff definitely predicates his right of recovery on the absence of rear red lights showing on the Blosser parked car at the time of the collision. In support of this contention, section 5 of the Municipal Code of the city of Superior, Nebraska, was introduced in evidence, reading as follows:

"Lights, Brakes, etc. Every motor vehicle while in use on the streets of this city shall be provided with good and sufficient brakes, and also with a suitable bell, horn, or other signal, and shall show exhibited during the period from one (1) hour after sunset to one (1) hour before sunrise, one lamp on motorcycles and two or more lamps

on four (4) wheeled motor vehicles showing white lights visible within a reasonable distance from the direction towards which such vehicle is proceeding, and a red light from the reverse direction."

In his brief appellant states his position as follows: "Leaving an unlighted vehicle on a highway, on a dark night without warning, constitutes gross negligence within the comparative negligence statute." The above is the holding in *Monasmith v. Cosden Oil Co.*, 124 Neb. 327.

It will be observed that the author of the opinion in the *Monasmith* case cites as controlling authority the case of *Giles v. Welsh*, 122 Neb. 164. In the *Giles* case the accident occurred on a dark, misty night on an unlighted county road. As a reason for the decision announced in the *Giles* case, this court stated: "They had a right to assume that there would be no motor vehicle without a tail-light upon the highway."

In the instant case the undisputed evidence justifies the conclusion that the place of the accident was well lighted, from which the fair range of vision extended more than 200 feet both north and south along Commercial avenue.

Then, too, both the *Monasmith* and the *Giles* cases were determined with direct reference to the statute then in force, providing: "Every motor vehicle while in use on public highways * * * shall have exhibited during the period from one hour after sunset to one hour before sunrise * * * two lamps on four-wheeled motor vehicles showing white lights visible, within a reasonable distance, from the direction in which such vehicle is proceeding, and a red light visible from the reverse direction." Comp. St. 1929, sec. 39-1105.

In both of the cases just referred to, the trucks causing the collisions were, at the time of the accidents, in actual use, and in charge of their drivers. They had been proceeding over the highways and had become temporarily "stalled," and stopped on the traveled portion of unlighted, public highways on dark nights, without exhibiting any of the lights required by the statutes then in force. Obvious-

ly, in view of the surrounding circumstances, and the express requirements of our legislation then in force, actionable negligence was evidenced.

But the legislature of 1931 enacted chapter 110 of the laws of that year for the purpose of securing, in part at least, uniformity in the state laws regulating the operation of motor vehicles on the highways throughout the nation, which this court has determined should be construed in the light of the cardinal principles of the act itself to give effect to this design. *Bainter v. Appel,* 124 Neb. 40.

By the terms of chapter 110, Laws 1931, section 39-1105, Comp. St. 1929, as hereinbefore quoted, was expressly repealed. In lieu thereof, section 43, ch. 110, Laws 1931, was enacted, in the following terms:

"(a) Every motor vehicle upon a highway within this state during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, *shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles and subject to exemption with reference to lights on parked vehicles as declared in section* 51. (*b*) *Every motor vehicle* other than a motorcycle, roadroller, road machinery, or farm tractor *shall be equipped with two head lamps, no more and no less, at the front of and on opposite sides of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in section* 45 *or section* 46 and except as to acetylene head lamps shall be of a type which has been approved by the department. (c) Every motorcycle shall be equipped with at least one and not more than two head lamps which shall comply with the requirements and limitations set forth in section 45 or section 46 and except as to acetylene head lamps shall be of a type which has been approved by the department. (*d*) *Every bicycle shall be equipped with a lighted lamp on the front thereof visible under normal atmospheric conditions from a distance of at least three hun-*

dred feet in front of such bicycle and shall also be equipped with a reflex mirror or lamp on the rear exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle." (Italics ours.) Comp. St. Supp. 1933, sec. 39-1174.

Section 51, referred to above in this language, viz., "subject to exemption with reference to lights on parked vehicles as declared in," is as follows:

"Local authorities in their respective jurisdictions may cause appropriate signs to be erected and maintained, designating residence and business districts, highway and steam interurban railway grade crossings and such other signs as may be deemed necessary to carry out the provisions of this act, and such additional signs as may be appropriate to give notice of local parking and other special regulations. Local parking and other special regulations shall not be enforceable against an alleged violator if, at the time and place of the alleged violation, an appropriate sign giving notice thereof, is not in proper position and sufficiently legible to be seen by an ordinarily observant person." Comp. St. Supp. 1933, sec. 39-1182.

A careful reading of the foregoing discloses that that which is strictly enjoined is, "Every motor vehicle (including automobiles) * * * shall be equipped with two head lamps;" and none of the "different classes of vehicles" save bicycles alone is required to be equipped "with a * * * lamp on the rear exhibiting a red light," etc. So, by statute, the legislature has seen fit to remove the requirement of a red tail-light for an automobile, and thus none was required by state law at the time the accident in suit occurred. Obviously, a cause of action based on an alleged failure to conform to a provision of the statute cannot be maintained when the provision itself has been repealed. Therefore, in view of the undisputed facts established in the present record, and the changes in the law effected by new legislation, including the express repeal of the old, it is thought that the doctrine announced in *Monasmith v. Cosden Oil Co., supra,* was not here applicable and controlling.

Bearing in mind that the legislative intent evidenced in the adoption of the uniform motor vehicle act regulating the operation of vehicles was, in part at least, to assure the safety and protection of the sojourner and the stranger within our gates from the dangers of incurring penalties for unwitting violations of unknown laws and regulations, and where the terms of the state enactment cover the subject of proper motor vehicle equipment, and proper parking and use of highway, both within and without municipalities, it would seem that the strict enforcement of section 5 of the Municipal Code of Superior as applicable and controlling in the instant case would be inconsistent with the clear legislative intent of our uniform motor vehicle act. Can it be said that a municipality may require the use of a red tail-light in parking an automobile which is not prescribed by state law as a proper equipment of the vehicle parked? Section 5 of the Municipal Code of Superior, if applicable to the present case, must be construed as a "local parking regulation." The requirements of section 43, ch. 110, Laws 1931, are expressly made "subject to exemption with reference to lights on parked vehicles as declared in section 51" already quoted. In turn, section 51 expressly limits "local authorities," which we understand to include municipalities, in the enforcement of local parking regulations by an express condition that "local parking and other special regulations shall not be enforceable against an alleged violator if, at the time and place of the alleged violation, an appropriate sign giving notice thereof, is not in proper position and sufficiently legible to be seen by an ordinarily observant person." There is not the slightest evidence of compliance with this requirement, even if the validity of section 5 of the Municipal Code of Superior be assumed.

But even if section 5 of the Municipal Code of Superior, hereinbefore quoted, be construed wholly independently of the statute, it is thought that its provisions are insufficient to support plaintiff's cause of action. Section 6, ch. 3 of the Municipal Code of Superior, relates solely to the regu-

lations for automobile parking on the streets of Superior. The defendant appears to have substantially conformed to all the requirements of section 6, but it does not express a requirement that the automobile lamps shall be lighted when the automobile is parked. Section 6 and section 5 of this ordinance must be construed together with due consideration to the subject of each. So interpreted, the words of section 5, viz., "every motor vehicle while in use on the streets of this city," and "showing white lights visible within a reasonable distance from the direction towards which such vehicle is proceeding, and a red light from the reverse direction," manifestly limit their application to an automobile "while in use" and then "proceeding" —an automobile in motion. It necessarily would have no application to an automobile parked for the night or longer on the public street, in strict conformity with the provisions of section 6, left unattended and not in present use. This conclusion is supported by the reasoning of the following cases: *City of Harlan v. Kraschel,* 164 Ia. 667; *Griffin v. McNeil,* 198 Ia. 1359; *Leete v. Hays,* 211 Ia. 379; *State v. Bixby,* 91 Vt. 287; *Coca Cola Bottling Co. v. Shipp,* 174 Ark. 130; *Musgrave v. Studebaker Bros. Co.,* 48 Utah, 410; *Commonwealth v. Keister,* 26 Pa. Dist. Rep. 922.

Therefore, in view of the admitted facts of the record before us, in the light of the statutory provisions discussed, we are constrained to the view that no sufficient evidence exists to sustain or support a judgment against the defendant. It follows that the trial court committed no error in overruling plaintiff's motion for a new trial and entering judgment upon the verdict returned.

The judgment is

AFFIRMED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. FRANK NORDHUES ET AL.: STATE OF NEBRASKA, APPELLANT.

FILED JULY 2, 1935. No. 29335.

1. **Eminent Domain:** "OWNERS." All persons with an interest in land, such as a mortgage, are owners, within statutes relating to the right of eminent domain.
2. ———: ———: MORTGAGEES. A mortgagee is a necessary party in an action to condemn real estate for public use under the power of eminent domain.
3. **States.** The state cannot be sued in its own courts without its consent.
4. ———. A suit to foreclose a mortgage involving real estate to which the state has legal title is one against the state which cannot be maintained without its consent.

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

William H. Wright, Attorney General, and *George W. Ayres,* for appellant.

Fred C. Foster and *Robert G. Fuhrman, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY and CARTER, JJ., and MESSMORE and REDICK, District Judges.

DAY, J.

The Northwestern Mutual Life Insurance Company brought this suit to foreclose a mortgage against several defendants. The state of Nebraska was made a party defendant for that it had purchased from the mortgagor a part of the premises which it was using for a highway. The decree foreclosed the right, title, and interest of all defendants, including the state, in the mortgaged premises. It also decreed that a writ of assistance issue to the sheriff to place the purchaser in possession. The state appeals from this judgment.

The petition alleges that the owners of the land, the mortgagors, conveyed a part of the premises to the state of Nebraska more than two years subsequent to the execu-

tion, delivery, and filing of plaintiff's mortgage; that whatever interest the state may have is subject, junior and inferior to the lien of plaintiff's mortgage. The answer of the state challenged the jurisdiction of the court for that (1) the plaintiff has not been given legislative leave to sue the state; (2) the claim had not been presented to the auditor of public accounts; (3) the claim is not one founded upon contract, express or implied. The trial court overruled the state's challenge to the jurisdiction of the court, after which the state took no part in the trial of the case.

The state's power to acquire land for a state or federal highway is conferred by section 39-1403, Comp. St. 1929. It may appropriate and condemn for public use such real estate as is necessary in the manner provided for counties by sections 26-709 to 26-715, Comp. St. 1929. Section 26-709, Comp. St. 1929, provides that there shall be no appropriation of private property for public use "until full and just compensation therefor shall have been first made to the owner thereof." It is well settled in this state that the mortgagee is an owner of the land within the contemplation of such statutes. The word "owner" as used in the eminent domain statutes means any person who has an interest in the real estate. *Gerrard v. Omaha, N. & B. H. R. Co.*, 14 Neb. 270.

In *Omaha Bridge & Terminal R. Co. v. Reed*, 69 Neb. 514, it was held: "A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain." See, also, *Board of Commissioners v. Northwestern Mutual Life Ins. Co.*, 114 Neb. 596, and *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276.

A mortgagee is a necessary party in an action to condemn real estate for public use under the right of eminent domain. But the state did not bring an action under the eminent domain statutes. Instead, it purchased a part of the land, included in the plaintiff's mortgage, for the purpose of constructing a public highway. The plaintiff, the mortgagee, had no notice of the purchase or the construc-

tion of the highway. The plaintiff's mortgage was of record and in a condemnation proceeding the mortgagee was a necessary party. By purchase, the state did not acquire any interest as against the mortgagee. Actually, it purchased the right of way subject to the mortgage. However, the state as purchaser is entitled to possession of the premises.

It is argued that this is a suit against the state and cannot be maintained without its consent. Section 22, art. V of the Constitution, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." Under this provision no suit can ordinarily be maintained unless authorized by legislative provision. The state cannot be sued in its own courts without its consent. *State v. Mortensen,* 69 Neb. 376; *McShane v. Murray,* 106 Neb. 512; *McNeel v. State,* 120 Neb. 674; *Eidenmiller v. State,* 120 Neb. 430.

The state has in a measure waived its prerogative by section 27-319, Comp. St. 1929, which provides: "The several district courts of the judicial districts of the state as now provided for and established by the Constitution of the state, and of such judicial districts as may hereafter be provided by law, shall have jurisdiction to hear and determine the following matters: First. All claims against the state filed therein which have been previously presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed. Second. All claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication. Third. Of all set-offs, counterclaims, claims for damages, liquidated or unliquidated, on the part of the state, against any person making a claim against the state, or against the person in whose favor such claim arose." Upon this statute the state based its challenge to the jurisdiction of the court. This is a suit to foreclose a mortgage against the state.

The state acquired legal title to a portion of the mortgaged premises subject, we think, to the mortgage. This case does not fall within the provisions of the general act providing for suits against the state and cannot be maintained thereunder. A suit to foreclose a mortgage involving real estate to which the state has legal title is one against the state which cannot be maintained without its consent. 59 C. J. 313; *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233; *Hjorth Royalty Co. v. Trustees of University*, 30 Wyo. 309.

Section 21, art. I of the Constitution, provides as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor." The interest of the mortgagee in real estate taken for public use is such property. In this connection, an interesting case is *Chick Springs Water Co. v. State Highway Department*, 159 S. Car. 481. It was held there that no legislative act was necessary to maintain an action against the state to recover just compensation for private property taken for a public purpose, since the constitutional provision was self-executing and itself gives sufficient consent to be sued. The argument of the opinion is that to hold that legislative permission to sue was necessary would enable the legislature to deny a constitutional right by failing or refusing to provide a remedy. We are impressed by the reasoning of this opinion and at the same time note that it does not find support in numerous authorities. After all, there is a distinction in that this is a suit to foreclose a mortgage and dispossess the state, while the South Carolina case was one at law for damages. The Constitution does not forbid the taking of the land but guarantees just compensation for the taking or damage. We are impelled by the great weight of authority to hold that this is a suit against the state which cannot be maintained without legislative permission. The judgment should be reversed and the suit dismissed as to the state.

REVERSED AND DISMISSED.

JOHN MCGUIRE ET AL., APPELLANTS, V. WILLIAM T. STIMBERT ET AL., APPELLEES.

FILED JULY 2, 1935. No. 29210.

1. **Statutory Provision.** "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1929, sec. 76-109.
2. **Fraudulent Conveyances:** EQUITY. In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction.

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

Stiner & Boslaugh, for appellants.

C. L. Stewart, contra.

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

PAINE, J.

This is a creditors' bill in aid of execution to set aside a conveyance of real estate. There was a partial judgment for plaintiffs, and from this the plaintiffs appealed.

The three plaintiffs are trustees for the depositors of the insolvent Farmers State Bank of Inland, Nebraska, having been duly elected as such trustees on May 5, 1932. Such plaintiffs secured a judgment on November 28, 1932, against William T. Stimbert in the sum of $2,013 for money loaned said Stimbert by the bank. An execution issued thereon was returned unsatisfied.

At the time said indebtedness was contracted to the bank, the said defendant, William T. Stimbert, owned certain real estate, and on November 17, 1932, while said action was pending against him for the money he owed the bank, and eleven days before the judgment was obtained, he and his wife gave a quitclaim deed for this land

to his father, David Stimbert, one of the defendants herein, for the avowed purpose of paying numerous debts which he owed his father. Plaintiffs insist that said deed was executed wholly without consideration, and with the intention of all the parties thereto to hinder, delay and defraud his other creditors, especially the plaintiffs. It is further alleged that the said William T. Stimbert is insolvent and the plaintiffs are without adequate remedy at law.

In the amended answer the defendants deny the allegations of the petition, except that said quitclaim deed was executed and delivered, and further allege that on March 1, 1929, the father deeded the same 120 acres of land to his son, William T. Stimbert, by warranty deed, expressly reserving therein that the grantee should pay the sum of $112.50 to the grantor on October 1 and the same amount on April 1 of each year during the natural lifetime of the father and mother. In said amended answer there is set out certain debts for pasture rent, corn and wheat purchased, and various other transactions, including the charge upon the real estate, all of said items making the total of $5,532.79 alleged to be due to the father from the son, and the payment of which indebtedness constituted the consideration for the quitclaim deed from the son to his father.

In the decree entered by the trial court it provided that the quitclaim deed should be set aside; that a homestead right of William T. Stimbert and his wife existed in the premises; that said premises should be sold, subject to payments due under the provisions set out in the warranty deed dated March 1, 1929, which amounted with interest to $739.80, and subject to the above homestead rights; and that from the proceeds of said sale cash rent due for pasture of an adjoining 40 acres should be deducted, in the amount of $507.14, which was unpaid; and the trial court rejected all of the other items claimed in the amended petition.

Complaint is made of the allowance of even these two remaining items. This court finds that the allowance of

$507.14 for rent of the pasture upon the northwest quarter of the southwest quarter of section 16 was not supported by sufficient evidence; therefore, said item is rejected by this court.

Evidence is to the effect that, when the note of William T. Stimbert was last renewed, the cashier of the bank relied upon his property statement, which failed to show any indebtedness whatever in favor of his father, but the defense made to this is that he signed the property statement in blank, and that the banker filled it in, which claim does not appeal to this court.

It is argued by the plaintiffs that the item of $739.80 was also erroneously decreed to be a lien upon the land, yet we find it specifically set out in the warranty deed dated March 1, 1929, as follows: "It being expressly understood and mutually agreed by and between the grantors and grantee herein as a further consideration for the execution and delivery of this deed of conveyance, that the said grantee is to pay to the said grantors herein the sum of $112.50 on Oct. 1 and $112.50 on the 1st of April of each year during the natural lifetime of either the said David Stimbert or of the said Marie Stimbert."

The evidence also discloses that at the same time the father conveyed other land to other children, reserving cash payments in the deeds similar to the one in this deed, which warranty deed, dated March 1, 1929, was drawn by the cashier of the bank, and said reservations inserted by him in the deed, so that the officers of the bank could not be heard to deny that such charges were made against the land at the time it was deeded by the father to the son, to say nothing of the notice given to the whole world when the deed was placed on record.

"In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is

consistent with the rules of law." Comp. St. 1929, sec. 76-109, which provision enjoins upon courts the duty of carrying into effect the intent of the parties in construing any instrument affecting the rights of the parties. In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction.

In the opinion of this court, the trial court was right in rejecting all of the various claims for a preference due to the father from the son, save and excepting only the payments reserved in the original deed, and all of the other claims, amounting to some $5,532.79, were attempts to illegally prefer the father to other creditors. The decree of the trial court is hereby affirmed, save and except as to the item of $507.14, which is stricken out, and as thus modified the decree will stand.

AFFIRMED AS MODIFIED.

JULIA A. EVERETT, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.

FILED JULY 2, 1935. No. 29267.

Insurance: ESTOPPEL. An insurance company may be estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course to his detriment.

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

Harley G. Moorhead, Harley G. Moorhead, Jr., and *Leroy A. Lincoln,* for appellant.

G. H. Seig, contra.

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

PAINE, J.

This is an action by a widow and beneficiary upon a $2,000 policy of life insurance in the Metropolitan Life In-

surance Company upon the life of her husband. The $2,000 policy was payable to the beneficiary in instalments according to a settlement option executed by the insured, whereby about $500 was to be paid immediately upon the death of the insured, and the balance was payable in monthly instalments of $66.66 with interest at 7 per cent. for 23 months thereafter.

On August 1, 1928, defendant issued this policy for $2,000, payable to the plaintiff, his wife, and insured paid therefor the premium of $3.90, which maintained the policy in force for one month from its date of issue, which payments were to continue for 53 years. He paid such monthly premiums upon said policy for 4¼ years. Defendant denied liability upon the ground that the premium for the month of November, 1932, in the sum of $3.90 had not been paid, and that the principal sum was therefore forfeited, the defendant insisting that, by the nonpayment of the monthly premium due November 1, 1932, the policy lapsed 31 days thereafter. The insurer died December 25, 1932.

At the close of all of the evidence, the defendant moved the court to take the case from the jury and find for the defendant, for the reason that there was insufficient evidence to support a judgment for the plaintiff and against the defendant. Thereafter the plaintiff moved the court to enter judgment for the plaintiff in the amount sued for, for the reason that the evidence of the defendant was not sufficient to establish its defense and plaintiff was entitled to a judgment as a matter of law. The trial court thereupon discharged the jury and found generally for the plaintiff, and gave judgment for the total amount of instalments due at that time, of $940.01, and taxed as part of the costs an attorney fee for the plaintiff in the sum of $200. The defendant assigned as errors the overruling of the motion for a directed verdict, for errors of law occurring at the trial, and that the verdict and judgment were not sustained by sufficient evidence and are contrary to law.

Plaintiff's exhibit No. 6, being a statement of the values in this policy tendered by the defendant company, shows that the cash surrender value of the policy was $94.94, and that a small loan, with interest thereon, standing as a lien against this policy, amounted to $88.20, leaving a net cash surrender value on the policy of $6.74, at death of the deceased. The unpaid premium was only $3.90, and in this particular form of policy there was no forfeiture clause. It did provide that in the case of lapse of payment certain options could be exercised within three months, which time had not yet expired. This court has held that, in such a situation and under these conditions, the cash value of $6.74 should be applied as a premium to continue the policy in force, for forfeitures are not looked upon with favor. In *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 26 L. R. A. n. s. 747, it says in the opinion: "We adhere to the rule this court has heretofore announced that 'forfeitures will be enforced only when the strict letter of the contract requires it.' * * * It can be permitted only when expressed in the policy in clear and unmistakable terms."

In *North Carolina Mutual Life Ins. Co. v. Terrell*, 89 A. L. R. 1459 (227 Ala. 410) the first syllabus reads as follows: "The full amount of a life insurance policy the premium of which was unpaid at the time of the death of insured, and not merely the amount of paid-up insurance, is, where the insured died within three months after the premium became due without having exercised any of the options afforded by the policy, recoverable under a policy which, while specifying that, except as therein provided, the payment of a premium shall not maintain the policy in force beyond the date when the next premium is payable, also provides that insured may, within three months after default in the payment of any premium, surrender the policy and have a choice between receiving its cash-surrender value, or paid-up insurance, or extended insurance, and that if no other option is selected, the policy will automatically be continued in force for the amount of paid-up insurance to which the insured is entitled." The anno-

tation following the case cites additional authorities supporting the quotation hereinabove. See *McMaster v. New York Life Ins. Co.*, 183 U. S. 25; *Higgins v. Old Line Ins. Co.*, 122 Neb. 254.

The insured in the case at bar had three policies in force in the same company, and had paid the premiums on two of the policies for December, but it appears he did not pay the monthly premium due on this older policy. It appears that the defendant's agent, Carr, observed that a small loan was being made on the policy, and concluded that the premium due would be taken out of the proceeds, and in his letter to the insured under date "11-15-32," written upon the letterhead of a district manager of the Metropolitan Insurance Company, being exhibit 4, said: "I will forward your policy to you as soon as it comes thru to me. A deposit of $2.32 will be necessary to put it in force. It will also pay the premium of Dec. and you will have nothing more to pay until Jan. 1-1933." The insured was thus led to believe the November premium was paid by the loan. The conclusion was doubtless drawn by the trial court that the failure of the insured to pay the premium was due to the statements and conduct of the defendant's agent, as well as by the written statement made by defendant's agent on plaintiff's exhibit 4 that the premium was paid, which statement the defendant ratified, and treated the policy in full force until long after the death of the insured. The reply pleaded that defendant was estopped from declaring a lapse by its conduct, and at no time gave notice of any lapse, and exhibit 10 is a letter of the third vice-president, F. J. Williams, urging deceased to pay the premium some 19 days after his death.

It has frequently been held that an insurance company may be estopped from denying liability where by its course of dealing, or its open actions, it has induced the insured to pursue a policy to his detriment. *Cook v. National Fidelity & Casualty Co.*, 100 Neb. 641; *Smith v. Liberty Life Ins. Co.*, 118 Neb. 557; *Peterson v. Cosmopolitan Old Line Ins. Co.*, 124 Neb. 792.

In our opinion the policy in question was in force at the death of the insured, because of the letter and conduct of the agent of the defendant. The judgment of the trial court is affirmed, and an attorney's fee in the sum of $150 is allowed in this court.

AFFIRMED.

ERNEST HOEPPNER V. CHARLES E. BRUCKMAN ET AL.: JAMES F. CROWLEY, TRUSTEE, APPELLANT: W. M. WHELAN, TRUSTEE, APPELLEE.

FILED JULY 2, 1935. No. 29331.

1. **Judgment:** VACATION AFTER TERM. "A district court has power to vacate or modify its judgments or orders after the term at which they were made, only for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929." *State v. Security State Bank*, 125 Neb. 516.
2. ———: ———: LIMITATIONS. Where an application for a modification of a decree on the ground of fraud in its procurement fails to set forth that the facts constituting the alleged fraud were not discovered within two years after the trial, and fails to show any reason for extending the two years allowed by statute for modifying judgments procured by fraud, equity is powerless to relieve.
3. ———: ———. When it affirmatively appears from the evidence at a hearing on an application to modify a decree alleged to have been procured by fraud, after the term at which it was entered has been adjourned, that the defense alleged in the application cannot be sustained, the application should be denied.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Reversed and dismissed.*

Tibbets, Canaday & Hewitt, for appellant.

Edmund P. Nuss and *W. M. Whelan, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY and CARTER, JJ., and MESSMORE and REDICK, District Judges.

CARTER, J.

This is an appeal from an order of the district court for Adams county confirming a sale of real estate in a foreclosure action in which order the court modified the decree of foreclosure and changed the priority of the liens therein adjudicated.

The record shows that the foreclosure action was commenced by Ernest Hoeppner on September 16, 1929, on a real estate mortgage dated December 12, 1921. One Youngblood filed an answer and cross-petition on the same day praying for the foreclosure of a tax sale certificate covering the lands included in the mortgage. On February 24, 1930, a decree was entered foreclosing both liens and fixing the tax lien as a first lien and the mortgage lien as a second lien. An order of sale was issued on June 14, 1933, and the premises were subsequently sold. On July 25, 1933, W. M. Whelan, as successor trustee for the holders of the bonds secured by the mortgage, filed his verified petition in the same action praying for an order confirming the sale and for a further order decreeing the mortgage lien to be a first lien instead of a second as adjudicated in the decree of foreclosure dated February 24, 1930. The petition filed alleged in substance that Youngblood had purchased and held the tax sale certificate as trustee for Hoeppner & Uerling, the original trustee of the holders of the bonds secured by the mortgage; that Hoeppner & Uerling were obligated by their contract of sale of the bonds to protect bondholders by paying the taxes due on said lands; that the purchase of the tax lien by Hoeppner & Uerling was a violation of their duty to and a fraud upon bondholders; and that the tax lien should therefore be subsequent to the rights of bondholders.

James F. Crowley, trustee in bankruptcy of the firm of Hoeppner & Uerling, filed an answer alleging that the decree of foreclosure of the tax lien had been assigned to him; that the same was a first lien, and that the trial court was without jurisdiction for the reason that the decree was granted under date of February 24, 1930, that the

term of court at which it was entered had expired, and that the petition did not allege facts entitling the trustee for bondholders any relief. Upon a trial of the case on the issues thus framed, the trial court held the mortgage lien to be superior to that of the tax lien. The trustee in bankruptcy of Hoeppner & Uerling thereupon appealed to this court.

It will be noted that the decree of foreclosure was entered on February 24, 1930, and the application for modification was filed on July 25, 1933, three years and five months later.

Fraud practiced by the successful party in obtaining the judgment or order is made a ground for modification by our statute. Comp. St. 1929, sec. 20-2001. In order to obtain a modification on this ground, however, proceedings to modify the judgment or order must be commenced within two years after the judgment was rendered or the order made. Comp. St. 1929, sec. 20-2008. In *State v. Security State Bank,* 125 Neb. 516, this court held: "A district court has power to vacate or modify its judgments or orders after the term at which they were made, only for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929." This same rule was followed in *Lyman v. Dunn,* 125 Neb. 770.

The only exception to the statutory limitation of two years is where the fraud was not discovered within that period. This court has set out the rule in the following apt language: "Equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun." *Krause v. Long,* 109 Neb. 846. The petition of the trustee for bondholders does not allege that the date of the discovery of the alleged fraud was within two years of the date of the filing of the petition.

No reason whatever is given for not filing the application to modify the decree within the two-year period. This court is committed to the following rule: "Where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve." *Van Antwerp v. Lathrop,* 70 Neb. 747. Also, in *State v. Lincoln Medical College,* 86 Neb. 269, it was held: "There is nothing in the facts alleged to show that full knowledge did not come to the respondents within the two years, and, the statutory period having elapsed, it was incumbent on the petitioners to allege some facts excusing the failure to comply with the statute." See, also, *Brandeen v. Beale,* 117 Neb. 291. We therefore conclude that the trustee for bondholders is not entitled to relief in the case at bar, he not having pleaded or proved facts that gave the district court jurisdiction to act.

The statute requires that the application for modification should set forth the defense the applicant has to the original action. Comp. St. 1929, sec. 20-2002. The trustee for bondholders pleads that Hoeppner & Uerling were obligated by their contract of sale of the bonds to protect bondholders by paying the taxes represented by the tax sale certificate. No written contract was entered into and no attempt was made to prove an oral one. The record shows that each of the bonds sold was indorsed as follows: "For value received, I hereby assign and transfer the within bond, together with all my interest in and all rights under the mortgage securing same to (naming indorsee) without recourse." Under this state of the record, Hoeppner & Uerling were under no duty or obligation to protect the bondholders by paying the taxes represented by the tax sale certificate. It is not charged that they acted in bad faith in purchasing the tax sale certificate. Neither is it charged that the tax sale certificate was purchased for the purpose of obtaining a prior lien to bondholders with a view of depriving them of their lien. If Hoeppner &

Uerling had not purchased the tax sale certificate, the taxes would still be a first lien on the lands in question. The decree of foreclosure of the tax lien provided for the payment of interest thereon at the rate of 10 per cent. per annum, the same rate the taxes were bearing before the tax lien was sold. We fail to see where the bondholders have been in any way injured by the action of Hoeppner & Uerling in purchasing this tax sale certificate. To say the very least, it would be inequitable to require the trustee in bankruptcy for Hoeppner & Uerling to give up his lien without being placed *in statu quo,* which would require a return of the money used by Hoeppner & Uerling in buying the tax sale certificate. We conclude, therefore, that the first decree was right on the merits of the case and that it should not have been modified.

The decree of the trial court modifying the decree of foreclosure dated February 24, 1930, is reversed and the application for modification is dismissed.

REVERSED AND DISMISSED.

AMY SPRAGUE, APPELLEE, V. ALLIED MILLS, INC., ET AL., APPELLANTS.

FILED JULY 9, 1935. No. 29327.

1. **Trover.** "A person who aids in the conversion of property is responsible to the owner for its value." *McCormick v. Stevenson,* 13 Neb. 70.
2. **Evidence.** An owner of household goods, used for family purposes, is competent to express an opinion concerning its value. *Lincoln Supply Co. v. Graves,* 73 Neb. 214.
3. **Damages.** In a law action, under conflicting evidence, the amount of damages is a question for the jury.
4. **Trial:** INSTRUCTIONS. "On appeal, instructions to a jury should be construed as a whole, and when, so construed, they fully and fairly state the law applicable to the issues and the evidence, harmless errors in instructions considered separately do not require the reversal of the judgment below." *Iden v. Evans Model Laundry,* 121 Neb. 184.

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

Gaines, McGilton, McLaughlin & Gaines, Morgan, Sutton & Fromkin and *Foster & Yates,* for appellants.

Wear, Garrotto & Boland, Robert E. McCormack and *G. F. Nye, contra.*

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

GOSS, C. J.

Plaintiff sued defendants for damages for conversion of her household goods. From a judgment against both defendants, they appealed. They briefed and argued their assignments of error separately. To save words, we do not set out here their separate assignments but shall endeavor to state them sufficiently as we proceed.

Both defendants say the court erred in not sustaining their motions for directed verdicts. Plaintiff is a married woman, the wife of Dr. A. W. Sprague, veterinarian. They had lived in Omaha since 1925. Dr. Sprague had gone to Oswego, New York, and about March 1, 1932, Mrs. Sprague stored her household goods with the Gordon Storage Warehouses, Inc. She testified that she owned the goods. She was later furnished by the storage company at its office a typewritten list of them which showed that the storage company had listed them in her name as "Mrs. A. W. Sprague." On its ledger, showing all charges for packing, cartage and storage as paid, it carried the account in the name of A. W. Sprague. She had gone to New York after the goods were stored and letters had been written her by the storage company, in which she was addressed as Mrs. A. W. Sprague. In that name she purchased a $25 money order at Oswego and mailed it to the company in July, 1932. The company returned it by letter dated July 9, 1932, addressed to "Mrs. A. W. Sprague," stating that "your goods were sold by the constable on June 13 to satis-

fy a judgment of the Allied Mills, Incorporated." The representative of the storage company, who went to the house of plaintiff to examine the goods, to bid on the business and to arrange for the storage, testified that he asked plaintiff her husband's name and entered it in his notebook as "Dr. A. W. Sprague," followed by the house address. A clerk from the office of the county assessor identified a tax return for 1930, purporting to have been made by A. W. Sprague, scheduling household goods from the same address as the Sprague home. This was admitted and went to the jury for what it was worth. We think the evidence was sufficient to submit to the jury and for the jury to find that plaintiff owned the household goods.

Allied Mills, Inc., sued Arthur W. Sprague in the municipal court on a promissory note for $523.24, and on March 16, 1932, filed its affidavit in attachment on the ground of nonresidence of the defendant, obtaining a garnishment order against Gordon Van & Storage Company. On March 24, 1932, Gordon Storage Warehouses, Inc., formerly Gordon Van & Storage Company, answered as garnishee that it had "in its possession property belonging to the * * * defendant as per the attached list," setting up the list of household goods stored by plaintiff here, the list showing the name of "A. W. Sprague, No. 11244" at the head thereof. The evidence shows that all these goods were sold June 13, 1932, under the order of sale in the garnishment proceeding, for $100. The expenses of sale, $7.10, and the storage bill of $37.30, were deducted and the balance paid to Allied Mills, Inc. Mrs. Sprague had no notice of the proceedings or sale until in July, 1932, when she received the letter from Gordon Storage Warehouses, Inc. The record does not show that this defendant made any attempt whatever to defend the garnishment action or to postpone the sale until it could get notice to her. It claims as an excuse that she had left for New York and it had not yet received her address. We are of the opinion that, under the evidence and consequent finding by the jury, she was the owner, rather than her husband, that she did not

store the goods in the name of her husband, and that the participation of Gordon Storage Warehouses, Inc., in the sale of plaintiff's household goods and furniture for the debt of her husband amounted to a wrongful conversion, for which it was liable. See Comp. St. 1929, sec. 88-110.

Allied Mills, Inc., filed its affidavit for attachment and garnishment and thus began the proceedings which ended in the sale and conversion of plaintiff's property. The proceedings resulted in a sale of the goods of plaintiff as if they were the goods of Dr. Sprague, a debtor of Allied Mills, Inc. While Allied Mills, Inc., relied on the garnishment answer of the storage company that it had in its possession goods of the debtor, it turned out in a trial by jury that these goods did not belong to the garnishment debtor. Can Allied Mills, Inc., be heard to say that it did not thereby participate in the conversion of the goods of the real owner? We think not. The act of the Gordon Storage Warehouses, Inc., attempted in effect to transfer the title of the household goods belonging to Mrs. Sprague to her husband so that Allied Mills, Inc., could take advantage of that act and, by attachment proceedings, cause the title thus changed to pass to the purchaser at judicial sale. Both Gordon Storage Warehouses, Inc., and Allied Mills, Inc., acted tortiously and both became liable to Mrs. Sprague, the real owner of the property, for conversion.

"A person who aids in the conversion of property is responsible to the owner for its value." *McCormick v. Stevenson,* 13 Neb. 70. See *Stevenson v. Valentine,* 27 Neb. 338; *Starr v. Bankers Union of the World,* 81 Neb. 377.

Error is assigned because plaintiff was permitted to testify as to the value of her furniture. She had answered that she knew its fair and reasonable market value and then was permitted, over objection, to testify what that value was. "A husband and wife are competent to express an opinion as witnesses concerning the value of their own household furniture." *Lincoln Supply Co. v. Graves,* 73 Neb. 214. See, also, *Neal v. Missouri P. R. Co.,* 98 Neb.

460; *Thomas v. Scoutt,* 115 Neb. 848; *Folken v. Union P. R. Co.,* 122 Neb. 193.

Plaintiff testified her goods were worth $3,500. The verdict was $1,225. A second-hand dealer testified they were worth $115. It is assigned that the judgment in the amount of the verdict was excessive. From the evidence, which was meager, we cannot find that it was excessive. In a law action, under conflicting evidence, the amount of damages is a question for the jury.

Two instructions are criticized as erroneous. One follows the other. Construed as a whole, as they should be, they do not contain prejudicial error. "On appeal, instructions to a jury should be construed as a whole, and when, so construed, they fully and fairly state the law applicable to the issues and the evidence, harmless errors in instructions considered separately do not require the reversal of the judgment below." *Iden v. Evans Model Laundry,* 121 Neb. 184.

Other assignments of error have been considered and are overruled. The judgment of the district court is

AFFIRMED.

JOHN W. TOWLE, APPELLANT, V. ADAM MORRELL ET AL., APPELLEES.

FILED JULY 9, 1935. No. 29151.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION. Under a 99-year lease of land, lessee has an interest in the real estate and therefore the lease, in the event of a controversy with lessors over the extent of the rights granted, must be construed according to the statutory rule which requires the courts to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, if consistent with the rules of law. Comp. St. 1929, sec. 76-109.
2. ———: ———: REVERSION: ENCUMBRANCE. Under a 99-year lease of land, lessee and the latter's successors in interest cannot by contract, independently of lessor, destroy or encumber the reversion, but this principle does not prevent an assignment of the lease.

3. ———: ———: ASSIGNMENT. Under a 99-year lease, the restrictions on the right of lessee to assign it are such as are imposed by or implied from the lease.
4. ———: ———: ———. Ownership of and dominion over the estate granted by a lease of real estate for a term of years include the right of lessee to assign the lease in absence of fraud or contractual restrictions.
5. ———: ———: ———. Where a 99-year lease authorizes the assignment thereof with a release of lessee's liability for subsequently accruing rents on conditions afterward performed, the assignee may by another assignment, in absence of fraud or statutory or contractual restrictions, assign a definite and properly severable half of the leasehold estate to a responsible assignee without liability for future rents therefor, if the reversion and other rights of lessor are not thus impaired or any covenant of the lease violated.

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

Clarence T. Spier and *Arthur C. Bailey,* for appellant.

William Baird & Sons, contra.

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

ROSE, J.

This is a suit in equity for the interpretation of a 99-year lease and for a declaratory judgment determining the right of plaintiff as assignee to assign the north 40 feet, approximately half, of his leasehold estate without liability for future rent therefor. Plaintiff invokes this relief under the declaratory judgment act. Comp. St. 1929, secs. 20-21,140 to 20-21,155.

The demised real estate is situated at Twenty-fourth and Douglas streets, Omaha, with 93 feet fronting east on Twenty-fourth street and extending west 160 feet to an alley. The property was unimproved when leased. The lease was dated March 31, 1919. For the 5-year period beginning April 1, 1919, the agreed annual rental was $3,800 and for the remainder of the term $4,000 annually. The lease contained provisions for semiannual payments

of the rent and for restoring the premises to lessors upon breach of covenant on the part of lessee or assigns; required payment of taxes and assessments and the discharge of liabilities for water, gas and electric light; obligated lessee to carry insurance on improvements subsequently made; forbade waste; prohibited the use of the premises for a nuisance or for any other unlawful purpose. Other terms generally found in 99-year leases were also inserted. In connection with the entire lease, the provisions on which the litigants disagree are as follows:

"It is covenanted and agreed that the lessee, her heirs or assigns, may assign her interest in this lease and premises herein described to any responsible person, persons, or corporation, provided that all rents, taxes, assessments, insurance and all other charges of every kind shall be paid to the date of such assignment and all covenants and agreements herein contained to be kept by the lessee shall be fully complied with at that time; Provided, that in the event of such sale or assignment of said lease, the same shall be evidenced in writing duly executed and acknowledged by the assignor and assignee and recorded in the office of the register of deeds of Douglas county, Nebraska, whereupon and whereby the assignee shall expressly accept and assume all the terms and covenants in this agreement contained to be kept and performed by the lessee.

"Provided further that shall said assignment be made prior to the erection of new or additional improvements of value of not less than twenty-five thousand dollars ($25,000), said assignor shall be released and discharged from her lease and obligation hereby created when such new improvements or additions of value of not less than the sum of twenty-five thousand dollars ($25,000) have been fully erected and paid for and all other terms of the lease complied with by the lessee to that time, or upon obtaining the consent in writing of the lessors to such assignment, and such consent shall not be unreasonably or arbitrarily withheld.

"Provided further that shall said assignment be made

after the erection of new or additional improvements on said premises of value of not less than the sum of twenty-five thousand dollars ($25,000), the assignor shall be forever released and discharged from her lease and obligation hereby created.

"No provision of this lease shall be construed in any way or manner to prevent or prohibit the lessee from subletting said premises, or any part thereof, to be used for any purpose authorized under the former provisions of this lease."

The owners of the fee, lessors, were Adam Morrell and Mary Morrell, defendants. The original lessee was Rose C. Gentleman who assigned the lease to Ernest Sweet April 1, 1919. Sweet assigned the lease to John W. Towle, plaintiff, January 13, 1926. Prior thereto Sweet improved the premises at a cost of $29,000 by constructing thereon a one-story building consisting of four separate store rooms, each 20 feet wide, fronting east on Twenty-fourth street, with the entrance therefrom. May 21, 1927, Towle assigned to the "Dutch Cleaners, Incorporated," approximately a half interest in the lease or the north 40 feet of the leasehold estate, including two of the separate store rooms. Thereafter, the Dutch Cleaners, Towle's assignee, further improved the assigned north 40 feet by constructing another story on that part of the building and a cleaning and boiler-room in the rear, all at an expense of $12,000.

Lessors, defendants, received from the Dutch Cleaners rents for the north 40 feet of the leasehold estate for five years after Towle assigned that portion of it and surrendered possession thereof to his assignee.

The position of Towle, plaintiff, is that the lease, properly interpreted, permitted the division of the leasehold estate for the purpose of the assignment of the north 40 feet, a severable portion for commercial and industrial uses, since there was no contractual or statutory provision to the contrary.

Lessors, defendants, confidently assert that the lease deals with the demised premises as an entirety and that

there was no authorized division of it for the purpose of a partial assignment.

On this phase of the case the district court entered a decree in favor of defendants. John W. Towle, plaintiff, appealed.

Under a 99-year lease of land, lessee has an interest in the real estate and therefore the lease, in the event of a controversy with lessors over the extent of rights granted, must be construed according to the statutory rule which requires the courts "to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1929, sec. 76-109. The rule, generally, would be the same in absence of the statute.

The parties obviously intended improvement of the property for commercial and industrial purposes. With that end in view a building consisting of four separate store rooms was constructed, each with its own entrance. Continued occupancy of the entire property by the same lessee or tenant for 99 years was of course never contemplated by the contracting parties. The property interests acquired under the lease were subject to sale as shown by the provisions quoted. The law is that the lessee and those succeeding to her rights cannot by contract, independently of lessors, destroy or encumber the reversion. 35 C. J. 975. This principle, however, does not, in absence of statutory or contractual restrictions, prevent lessee from assigning the lease. 35 C. J. 976. The restrictions on the right to assign the term or the leasehold estate are such as are imposed by or implied from the lease.

In the present instance the right of assignment and of release from liability for future rent is specifically recognized on conditions stated in the lease. Subletting for any authorized purpose is permitted. There was no specific restriction to prevent Towle, the owner of the entire lease, from transferring the north 40 feet of the leasehold estate, a reasonably severable portion, to a responsible assignee.

Ownership of and dominion over the estate granted by the lease included that right in absence of a restriction expressed or implied. The evidence does not show that the assignment impaired the reversion or that Towle's assignee was not responsible within the meaning of the lease when the assignment was made or that the north 40 feet was not separately adapted to the commercial and industrial purposes for which it was improved and used or that the division for the purposes of the assignment was fraudulent, unreasonable, unfair or inequitable. It is a fair inference from the evidence that the Towle assignment was at the time made in perfect good faith in the exercise of good business judgment. A careful annotator who collected and reviewed authorities said:

"It is settled by an unbroken line of authority both in England and in this country, that, as the liability of the assignee of a lease to the lessor rests, in the absence of assumption of the provisions of the lease, on privity of estate, and not of contract, and as an assignment of the lease by the assignee terminates such privity of estate, he may, in the absence of fraud against the lessor, assign the lease at any time and thereby (at least when the assignment is accompanied by relinquishment of possession or beneficial enjoyment) his liability to the lessor for rent subsequently accruing will be terminated." 89 A. L. R. 433.

The lease authorized the assignment of the term or the entire leasehold estate, and relieved assignee from liability for subsequently accruing rents upon conditions which have been performed. There is no statutory or contractual restrictions against an assignment of half the improved premises for the unexpired term. Is an assignment *pro tanto* recognized by law? A leading law text on Landlord and Tenant contains the following statement:

"According to the weight of authority, there is an assignment *pro tanto* where the lessee transfers his interest in a part of the premises for the entire term, and the person to whom such an interest is conveyed becomes an as-

signee of the term with all the rights and liabilities incident to such a position." 35 C. J. 989.

The supreme court of Illinois ruled as follows:

"Where several persons hold the entire interest of the original lessee of premises, not as joint purchasers, but by separate deeds of assignment, each of them an undivided interest, they are not jointly liable to the lessor for the whole rent, but each assignee is severally liable for a part only according to his interest in the premises as compared with the whole interest under the lease." *Babcock v. Scoville,* 56 Ill. 461.

Assent of lessor to an assignment *pro tanto* may be implied from circumstances. *Lodge v. White,* 30 Ohio St. 569. In the present instance the addition of a second story on the assigned portion of the leased premises and other improvements at an expense of $12,000 increased the value of the fee or of the reversion and were inducements to lessors to consent to the assignment *pro tanto.* There is no evidence that at the time of the transfer, or while rents were being paid by assignee, that the corporation called "Dutch Cleaners" was not a responsible assignee or that lessors objected to the transaction. The acceptance of rents from the assignee for a period of five years in connection with other circumstances implied assent of lessors to Towle's assignment. Each of the two severable parts of the entire leasehold estate is adapted to commercial or industrial purposes for which it has been improved and used by different assignees. Towle's assignment does not seem to be inconsistent with any rule of law.

In harmony with these views, the cause is remanded, with directions to the district court to modify the decree below by adjudging the assignment of Towle valid with the effect of releasing him from liability for subsequently accruing rents for the north 40 feet of the leasehold estate for the unexpired term of the lease.

REMANDED FOR MODIFICATION OF DECREE.

ERNEST FRANKFURT, ADMINISTRATOR, APPELLEE, V. NEON RADIANT SIGN COMPANY ET AL., APPELLANTS.

FILED JULY 9, 1935. No. 29190.

1. **Landlord and Tenant:** LEASE: ASSIGNMENT. A severable half of a leasehold estate under a 99-year lease may be assignable in absence of fraud or of statutory or contractual restriction, where the assignment will not encumber or impair the reversion.
2. ———: ———: ———: ACCOUNTING. In a suit in equity against an assignee, to whom a 99-year lease had been transferred, for an accounting as trustee for assignor and for termination of the trust, assignor as a condition of such relief may, in a proper case, be required to do equity by restoring to assignee, or allowing him credit for, what, in good faith, in the exercise of good business judgment, he contributed from his individual funds to the leasehold estate.

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

Clarence T. Spier and *Arthur C. Bailey*, for appellants.

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

ROSE, J.

This is a suit in equity to require an assignee to whom a 99-year lease had been transferred to account as trustee for rents and other income, to terminate the trust, and to cancel an assignment by him of approximately half of the leasehold estate.

The demised real estate is situated at Twenty-fourth and Douglas streets, Omaha, with 93 feet fronting east on Twenty-fourth street and extending west 160 feet to an alley. The property was unimproved when leased. The lease was dated March 31, 1919. For the 5-year period beginning April 1, 1919, the agreed annual rental was $3,800 and for the remainder of the term $4,000 annually. Other provisions are stated in a case involving the same lease and need not be repeated here. *Towle v. Morrell, ante,* p. 398.

The owners of the fee, lessors, were Adam Morrell and Mary Morrell. The original lessee was Rose C. Gentleman, who assigned the lease to Ernest Sweet April 1, 1919. Sweet assigned the lease to John W. Towle January 13, 1926. Prior to the assignment to Towle, Sweet improved the premises at a cost of $29,000 by constructing thereon a one-story building consisting of four separate store rooms, each 20 feet wide, fronting east on Twenty-fourth street, with the entrance therefrom. May 21, 1927, Towle assigned to the "Dutch Cleaners, Incorporated," approximately a severable half interest in the lease or the north 40 feet of the leasehold estate, including two of the store rooms. Thereafter, the Dutch Cleaners further improved the assigned north 40 feet by constructing another story on that part of the building and a cleaning and boiler-room in the rear, all at an expense of $12,000. The Dutch Cleaners are still occupants of the north 40 feet under the Towle assignment. They paid rentals therefor to lessors for five years. The other half of the leasehold estate is occupied by Neon Radiant Sign Company, tenant under the assignment by Sweet to Towle.

Sweet died July 9, 1932, leaving surviving him his sole heirs at law Martha Sweet, his widow, Grace Emily Sweet, his daughter, and Ernest Sweet, Jr., his son. Ernest Frankfurt, administrator of the estate of decedent, plaintiff, brought this suit in equity against Neon Radiant Sign Company, Dutch Cleaners, John W. Towle and Martha Sweet, defendants, to declare Towle a trustee for his assignor, Ernest Sweet, deceased, to terminate the trust and to require the trustee to account to the administrator for the rents and other income from the entire leasehold estate and to cancel the assignment from Towle to the Dutch Cleaners. Lessors are not parties to the action.

The district court granted plaintiff equitable relief on the theory that, under the assignment from Ernest Sweet to Towle, the latter was trustee for the former. By decree the trust was terminated. The assignment by Towle to the Dutch Cleaners was also canceled as invalid. Defendants appealed.

The proper deduction from the evidence is that Towle, after the entire lease had been assigned to him, from his own individual funds, in good faith, at different times, in what seemed to be the exercise of good business judgment, expended a large amount of his own individual funds for the benefit of the leasehold estate. Without requiring the administrator, or the heirs of Ernest Sweet, to do equity by restoring to Towle, or allowing him credit for, what he had thus contributed, and without making any other provision to protect him from the loss of such funds, the district court by decree canceled the assignment of the north 40 feet of the leasehold estate to the Dutch Cleaners, terminated the trust, and deprived Towle of possession of the leased property, which he had acquired in good faith under the assignment to him by Ernest Sweet.

In the former case involving the same lease it was held that the Towle assignment to the Dutch Cleaners was valid. *Towle v. Morrell, ante,* p. 398. There was therefore error in the judgment below to the contrary. There was also error in restoring the lease to plaintiff without giving Towle credit, or protecting him in some form, for what he contributed in good faith to the leasehold estate. The maxim that he who seeks equity must do equity should have been applied.

For the errors pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ELLA BLOOR ET AL. V. STATE OF NEBRASKA.

FILED JULY 9, 1935. No. 29457.

1. **Unlawful Assembly.** If three or more persons assemble together with intent to do any unlawful act, with force and violence, against the person or property of another, or to do any unlawful act against the peace, the offense is unlawful assembly, punishable by fine and imprisonment. Comp. St. 1929, sec. 28-804.

2. **Indictment.** Riot and unlawful assembly are kindred offenses in contemplation of criminal law and may be charged in the same complaint.
3. ———. In a prosecution for unlawful assembly, a complaint charging more than the elements essential to such an offense is not for that reason vulnerable to a motion to quash.
4. **Verdict** of guilty in a prosecution for unlawful assembly *held* supported by the evidence.

ERROR to the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

David J. Bentall, Dewey Hanson and *R. P. Starr,* for plaintiffs in error.

William H. Wright, Attorney General, contra.

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

ROSE, J.

In a prosecution in the district court for Sherman county, Ella Bloor, Harry McDonald, Carl Wicklund, Portius Sell, John Squires, Floyd Booth and Loretta Booth, defendants, were tried on a complaint by the county attorney, charging in the name of the state that they—

"On or about the 14 day of June A. D. 1934, in the county of Sherman and state of Nebraska, then and there being, did then and there unlawfully and riotously assemble and gather, together with fifty or more other evil disposed persons whose names are unknown to complainant, with the intent then and there to do certain unlawful acts with force and violence, to wit, to disturb the public peace, to abuse and resist the sheriff of Sherman county, Nebraska, in the execution of his office and to make an assault upon Merle Reed, Leslie Tilton, Harry Oltman, Roy Elrod, Mervin Smith, Howard Rowe and other persons whose names are unknown to the complainant, and that being then and there so unlawfully assembled and gathered together with the purpose and intent aforesaid and having armed themselves with clubs, sticks, black-jacks and other offensive weapons said defendants did then and there unlawfully

and riotously abuse and resist the sheriff of Sherman county, Nebraska, in the execution of his office and did then and there unlawfully and riotously and with force and violence strike, beat and wound Merle Reed, Leslie Tilton, Harry Oltman, Roy Elrod, Mervin Smith, Howard Rowe and numerous other persons whose names are unknown to the complainant and did then and there unlawfully and riotously in the manner and by the means hereinbefore described disturb the public peace of the people of Sherman county, Nebraska, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The statute making unlawful assembly a punishable offense is as follows:

"If three or more persons shall assemble together with intent to do any unlawful act, with force and violence, against the person or property of another, or to do any unlawful act against the peace; or, being lawfully assembled, shall agree with each other to do any unlawful act as aforesaid, and shall make any movement or preparation therefor, the persons so offending shall be fined in any sum not exceeding one hundred dollars, and be imprisoned in the jail of the county not exceeding three months." Comp. St. 1929, sec. 28-804.

Upon a trial the jury found each of the defendants named guilty as charged in the complaint and each was sentenced by the district court to pay a fine of $100 and to be imprisoned in the county jail for 30 days, less the number of days already detained therein. By petition in error defendants present for review the record of their conviction.

It is contended by defendants that the complaint, the rulings of the trial court and the instructions confused the offense of unlawful assembly and the offense of riot to the prejudice of defendants. There are specific assignments that the trial court erred in overruling a motion to quash the complaint on the grounds that it purports to charge more than one offense; that it fails to state facts sufficient

to constitute a cause for a criminal complaint; that it is not sufficiently specific to charge an offense.

Riot and unlawful assembly are kindred offenses in contemplation of criminal law and may be charged in the same complaint. 54 C. J. 829. Unlawful assembly is defined by the statute quoted. An examination of the complaint shows that it contains all the elements essential to the statutory offense of unlawful assembly—an assembly of three or more persons with intent to commit unlawful acts. If the complaint is interpreted as going further and as charging a riot, elimination of the surplusage in that particular would still leave a valid complaint for unlawful assembly, the unlawful acts which defendants were accused of intending to commit being stated. In this condition of the record, error does not affirmatively appear in the overruling of the motion to quash the complaint.

The principal assignments are that the evidence is insufficient to support a verdict against defendants and that the trial court erred in overruling a motion to direct a verdict in their favor at the close of the testimony. There are over 700 pages of evidence and consequently it cannot be discussed in detail. An examination of the record, however, shows that the evidence is sufficient to sustain a verdict that all defendants convicted were guilty of unlawful assembly. There is evidence of the following facts: June 13, 1934, defendant Wicklund went to the Fairmont Creamery in Loup City, Sherman county, and caused a disturbance. The manager of the creamery called the sheriff who directed the removal of the disturber. Wicklund threatened violence and later said to the sheriff, "We'll have 5,000 men in here and we'll block every road into Loup City." By wire he sent calls to South Dakota and Iowa for an assembly to "demonstrate" and pledged "solidarity" to chicken pickers on strike. There was no strike. There were calls for help from four different states. Crowds from different places gathered in Loup City, some in a quarrelsome mood. Thirty persons from Arcadia approached the sheriff and one of them became abusive.

June 14, 1934, defendant Squires and his wife went to the fire station and the wife said in presence of her husband that the fire truck should be put out of commission before they started anything. Defendant Squires told a member of the fire department he had better stay away from the fire truck. A crowd of several hundred people gathered at the courthouse. Defendants were present. Harry Smith addressed the crowd and among other things said:

"If they didn't get their demands that they would stop all roads so they couldn't even sell a toothpick in Loup City," and "If they lock any of us up why we'll get them out if we have to get them out by force."

Defendant Wicklund spoke and among other things said, referring to the sheriff:

"If they took him or bothered him in any way he would bust him in the nose."

There was a cry: "To hell with the sheriff," and "If you put him (Squires) in jail, we'll take him out."

There was violent interference with the sheriff and his deputies in their duty to preserve order. The assembly was proved beyond question. The intent to assemble and commit unlawful acts by resisting officers in the performance of public duties and by interfering with personal and property rights of law-abiding citizens was fairly shown by competent evidence. That each of the convicted defendants was a participant in all the elements constituting the offense of unlawful assembly was a proper finding by the jury on the evidence as a whole. The evidence adduced by the state went further than was necessary to a conviction for unlawful assembly and tended to strengthen proof of unlawful intent, but does not lend support to the assignment of error that the evidence is insufficient to sustain the conviction. The trial court by instructions and the jury by verdict protected defendants from a conviction for riot.

Instructions and rulings on evidence are challenged, but in these respects error prejudicial to defendants has not been pointed out or found in a review of the record.

AFFIRMED.

JAMES RIGG, APPELLANT, V. ATLANTIC, PACIFIC & GULF OIL COMPANY, APPELLEE.

FILED JULY 9, 1935. No. 29544.

Master and Servant: WORKMEN'S COMPENSATION LAW. The Nebraska workmen's compensation act is not applicable where the contract of employment was made in another state where the employee was injured in said state in the performance of duties which were not incidental to an industry conducted in this state by the employer.

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

Anson H. Bigelow, for appellant.

Crossman, Munger & Barton and *W. G. Richard, contra.*

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

DAY, J.

This is a compensation case. The state compensation commissioner did not award compensation. The plaintiff appealed to the district court, where a judgment was entered in favor of defendant, from which plaintiff appeals to this court. The injury of the plaintiff in the course of his employment, the amount of the wages paid, and some degree of permanent disability as a result were admitted facts.

There were two primary issues presented to the trial court aside from the extent of the disability. One was that the plaintiff, Rigg, was not at the time of the injury an employee of the defendant, Atlantic, Pacific & Gulf Oil Company, but was the employee of the Pennsylvania Consumers Oil Company. The other issue was that the plaintiff was not compensable for his injuries under the Nebraska law for want of jurisdiction of the subject-matter.

In view of the conclusion of this court as to the second issue presented, the first is not so important in the determination of this case. However, it consumed a major por-

tion of the attention of the trial court, and the evidence relating thereto comprises a large part of the record. It is discussed here very briefly for that it is so closely related to the question of jurisdiction over the subject-matter. The Pennsylvania Consumers Oil Company had its principal place of business in Council Bluffs, Iowa. It is contended here that Rigg was employed by it about December 18, 1930. It had two filling stations and two resale stations in Omaha, a station in Weeping Water, and one at Eagle, Nebraska. At the time, this constituted its entire business in Nebraska. The plaintiff was a painter, and it was his duty to paint stations with the colors of the Atlantic, Pacific & Gulf Oil Company as directed. He painted some of the stations above described in Nebraska, but most of his work was in Iowa. The Atlantic, Pacific & Gulf Oil Company owned a majority of the stock in the Pennsylvania company, and the record reveals that its business and that of the Atlantic, Pacific & Gulf Oil Company were not easily distinguishable. At first, the pay checks to plaintiff were from the Pennsylvania company, but later they were from the other company. The superintendent of construction who employed plaintiff testified that he worked for the Atlantic, Pacific & Gulf Oil Company. At the time of the injury, May 28, 1931, plaintiff was paid with an Atlantic, Pacific & Gulf Oil Company check, and he was painting stations their colors. He was paid compensation for 100 weeks by checks of the Atlantic, Pacific & Gulf Oil Company in Iowa. An application for a determination of the permanent disability named both companies as employer. However, it is insisted by defendant that the corporations are separate and distinct entities, and it was not the plaintiff's employer at the time of the accident. As stated, this does not seem necessary to determine for a decision of this case. If the plaintiff was employed by the Atlantic, Pacific & Gulf Oil Company, its principal place of business was in Kansas City, Missouri. If he was employed by the Pennsylvania Consumers Oil Company, its principal place of business was at Council

Bluffs, Iowa. If both companies were identical, as contended by appellant, the principal place of business of the industry conducted in Davenport, Iowa, was at Council Bluffs, Iowa, and certainly not at Omaha, Nebraska. There were only four stations in Nebraska, except stations designated as resale stations run by others selling merchandise of the company of which there were at one time ten. The number of stations in Nebraska was very small as compared to the number in Iowa. The plaintiff was injured at Davenport, Iowa.

Even assuming that the defendant was the employer at the time of the injury, the plaintiff does not, under any conclusion reached by this court from the evidence in trial *de novo,* come within the provisions of the Nebraska workmen's compensation act. The contract of employment was made in Iowa. The superintendent sent word to plaintiff to call him by telephone. At this request, Rigg called and was told that if he wished to work to come to the plant in Council Bluffs. He went to Council Bluffs and commenced his employment by painting a truck there to be used in the work. He then did some work in Omaha, but considerable more in Council Bluffs and other points in Iowa. All of the time, he was paid from the Council Bluffs office of the oil company. He reported to the superintendent in Council Bluffs, Iowa, for work. There is a suggestion that plaintiff was employed by the oil company from a headquarters at Twenty-eighth and Boyd streets in Omaha. A statement of plaintiff's account appears on a form of the Atlantic, Pacific & Gulf Oil Company, Twenty-eighth and Boyd streets, Omaha, Nebraska, but the plaintiff's name is typed as follows: "Jim Rigg, c/o A P & G Oil Co., Council Bluffs, Iowa." There is no evidence which would support a finding of fact that plaintiff was employed at and worked out of a headquarters in Omaha, Nebraska. It is concluded (1) that the contract of employment was made in Iowa, (2) that the employee was injured while working in Iowa, (3) that the work of the employee at the time of the injury was not incidental to the industry in Nebraska of the

employer. The industry conducted in Nebraska by the defendant, if any, was the operation of four filling stations. The painting of a station in Davenport, Iowa, was not incidental to the business in Nebraska.

The Nebraska workmen's compensation act is not applicable where the contract of employment was made in another state where the employee was injured in said state in the performance of duties which were not incidental to an industry conducted in this state by the employer. *Watts v. Long,* 116 Neb. 656; *Stone v. Thomson Co.,* 124 Neb. 181; *Freeman v. Higgins,* 123 Neb. 73; *Esau v. Smith Bros.,* 124 Neb. 217; *Skelly Oil Co. v. Gaugenbaugh,* 119 Neb. 698. If the employee had been injured while painting defendant's oil station in Nebraska, the case in Iowa would have been identical with the facts in *Penwell v. Anderson,* 125 Neb. 449. In that case, Good J., so clearly analyzed all the previous opinions of this court that it is unnecessary to do so again. An application of the law announced in these decisions, as reviewed in the last cited case, supports our conclusion here. The question of the extraterritorial operation of workmen's compensation acts has given the courts numerous cases. Reference is made to the annotations in 59 A. L. R. 735, 82 A. L. R. 709, and 90 A. L. R. 119, as evidencing the extent of the problems. The rights and liabilities under workmen's compensation acts are purely statutory, and the statutes of different states are not identical. We are satisfied to continue upon the course already charted by previous decisions.

These rules are decisive of this case. The relationship between the Pennsylvania and the Atlantic oil companies is immaterial, therefore, and is not decided. The same is true of the payment of compensation under the Iowa law. The extent of the injury is likewise immaterial. The judgment of the district court is followed for a different reason from that in the journal entry of the district court. Where a trial court has reached the correct decision, its judgment will not be disturbed. *State v. Dickinson,* 59 Neb. 753.

AFFIRMED.

FARMERS STATE BANK OF SMITHFIELD, APPELLANT, V. HENRY RENKEN ET AL., APPELLEES.

FILED JULY 9, 1935. No. 29291.

1. **Fraudulent Conveyances:** CONVEYANCE FROM PARENT TO CHILD. When a conveyance of real property is made from one member of a family to another, which places the property beyond the reach of the creditors of the grantor, the transaction will be closely scrutinized, and the grantee must establish the *bona fides* of the conveyance.
2. ———: ———. A transfer of realty from a father to a son will not be deemed fraudulent as to creditors of the father where the son gave a fair and reasonable consideration, without notice or knowledge of any fraudulent intent on the part of the father.

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

Cook & Cook, for appellant.

Frank A. Anderson, A. W. Storms, O. E. Bozarth and *C. E. Clark, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

This is a suit in equity, brought as a creditors' bill, to set aside as fraudulent two deeds of real estate made by the judgment debtor to two of his sons. The trial court found generally in favor of the defendants, and dismissed the plaintiff's action.

It is disclosed by the evidence that on April 14, 1926, Henry Renken, a retired farmer, now about 77 years of age, signed a note with his youngest son, Louie Renken, to one Lew T. Smith, in the sum of $5,650, and said Smith sold and assigned said note to plaintiff bank; that on July 21, 1932, the said Henry Renken and Louie Renken gave a note to the plaintiff for $300, and the same parties on July 21, 1932, gave another note to the plaintiff for $1,600; that on February 27, 1933, the plaintiff obtained a judg-

ment against Henry Renken and Louie Renken in the district court for Phelps county, Nebraska, in the sum of $7,615.09, with 10 per cent. interest. On September 15, 1933, a certified transcript of said judgment was filed in the district court for Gosper county, Nebraska, and upon this judgment it was sought to subject to sale two quarters of land in Gosper county which had been deeded by Henry Renken and wife to his sons Henry W. Renken and Otto H. Renken. In this connection the evidence disclosed that the father, Henry Renken, had made an agreement in about 1904 with his son Henry, and a little later with Otto, that if they each stayed at home and worked faithfully for the father until they were married he would give them each a farm; that Henry carried out his part of the agreement faithfully until he was married in 1909, and Otto did the same until he was married in 1913. Henry W. Renken, the oldest son, was 26 years of age at the time he was married, and the quarter-section of land which his father designated as his was unimproved, but the father at once improved it by building a house and barn, and stocked it with live stock and with some machinery, and Henry on his part put upon said land improvements to the value of $3,749.25, all upon the promise of his father that the land would be his some day. He paid his father rent upon the land each year, being one-third crop rent. Otto H. Renken entered into a similar agreement with his father, that if he would remain at home and work for his father until he was married he would give him a farm and build him a home, and, in accordance therewith, he remained at home and rendered valuable services for his father until he was married in 1913, when his father put improvements upon the quarter of land which was to be his, building a house and barn, corncrib, windmill, and moving a chicken house up from the home place, and the son Otto has lived on this quarter-section of land ever since.

During the years these two sons lived at home, they were not paid any wages, but received a small amount of spending money and their clothing, and worked hard for

the father, just like hired men. After Otto moved onto his quarter he built an addition to the house, consisting of a bathroom and pantry, at his own expense, and also built a cattle shed, 60 by 36 feet, with cement floor and stanchions, a hog house, 20 by 30 feet, a large hen house, a good-sized water tank, an ice house, being a cave bricked up, with cyclone roof, built a cistern, and installed a Delco water plant in the basement, and built fencing, cross-fencing, and a garage, all at his own expense. Each of the brothers planted on their respective farms a large amount of trees and other nursery stock, Henry W. Renken testifying that the nursery stock alone cost him $1,000, and each of these two sons kept the improvements upon their respective places repaired and painted.

At the date of the execution and delivery of the three notes which have been reduced to judgment, these two improved quarter-sections of land stood in the name of the father, Henry Renken, who signed the notes. The northeast quarter of section 16, being the place occupied by Henry W. Renken, was encumbered by the father with a mortgage of $6,000, and was deeded to him by his father October 11, 1932, subject to the mortgage, and the northeast quarter of section 15, being Otto's place, was encumbered by a mortgage in the sum of $7,000. On October 8, 1932, the father, Henry Renken, and his wife conveyed by warranty deed the northeast quarter of section 15, township 7, range 21, to Otto H. Renken, subject to the mortgage against the property in the sum of $7,000. It is not denied that, at the time the father gave a property statement to the plaintiff bank some years before, he had listed these two quarter-sections of land as his own, and failed to list any indebtedness owing to his sons, Henry W. or Otto.

It is insisted by the defendants that the contract and agreement entered into by the father with the sons was long prior to the time that he signed the notes with his son Louie, and that in conveying the two quarter-sections of land to these two sons the deeds were based upon a sufficient consideration and were valid, and that no mutual

fraudulent intention between the father and either of these sons has been disclosed in the evidence. The evidence discloses that each of these sons, Henry W. and Otto, placed of record with the county clerk of Gosper county, Nebraska, notices of their respective claims to the respective quarters of land upon which they were living, and of the interest they had therein and the permanent improvements they had placed thereon, and said notice was entitled "Notice of Occupying Claimant's Interest;" that one of the notices was recorded in Book 5 of Miscellaneous Records of Gosper county, at page 325, by Henry W. Renken on October 6, 1930, and a similar notice was placed of record by Otto H. Renken in Book 5 of Miscellaneous Records of Gosper county at page 346 on March 3, 1931. It appears that the only purpose of these respective notices was to give notice to the world that they were claiming rights in and to these quarters of land upon which they were living, and which their father had not yet deeded to them, but had promised to give them years before if they would remain and work for him until they were married, and was an honest effort on their part, in a perfectly open and aboveboard manner, to give notice to all parties of their interest in these respective tracts of land.

The appellant bank insists that when a conveyance of property is made from one member of a family to another, and the effect of it is to place property beyond the reach of the creditors of the grantor, the transaction will be closely scrutinized, and the grantee must establish the *bona fides* of the conveyance, and cites in support thereof *Blanchard v. McMillan,* 113 Neb. 275, and *Tanner v. Frink,* 101 Neb. 660. Our court has gone still further, in *Buckner v. McHugh,* 123 Neb. 396, and held that a conveyance from a parent who is unable to pay his debts to a child should be most carefully scrutinized, because such transactions are presumptively fraudulent. See *Light v. Kennard,* 11 Neb. 129.

It is admitted by all the parties to this lawsuit that this is, and has been, the law in Nebraska for many years, but

in considering the above statement of the law there are certain requirements, which are essential to the application of the law and run through all the opinions, bearing upon this question. To set aside such a conveyance as a fraudulent transfer, the fraudulent intent must be participated in by both parties to the transaction.

In our Nebraska law, in the chapter relating to conveyances to defraud creditors, section 36-405, Comp. St. 1929, it provides generally that this question of fraudulent intent shall be deemed a question of fact, and not of law, and section 36-406, Comp. St. 1929, provides that the provisions of this chapter shall not affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. By this chapter of our statutes our legislature confirmed prior rulings of our court which had held it proper and right to set aside fraudulent conveyances when both the grantor and the grantee were parties to the fraud and joined in an attempt to beat the creditors of the grantor, but it is just as evident from the section cited that the legislature made it clear that the law would not affect the title of a *bona fide* purchaser who did not have previous notice of the fraudulent intent of the grantor, or who did not join with the grantor and assist him in perpetuating a fraud upon his creditors.

This same limitation has recently been set out by Chief Justice Goss in *State Bank of Beaver Crossing v. Mackley*, 121 Neb. 28, in which is cited from *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130, the following statement of the law of Nebraska: "In the absence of a mutual fraudulent intent, the law does not interfere with the right of a person, be he solvent or insolvent, to make such disposition of his property, based upon a valid consideration, as his judgment dictates."

It has been held that the true facts of a consideration expressed in a deed may be shown by parol testimony

(*Hartman v. Lipovsky,* 122 Neb. 823); therefore, the trial judge in the case at bar allowed evidence to be taken at some length showing that the son, Henry W. Renken, moved upon the tract of land deeded to him very shortly after his marriage in 1909, upon an agreement with his father that this place should be his, and in pursuance of said agreement had resided upon said place for about 25 years, adding thousands of dollars of improvements to the place out of his own money, and considering and treating it as his own in every respect save upon two points, *i. e.,* the naked title still remained in his father, and he paid his father certain share rent from part of the farm; and the same facts were brought out in evidence in relation to the property occupied by Otto for more than 20 years.

An examination of the evidence discloses that the father did not strip himself of all of his property when he deeded these two quarters of land to his sons, Henry W. and Otto, but he also owns 320 acres of land in Cheyenne county, Nebraska, which is well improved, and of a fair market value of between $13,600 and $15,200, according to the witnesses, subject only to a mortgage of $3,000. In the face of these facts, it cannot be said that the father was insolvent when he conveyed the property to his sons. It is also disclosed by the evidence that the plaintiff's judgment is practically all of the indebtedness outstanding against Henry Renken.

The father recognized the long-standing obligations to his sons, and the *bona fide* agreement that he had made with them more than 20 years before, and in a sense preferred them as to his other creditors. This evidence of an adequate consideration for these transfers overcame the presumption of fraud, and does not disclose any fraudulent intent on the part of the two sons, Henry W. Renken or Otto H. Renken.

The trial court found that the deeds in question were each based upon a valid consideration and were without mutual fraudulent intent, and quieted the title in the respective grantees. After a careful consideration of the

entire record, this court unanimously finds no prejudicial error therein, and affirms the decree as entered.

AFFIRMED.

LINCOLN JOINT STOCK LAND BANK, APPELLANT, V. JOHN H. BEXTEN ET AL., APPELLEES.

FILED JULY 9, 1935. No. 29471.

1. **Contracts**: CONSTRUCTION. Where a word or part of a word has been omitted by inadvertence from a written contract, the same may be supplied by construction at law without resort to reformation, if the context shows that the word or part of a word is omitted.
2. ———: AVOIDANCE. On the facts presented by the record in this case, "Courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form." *Von Knuth v. Ryan*, 107 Neb. 351.
3. **Banks and Banking**: AUTHORITY OF CASHIER. Under the facts in this case, *held*, that the cashier of defendant bank did not have actual authority from said bank to enter into and sign the contract in question.
4. ———: ———: ASSUMPTION OF MORTGAGE INDEBTEDNESS. Where a national bank, holding a second mortgage on land to protect its lien, acquires title to the land, taking title, for its convenience, in the name of its cashier, the cashier has no inherent authority, by reason of his position as cashier, to enter into a contract, as agent for the bank, assuming liability on the part of the bank for the payment of the debt of a third person secured by a first mortgage thereon.
5. **Principal and Agent**: UNAUTHORIZED CONTRACTS: RATIFICATION. "A principal who accepts the fruits of a contract made by an agent in excess of his authority is liable to the person with whom such contract is made, if he had full knowledge or was put on inquiry from which he could have obtained full knowledge.

   "Ratification by the principal of the unauthorized act of his agent has the same effect as prior express authority, and generally relates back to the time when the unauthorized act was done." *General Credit Corporation v. Moore*, 128 Neb. 881.

6. ———: ———: ———: QUESTION OF FACT. In an action at law, the question whether a contract made by an agent in excess of his authority has been ratified by his principal is ordinarily a question of fact to be determined by the jury.
7. ———: ———: ———: KNOWLEDGE OF FACTS: QUESTION FOR JURY. On the facts in this case, where a principal has accepted the fruits of a contract made by an agent in excess of his authority, the question whether the principal at the time of accepting the same had full knowledge of the terms and conditions of the contract, or was put upon inquiry from which he could have obtained full knowledge thereof, *held* to be for the jury to determine.
8. Contracts: LIABILITY. "A disclosed or partially disclosed principal is subject to liability upon an authorized contract in writing, if not negotiable or sealed, although it purports to be the contract of the agent, unless the principal is excluded as a party by the terms of the instrument or by the agreement of the parties." Restatement, Law of Agency, sec. 149.

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

Good, Good & Kirkpatrick, Brogan, Ellick & Shoemaker and *James J. Fitzgerald, Jr.*, for appellant.

Finlayson, Burke & McKie, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

HASTINGS, District Judge.

This is an action at law commenced in the district court for Douglas county, Nebraska, by the Lincoln Joint Stock Land Bank of Lincoln, Nebraska, as plaintiff, against John H. Bexten, Mary A. Bexten, his wife, and the First National Bank of Omaha, Nebraska, as defendants, upon a written contract wherein the plaintiff is named as party of the first part and the defendants Bexten as parties of the second part. At the conclusion of the taking of the evidence the defendants made separate motions asking the court to direct the jury to return a verdict in their favor,

or, in the alternative, that the court dismiss the action against each of them. The trial court dismissed plaintiff's cause of action against each and all of the defendants. Plaintiff appeals from the judgment of dismissal.

This is the second appearance of this case in this court; the earlier is reported in 125 Neb. 310. The first appeal was taken by the plaintiff from an order sustaining separate demurrers of the defendants, the First National Bank of Omaha and Mary A. Bexten; the ground of the demurrers being that the petition did not state facts sufficient to constitute a cause of action. Plaintiff elected to stand upon its petition. This court held that the petition stated a cause of action and reversed and remanded the cause.

This cause was tried upon the same petition that was before this court for consideration in the first case, and reference is made to the opinion in that case for the statement of the facts alleged in the petition.

After reversal, John H. Bexten filed his answer, in which he admitted that he took the title to the real property described in plaintiff's petition at about the time named therein, admitted that he entered into an agreement with the plaintiff on or about the date alleged in plaintiff's petition, and denies that he assumed or agreed to pay, or intended to assume or agree to pay, the Lacey note and mortgage. He further alleged that he had determined to discontinue making the semiannual payments and had so informed plaintiff's agent and representative, and that, as an inducement to him to continue making the payments, plaintiff agreed to reduce the rate of interest and to reduce the amount of the semiannual payments; that, pursuant to negotiations in respect thereto, plaintiff submitted to said defendant for examination a printed instrument which defendant did not read or carefully examine, but which he believed to be an acknowledgment of the understanding reducing the rate of interest and semiannual payments. He further denied that he was the agent of the defendant First National Bank in executing said agreement or any

other instrument in connection with said matters, and denied that he was authorized for or in behalf of said bank to enter into said agreement in behalf of said bank.

The defendant First National Bank filed a separate amended answer in which it alleged that John H. Bexten took and held the title to the property, described in plaintiff's petition, as trustee for the defendant, and specifically denied that it authorized the defendant John H. Bexten for it or in its behalf or in its name to make or execute or enter into said extension agreement. Said defendant denied generally each and every allegation in plaintiff's petition.

Plaintiff filed separate replies to the respective answers, consisting of a general denial.

Briefly summarized, the essential facts are that on June 11, 1919, one Lacey procured a loan from the plaintiff of $35,000, the payment of which was secured by a mortgage on a section of land in Monona county, Iowa. The promissory note for which the mortgage was given to secure drew 6 per cent. interest from April 1, 1919, until maturity, which was payable semiannually, $1,225 on the 1st day of October, 1919, and a like sum on the 1st day of April and October in each year until 65 semiannual payments had been made, and a final payment of $1,023.05 on the 1st day of April, 1952. Thereafter there was assigned to the defendant bank, as collateral to a loan of a borrower, a second mortgage on the land in question securing $20,000, and later said bank became the owner of said second mortgage to protect itself on the loan to which it was collateral. In 1922 or 1923 the plaintiff commenced foreclosure proceedings, and the defendant bank became interested in acquiring title to the land involved to protect its second lien. Before acquiring the title it was agreed that plaintiff would dismiss the foreclosure proceedings and reinstate the loan if the defendant bank paid the delinquent instalments and taxes. Pursuant to said agreement plaintiff dismissed the foreclosure proceedings and reinstated the loan, and defendant bank paid the delinquent items on April 25,

1923, then amounting to $7,508.28. The title to the land was taken in the name of John H. Bexten in April, 1923, who then was cashier of defendant bank, for the convenience of the defendant bank. The defendant bank thereafter, through its agents and employees, leased the land, collected rentals, and paid interest and taxes thereon from October 1, 1923, to April 1, 1926, inclusive. The defendant John H. Bexten, who became cashier of defendant bank in 1922, resigned his position in 1929, and severed his connection with said bank, and, at the request of defendant bank, Bexten conveyed the land to Mr. Elliott, assistant cashier of the bank, who held it for the same purposes that Bexten had held it.

On September 10, 1926, the contract upon which this action is brought was entered into between the plaintiff bank, as "party of the first part," and John H. Bexten and his wife, Mary A. Bexten, as "parties of the second part," which, by its terms, reduced the rate of interest from 6 per cent. to 5¼ per cent. per annum, resulting in the reduction of the semiannual payments to $960.93. The agreement also stipulated for an acceleration of the maturity of unpaid instalments in the event of default of the payment of any one of the instalments, and extended the time of final payment to the year 1966. It provided that after five years from the date of the agreement "the mortgagor" had the option of paying in advance upon any regular instalment date any number of payments on account of the principal of the loan, etc. Also: "Part.....of the second part agrees to make said payments as herein provided and the said original note and mortgage shall continue in full force and effect as originally made except as extended and modified by this agreement." The contract was signed in the name of plaintiff by its president, as "party of the first part," and by defendants John H. Bexten and Mary A. Bexten, as "parties of the second part." The contract was executed in duplicate, Bexten retaining a copy and transmitting the original to plaintiff. Bexten testified he placed the copy retained with his personal pa-

pers in the defendant bank, and shortly before the first semiannual payment became due in October, 1926, advised the officers of defendant bank that he had entered into the contract whereby the rate of interest had been reduced to 5¼ per cent., but did not show them the contract, nor did they ask to see it. The instalments, as provided in said contract, were paid by the defendant bank as they became due to October 2, 1930. Default was made on the instalment due on April 1, 1931. Thereupon the plaintiff commenced foreclosure proceedings in Iowa, to which defendant bank and the defendants Bexten were made parties, constructive service was had upon these defendants, a decree of foreclosure was entered, the land sold, and the plaintiff bought the same at the sale had November, 1931, for $23,000. When the deed was received by the plaintiff, after credit had been given for the amount paid, the amount remaining due to the plaintiff was $10,916.47.

It further appears from the correspondence between the plaintiff and defendant bank, previous to the time that the contract in question was entered into, that plaintiff was advised that the defendant bank was the owner of the land on which it held its mortgage, how it became the owner, and that the defendant John H. Bexten had no interest therein, and that he held the mere naked legal title for the benefit of the bank, without any management or control over the same except as an officer and agent of the bank.

It is conceded by counsel for plaintiff that the motion of the defendant Mary A. Bexten was rightfully sustained, as the evidence fails to sustain the allegations of plaintiff's petition as to the recovery of a valid personal judgment against her for the deficiency in the foreclosure proceedings in Iowa, and that, having signed the contract solely as the wife of John H. Bexten, she incurred no liability thereunder.

Error is assigned in sustaining the motions of defendant bank and of the defendant John H. Bexten to dismiss as to each of them. The trial court, in sustaining the motions of the defendant bank and John H. Bexten, said: "How-

ever, I do not believe that the parties intended that the clause 'Part.....of the second part agrees to make said payments as herein provided' should be binding or a part of the agreement because they failed to fill in the blank space after the word 'Part' with the letters 'ies.'" No other reason was given by the trial court for the sustaining of said motions.

Based upon the ground assigned by the trial court for the dismissal as against said defendants, it is urged by their counsel that the failure to insert the letters omitted from the assumption clause of the contract rendered it void. This position is untenable. It appears from the contract that the letters necessary to fill the blank are clearly indicated by the agreement itself and no ambiguity arises in connection therewith. "Where the context of a written contract clearly implies or suggests that a certain word has been omitted, such word will be supplied by construction to fully express the intention of the parties." *Hamilton v. Wead*, 122 Neb. 854. See, also, *Kannow & Sons v. Farmers Cooperative Shipping Ass'n*, 76 Neb. 330.

Where a word or a part of a word is omitted by inadvertence from a written contract, the same may be supplied by construction at law without resort to reformation, if the context shows that the word or part of a word is omitted. 4 Page, Contracts (2d ed.) 3503; 13 C. J. 538; *Olcon v. Rosenbloom & Co.*, 247 Pa. St. 250; *Rapp v. Linebarger & Son*, 149 Ia. 429; *Donnybrook State Bank v. Corbett*, 37 N. Dak. 87.

When this court held that the petition stated a cause of action in the former appeal, there was attached thereto as a part thereof an exact copy of the original contract introduced in evidence herein, and while the question here presented was not directly raised, this court, in holding the petition stated a cause of action, held, in effect, that the omissions of the letters in the blank in the assumption clause did not invalidate the contract. It follows that the failure to fill in the letters in the blank left in the assumption clause did not furnish a sufficient ground to warrant

the dismissal of plaintiff's cause of action against said defendants or either of them.

In their brief counsel for defendants "Concede that unless the omission of the word 'parties' from the agreement renders that part of it ineffective, so that there is no assumption of the debt, the defendant Bexten is otherwise liable, and the order of the district court, dismissing him from the case, would therefore be erroneous."

The defense tendered by the answer of the defendant John H. Bexten that he did not read the contract and know that the assumption clause was contained therein, under the facts, is not available to him. "Courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form." *Von Knuth v. Ryan,* 107 Neb. 351.

It is urged by counsel for the defendant bank that the judgment of dismissal was properly sustained in its behalf because there is no evidence that the defendant Bexten was the agent of the defendant bank with authority to bind the bank by signing the extension agreement with the clause assuming liability for the payment of the mortgage debt therein. It is not claimed that the defendant Bexten did not have authority, as an officer and agent of the defendant bank, to execute the extension agreement for the reduction of the rate of interest and the extension of time of payment, but that he exceeded his authority as an agent when he executed the extension agreement with the assumption clause included.

Counsel for plaintiff discusses, from four points of view, the authority of the defendant Bexten to bind the defendant bank, and the liability of the bank for his act: First, actual authority; second, inherent authority; third, apparent authority; fourth, ratification.

Counsel for plaintiff contends that a by-law of defendant bank gave Bexten, as cashier of the bank, actual authority to enter into and sign the contract in question.

The by-law on which the contention is based is as follows: "All contracts, checks, drafts, etc., and all receipts for circulating notes received from the comptroller of the currency, shall be signed by the president, cashier, or other duly authorized officer." As we construe the by-law, it refers only to contracts authorized by the board of directors, or such as were within the inherent power of the cashier to enter into. There is no evidence that Bexten was authorized by the board of directors to sign and execute the contract in question. In the absence of express authority on the part of directors of the bank, the cashier did not have authority, inherent in his position as cashier, to bind the defendant bank by entering into a contract including assumption of liability. 4 Michie, Banks and Banking (Perm. ed.) 133; *United States v. City Bank of Columbus*, 21 How. (U. S.) 356; *Bilbo v. Ball*, 194 Ia. 875; *Spongberg v. First Nat. Bank*, 18 Idaho, 524; *Bank of Gloster v. Hindman*, 95 Miss. 742; *Montgomery Bank & Trust Co. v. Walker*, 181 Ala. 368.

We have defined apparent authority of an agent which will bind his principal, to be: "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority conferred upon him by his principal." *Mangiameli v. Southern Surety Co.*, 111 Neb. 801. The facts and circumstances disclosed by the evidence are wholly insufficient to show apparent authority to obligate defendant bank for the payment of the mortgage debt.

Counsel for plaintiff insists that, although the assumption of the payment of the mortgage debt by Bexten might have been in excess of his authority as agent for the defendant bank, nevertheless the evidence is sufficient, with the reasonable inferences to be drawn therefrom, to have warranted a finding that defendant bank, by accepting the fruits of the contract, ratified the same. In accord with numerous decisions of this court we have recently held:

"A principal who accepts the fruits of a contract made by an agent in excess of his authority is liable to the per-

son with whom such contract is made, if he had full knowledge or was put on inquiry from which he could have obtained full knowledge.

"Ratification by the principal of the unauthorized act of his agent has the same effect as prior express authority, and generally relates back to the time when the unauthorized act was done." *General Credit Corporation v. Moore,* 128 Neb. 881.

A few days after Bexten had entered into the contract for the benefit of the bank, the bank made the first payment thereunder to plaintiff. At that time its officers, through the defendant Bexten, had knowledge of the execution of the contract; that he had a duplicate thereof in his possession in the bank, and that by its terms the rate of interest and the amount of semiannual payments had been reduced. By reason of the agreement the defendant bank, for nearly five years, continued to enjoy and use the property encumbered by plaintiff's mortgage at a reduced interest rate and with postponed date of payment. The defendant bank benefited by the reduction in the amount of the nine semi-annual payments that it made on the contract. The officers of defendant bank were all men of large business experience, and whether, during the time that the bank was enjoying the fruits of the contract, they had full knowledge of its terms and conditions, or knowledge sufficient to have put them upon inquiry, presented a question of fact for the jury to determine. The fact that defendant Bexten testified that he did not read the contract, that he did not inform the officers of its terms, other than that it reduced the rate of interest, and that the other officers did not see the contract, was not conclusive that the bank, through its officers, did not have knowledge of the obligations imposed by the contract, or sufficient knowledge to put them on inquiry from which full knowledge could have been obtained. The reasonableness or unreasonableness of this testimony, and the weight to be given it, was for the jury. 21 R. C. L. 820, sec. 6. The question whether the defendant bank ratified the contract

entered into by Bexten was a question for the jury to determine.

It is contended by counsel for the defendant bank that the rule as to the liability of an undisclosed principal cannot be invoked against or in behalf of a principal known to the other party to the contract at the time the contract was made. Counsel further contend that where a person with knowledge of the agency enters into a contract with the agent, in the agent's name, his election to deal with the agent as an individual appears and takes place at the time of the making of the contract. The rule supported by the great weight of modern authority is stated in section 149, Restatement, Law of Agency: "A disclosed or partially disclosed principal is subject to liability upon an authorized contract in writing, if not negotiable or sealed, although it purports to be the contract of the agent, unless the principal is excluded as a party by the terms of the instrument or by the agreement of the parties."

In the comment on the rule stated, it is said:

"The fact that the principal's name is not in the instrument and that there is no appearance of agency upon the writing is some evidence that the parties intended that the agent alone should be liable. It is not sufficient evidence, however, to raise a presumption against the liability of a disclosed principal where it appears that, prior to the signing of the memorandum, the agent was known to be acting as an agent in the transaction.

"Upon the question of whether or not, under the circumstances, the third person accepted the credit of the agent only, the written memorandum binding the agent is not conclusive evidence, except where by its specific terms the principal is excluded as a party."

The same contention made here was made in the case of *Moore v. Consolidated Products Co.*, 10 Fed. (2d) 319. The court, passing upon this question, said: "The question, after all, is one of fact. Was the contract made for and in behalf of the principal? If it was, the act of the agent was the act of the principal, and the principal may sue or

be sued thereon. The great weight of modern authority applies the rule, both where the principal is known and where the principal is undisclosed, to the other party to the contract." Many authorities are cited by the court in that opinion sustaining this proposition.

Although the extension contract purports to be the contract of the defendant Bexten, his principal, the defendant bank, is not excluded by the terms thereof, or by agreement of the parties. The evidence shows that it was understood that Bexten was entering into the contract for the defendant bank, and for its benefit. The facts in this case show no election on the part of the plaintiff to deal with Bexten as an individual.

The liability of the defendant bank to make payment of all deferred instalments depends upon whether that element of the contract was ratified by the defendant bank. If so, the legal effect is the same as if Bexten had prior express authority to enter into the contract, and the defendant bank is liable thereon.

It follows from what has been said that error was committed in entering a judgment of dismissal for the defendants John H. Bexten and the First National Bank, and as to them the judgment is reversed and the case remanded for further proceedings. The judgment as to the defendant Mary A. Bexten is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. NATIONAL SURETY CORPORATION, APPELLEE, V. WILLIAM B. PRICE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., APPELLANTS: HOMER L. KYLE, ADMINISTRATOR, INTERVENER, APPELLANT.

FILED JULY 9, 1935. No. 29357.

1. **Mandamus** against the proper state officers is the proper remedy to enforce the execution and delivery of a warrant where appropriation therefor has been duly made by the legislature.
2. **Statutes**: PROVISO: CONSTITUTIONALITY. A proviso attached

to an appropriation, subject of which proviso is not referred to in the title of the act, is contrary to section 14, art. III of the Nebraska Constitution, and is invalid.

3. ———: CONSTITUTIONALITY. "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld." *State v. Stuht*, 52 Neb. 209.

4. **States.** "Every state has jurisdiction to determine for itself liability of property within its territorial limits to seizure and sale under process of its courts." *Clark v. Williard*, 294 U. S. 211.

5. **Garnishment** does not lie against the state except as authorized by sections 20-1012, 20-1013, Comp. St. 1929, and said provisions do not authorize garnishment for the fund involved in this case.

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

William H. Wright, Attorney General, and *Edwin Vail,* for respondents.

J. W. Kinsinger, H. C. Henderson and *Stewart, Stewart & Whitworth,* for intervener.

Smith & Schall and *James C. Kinsler,* for relator.

Howard Saxton and *F. C. Radke, amici curiæ.*

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

LIGHTNER, District Judge.

Mandamus to compel the auditor and other state officers to issue and deliver a warrant for $5,000 to relator, National Surety Corporation, being the premium on state treasurer Hall's bond for the biennium January, 1933, to January, 1935. The district court found for the relator, and the respondents and Kyle, administrator, intervener, appeal. The controversy arises from the fact that the National Surety Company, predecessor of the relator, Nation-

al Surety Corporation, wrote the state treasurer's bond for the biennium above referred to, and afterwards became in a failing condition, and was rehabilitated through certain proceedings in the state of New York and continued under the name of National Surety Corporation. The present suit is in effect a controversy between the National Surety Corporation, which claims the premium, and certain Nebraska creditors of the National Surety Company. The National Surety Corporation claims that it is the duly constituted successor of the National Surety Company, that it assumed the obligations of the company, received an assignment of this claim, and is entitled to the $5,000 premium. Respondents and intervener claim, on the other hand, that the $5,000 is a fund for creditors of the state of Nebraska and should be paid in satisfaction of their claims, rather than to relator corporation. The 1933 Nebraska legislature, in making appropriation for the premium, attempted to effectuate this latter purpose, and after making the appropriation added a proviso, the appropriation and proviso being as follows:

"Premium on Official Bond of State Officers

"National Surety Company, Omaha, premium on state treasurer's bond.....$5,000

"Provided that the claim of the National Surety Co., of Omaha, for $5,000 shall be paid to the director of insurance for the state of Nebraska to be held by him to satisfy claims against said National Surety Co., which is now in the hands of the Receiver." Laws 1933, ch. 15.

It is claimed that the title of the appropriation bill did not properly refer to the subject-matter of the proviso and is in violation of section 14, art. III of the Constitution. Other facts necessary for a complete understanding of the controversy are that, subsequent to the furnishing of the bond, to wit, on or about April 29, 1933, and while the state treasurer's bond was still in full force and effect, proceedings were commenced in the proper court of New York state, pursuant to the laws of that state, for the rehabilitation of the National Surety Company, which was a cor-

poration of New York; that, pursuant to the orders of that court in the rehabilitation proceedings and in accordance with the laws of New York, certain assets of the National Surety Company were conveyed to the relator, National Surety Corporation, also a corporation of New York, including the $5,000 here in dispute, which was then unpaid; that later certain creditors of the National Surety Company brought suit in the same court, or intervened in the rehabilitation proceedings and attacked the validity of said rehabilitation proceedings, and undertook to subject certain of the assets of the National Surety Company, or all its assets, to the satisfaction of their claims; that said suit was duly tried and by successive appeals was carried to the court of appeals, which is the highest court and court of last resort of New York, and determined against said creditors, the statute permitting rehabilitation was held valid, and the plan for the rehabilitation of the National Surety Company was in all respects confirmed and approved.

The district court made findings of fact as follows:

"That the relator, National Surety Corporation, from midnight of April 30, 1933, duly entered into an assumption of said state treasurer's bond of the respondent, George E. Hall, state treasurer of Nebraska, and the liability thereon, and that said bond, ever since midnight of April 30, 1933, has remained and is now in full force and effect as an obligation of the relator, National Surety Corporation; that the National Surety Company also made an assignment or bill of sale to relator of its claim against the state of Nebraska for the payment of said premium on said state treasurer's bond, as appears by the pleadings, and as established by the evidence herein. * * *

"That prior to the commencement of this suit a certain creditor of the National Surety Company commenced a certain action against it in Knox county, Nebraska, and caused attachment process to be issued and notice of garnishment under said attachment to be served upon certain officers of the state, to wit, Lee Herdman, director of in-

surance, and the defendant Hall, state treasurer, requiring them to appear and answer in said county, which said action is still pending; that another action was begun by the same creditor of the National Surety Company in Knox county, Nebraska, and prosecuted to judgment against the said National Surety Company and a transcript of the judgment filed in Lancaster county, Nebraska, and garnishment process issued thereon against said Lee Herdman, director of insurance, and the defendant Hall, state treasurer, both personally and in their official capacity; that each of said defendants filed motions to quash the said garnishment process against them in their official capacity, which have been sustained, and each answered personally that he has no funds personally in his possession or under his control belonging to the said National Surety Company, and that said action is still pending, except as indicated by the premises.

"That following the passage of said appropriation act by the legislature of the state of Nebraska, the respondent, William B. Price, auditor of public accounts of the state of Nebraska, in an effort to literally comply with the language of said proviso, issued a warrant for $5,000 payable to Lee Herdman, the said director of insurance, but that the respondent, George E. Hall, state treasurer of the state of Nebraska, to whom said warrant was delivered to be countersigned by him, and given to the said director of insurance, refused to countersign said warrant and still retains possession of the same; and that the money so appropriated by said legislature of the state of Nebraska for the purpose of paying said premium on said state treasurer's bond has never been delivered to said director of insurance, but remains in the treasury of the state of Nebraska. * * *

"That George S. Van Schaick, superintendent of insurance of the state of New York (and rehabilitator of said National Surety company), being mistakenly or erroneously advised as to the reception of said sum of $5,000 by said director of insurance of the state of Nebraska, as

contemplated by the proviso attached to said legislative appropriation and as attempted in the manner heretofore described, brought an action in the district court of the third judicial district of Nebraska against Lee Herdman, director of insurance, to require the latter to account to him for the said $5,000; that subsequently the defendant Hall and the National Surety Company were made parties defendant in said action, though said Hall was never served with summons therein; that Homer L. Kyle, as administrator of the Matthews estate, filed petition of intervention in said action claiming to be a creditor of the National Surety Company and to have an interest in said fund; that thereafter said action was duly dismissed upon motion of plaintiff's attorneys * * * who filed said suit; and that shortly thereafter said intervener, Homer L. Kyle, administrator, caused said action to be reinstated, and said action now remains docketed in this court and pending upon a motion of the said Van Schaick to quash the petition of intervention of said Kyle, administrator, and another motion of said Van Schaick to dismiss said action; that the said Kyle, administrator, however, claims some right and interest in and to said fund by reason of his said intervention; that both the defendant Hall and the said Herdman, director of insurance, duly filed demurrers in said action.

"That as a matter of fact said sum of $5,000 was duly appropriated by said legislature of the state of Nebraska for the purpose of paying the indebtedness of the state of Nebraska to said National Surety Company, and its successor, National Surety Corporation, for the furnishing of said state treasurer's bond by said National Surety Company, and the assumption of liability thereon by the relator, National Surety Corporation, all as hereinbefore set forth; and that said appropriation of $5,000 for that purpose, duly made by said legislature as aforesaid, was for that purpose, namely, for the purpose of paying said premium on said state treasurer's bond, and for that purpose only."

All the foregoing findings are abundantly sustained by the evidence and the questions presented on the appeal have to do mostly with the law applicable to the facts.

Respondents contend that mandamus does not lie, since relator had an adequate remedy at law by appeal from disallowance of its claim, and they refer to section 9, art. VIII of the Constitution, which reads as follows: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn. Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." They also call attention to section 77-2607, Comp. St. 1929, passed pursuant to the constitutional provision. The record does not show, however, that the state auditor ever disallowed the claim of the National Surety Corporation or exercised any discretion with regard to it.

Section 14, art. III of the Constitution, provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title of the bill here in question, H. R. 601, Laws 1933, is as follows: "An act to make appropriations for the payment of claims filed against the state of Nebraska in the office of the auditor of public accounts, not heretofore paid, and for which no appropriation has been made; to make appropriations for the payment of miscellaneous claims presented to the legislature, for which no appropriations have heretofore been made; to provide the manner in which certain money so appropriated shall be paid and expended; and to declare an emergency." Laws 1933, ch. 15. An identical title was under consideration in *Weaver v. Koehn,* 120 Neb. 114. The third point of the syllabus announced the rule as follows: "The title of chapter 33, Laws 1929, in so far as it relates to the appropriation of $260,111.34 for reimbursement of depositors in banks, *held* insufficient to disclose the nature, purpose, and effect of the appropriation referred to in the body of the act." We hold that the title to H. R.

601 is sufficient to uphold the appropriation, but not sufficient to uphold the limitation attempted to be placed upon it in the proviso.

Appellants further contend that the relator cannot claim under a statute and at the same time attack some of the provisions of the same statute. The general rule is stated in 59 C. J. 642, and in *State v. Howard,* 96 Neb. 278, and *State v. Stuht,* 52 Neb. 209. In the latter case the general rule was laid down as follows: "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld."

It is quite apparent that the unconstitutional part of the appropriation can be separated from the other portions and did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it. In fact, the appropriation was for a legitimate claim against the state, so recognized by all the parties to this proceeding, and the legislature had no duty in connection with it other than to appropriate the money for the payment of the claim.

The supreme court of the United States has held: "Every state has jurisdiction to determine for itself liability of property within its territorial limits to seizure and sale under process of its courts." *Clark v. Williard,* 294 U. S. 211.

This was a controversy which arose in Montana with reference to some personal property of the Federal Surety Company of Davenport, Iowa. One Clark had been appointed liquidator of the Iowa company in Iowa and was attempting to reduce the assets in Montana to his possession. The defendants were judgment creditors in Montana.

On return of this case to Montana after the supreme

court opinion, the Montana supreme court determined by a divided court that it was the policy of that state to permit attachment of the property in Montana, and that such doctrine was not contrary to the authority of *Blake v. McClung*, 172 U. S. 239, *id.* 176 U. S. 59, because, while it is not within the power of the state to grant a preference or priority to local creditors over those from other states, by reason of the declaration of section 2, art. IV of the federal Constitution, providing that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," the policy of permitting attachments in the state was applicable to both nonresident and resident attaching creditors, and therefore not inimical to the constitutional provision just quoted. The Montana court in *Mieyr v. Federal Surety Co.*, 97 Mont. 503, held that the policy of the state with reference to preferences granted to attaching creditors is binding upon the courts, and further held in regard to such matter: "What is the 'public policy' of a state and what is contrary to it is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the lawmaking power, and, in the absence of them, to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the state." (34 Pac. [2d] 982.)

An extended discussion of the public policy of Nebraska is scarcely necessary, in view of the fact that the very first ground for attachment in this state is that the defendant is a foreign corporation. Our courts have also uniformly sustained the right to attach. Therefore it would seem to be the established public policy of Nebraska to permit sequestration of property of nonresidents present in the state for the satisfaction of debts, regardless of the fact that proceedings to rehabilitate the debtor company have been perfected in the parent state. Neither does the rule of comity require such rehabilitation proceedings in New

York to be given effect in Nebraska. In the Montana case above referred to, *Mieyr v. Federal Surety Co.*, it was held: "Rights and remedies of property are governed by laws of state in which it is situated, and statutory assignment to liquidator can only be given force in other states on ground of comity and not by constitutional mandate. 'Comity' is neither a matter of absolute obligation on the one hand nor of mere courtesy and good-will upon the other, but it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. Comity involves reciprocity." (34 Pac. [2d] 982.)

While these authorities establish the general principle, they do not throw any light on the specific question before us, which is whether in this particular case any steps have been taken or perfected by creditors which give them a greater right to the $5,000 than relator corporation.

The provision of the appropriation act is not only contrary to our Constitution because the subject thereof is not mentioned, but it provides no method to apportion the fund among the creditors of the National Surety Company, and there does not seem to be any method by which the various creditors or any single creditor can establish a claim to the fund. If the intention of the legislature was, as appears probable, that the fund should be exclusively for Nebraska creditors, then it is in violation of section 2, art. IV of the federal Constitution, which provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." If the intention was to permit all creditors wherever located to share, then the administrative cost of distributing the amount would seem to be excessively large.

The only remaining method for any creditor to get the fund would be through garnishment proceedings. The general rule is that a sovereign government cannot be re-

quired to answer as garnishee. Furthermore, garnishment proceedings were instituted before the district court in Lancaster county. The state treasurer and director of insurance in their official capacity filed a motion to quash the garnishee summons, and answered that they had no money of the surety company in their possession personally. The motion to quash was sustained, and it does not appear that any appeal has been prosecuted from such order of the court. This ruling of the district court seems to be in accordance with law.

Sections 20-1012, 20-1013, Comp. St. 1929, do not authorize garnishment of the state in proceedings of this kind. This law, which was passed in 1925, was "An act to provide for garnishment of officers and employees of the state of Nebraska or any county," etc. Laws 1925, ch. 58. The law expressly says that it shall apply "only in case it is sought to hold and apply the earnings of such officers and employees which earnings have been earned by personal services rendered to the state or to any county," etc. Comp. St. 1929, sec. 20-1012. See in this connection *Home Savings & Loan Ass'n v. Carrico,* 123 Neb. 25. Furthermore, there is nothing in the record to justify holding this fund, even though garnishment were duly authorized, because the claim had been assigned to the National Surety Corporation long before institution of any of the proceedings herein. It is true that the National Surety Corporation is merely the successor of the National Surety Company and as to fees already earned the assignment under circumstances here existing might not be good against creditors, but it will be noted from the foregoing statement of facts that the bond was for the two-year term beginning January 5, 1933, and that the rehabilitation was complete and the assumption of liability under the state treasurer's bond by the new company was begun at midnight of April 30, 1933. Therefore all premiums earned after that time were the property of the successor corporation. This assumption of liability was open and acquiesced in by the state. As to this phase of the case we cannot see that the

creditors are any better off than if the bond had been canceled and rewritten in the National Surety Corporation, or in some entirely different company. The new company would be entitled to the premium from and after midnight April 30, 1933, to the end of the two-year period in any event. Appellants contend that the whole scheme is fraudulent, but it was sustained by the highest court in New York state. There is no evidence of fraud outside of the mere recital of what was done, and the plan was not inherently fraudulent, especially as to this fund, only a sixth of which was earned at the time. It is true that its effect has been and will be to delay the creditors of the National Surety Company in the collection of their claims, but the moratorium acts of the various states do that and have been sustained by our national supreme court. *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U. S. 398. The rehabilitation of the National Surety Company was an emergency act, beneficial alike, it seems to us, to the company and to its creditors and patrons. While a federal judge in *Ulmen v. National Surety Co.,* 4 Fed. Supp. 194, severely criticized the plan, our opinion is that it was an honest effort to do the best under the circumstances for all concerned. It would unduly extend this opinion to go into the details of the plan. A short quotation from the opinion of Valente, J., supreme court, county of New York, when the rehabilitation plan was submitted to that court, sufficiently presents the matter. He said in part:

"This memorandum would be unduly lengthened if a discussion were had of the obvious staggering losses which liquidation would cause and the tremendous inconveniences and losses it would saddle upon trustees, administrators, and others who are holders of bonds of the National Surety Company. If liquidation in the net result yielded more than the adoption of the plan of rehabilitation, inconvenience and temporary confusion might have to be overlooked, but on the face of it the result would be quite the reverse.

"The destruction of the good-will by liquidation is not

the only element of loss. The item of $12,000,000 assets transferred to the new corporation which it is claimed by the objector would inure to the old in the event of liquidation is really confined to the item of two to three million semiliquid assets turned over to the new company. The $5,000,000 collateral of the reconstruction finance corporation would have to be returned to that corporation and it is doubtful whether the liquidation of the collateral in the hands of that corporation would yield the amount of the debt to it. Under present conditions it might even be insufficient to cover the debt. The $4,000,000 of premiums to be collected would also vanish into thin air; so that the net result of liquidation would be scattering, as compared to the probability of substantial recoupment by the creditors under the present plan."

At another place in his opinion he calls attention to the fact that the good-will, a valuable asset to a going concern, would be destroyed by liquidation.

While every state has jurisdiction to determine for itself liability of property within its territorial limits to seizure and sale under process of its courts, the courts of Nebraska will hardly go so far as to say that premium earned by a successor of the debtor company can be held for the debts of the latter where all the proceedings for the organization of the successor company and the taking over of the assets of the debtor company have been fully approved by the courts of the parent state and acquiesced in by our own state officers who continued under the bond after the new company had assumed liability thereunder. Let appellants remember that, if there had not been rehabilitation in some form and the National Surety Company had failed, the liability of the state for premium would have been only the premium earned, and not the $5,000 for the full two-year period.

In the Montana case the levies were made long before the Iowa liquidator made any move to reduce the property in question to his possession. He based his right entirely on his position as statutory liquidator of the Iowa com-

pany. There was, of course, no claim of an independent right such as we have here where the reorganized company actually earned most of the premium in dispute.

The judgment of the district court was right and the mandamus may issue.

AFFIRMED.

FRANK B. KIMBALL ET AL., APPELLEES, V. LINCOLN THEATRE CORPORATION, APPELLANT.

FILED JULY 9, 1935. No. 29349.

1. **Landlord and Tenant:** EVICTION. "Whether the acts of the landlord constitute a constructive eviction of the tenant, or whether the landlord intended said acts as an eviction, must be determined from all the facts and circumstances surrounding the particular case." *Kimball v. Lincoln Theatre Corporation*, 125 Neb. 677.
2. **Appeal.** Where plaintiff began a suit, aided by attachment, on a lease for rent, and the suit was prematurely brought because a demand for rent had not been given as provided in the lease, such lack of notice is a fact for the jury to consider in determining whether or not there was a constructive eviction, and an instruction that, if rent would not have been paid if such notice had been given, then the defendant could not gain any advantage from the fact that such notice was not served, is not prejudicial error as tending to cause the jury to find that the entire suit and attachment proceedings were legal.
3. ———. The theory adopted at the trial by the parties and the court, as to the issues, will be followed on appeal.

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

Beghtol, Foe & Rankin, for appellant.

Chambers & Holland, contra.

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

MUNDAY, District Judge.

This case was before this court previously on a former

appeal, and the opinion will be found reported in 125 Neb. 677. The facts are there recited with sufficient fullness, and though plaintiffs urge that some evidence on the second trial is more amply brought out, to the effect that plaintiffs instructed and authorized the attachment mentioned in the evidence to be levied, and also as to the extent to which the attachment interrupted the use of the building in question by the defendant, an examination of the record convinces us that the evidence is not such as to exact any change from the conclusions therein announced.

On this appeal the appellant contends that the trial court erred: (1) In giving certain instructions; (2) in failing to instruct on partial eviction of the premises, claiming that was one of the issues as made by the pleadings and evidence.

The alleged error in giving instructions Nos. 4, 5, 7 and 8 is connected with defendant's assignment of error that the trial court did not submit the question of partial eviction to the jury and will be considered with that assignment.

Instruction No. 9 given by the trial court is criticized. It is as follows:

"You are instructed that the law does not require the doing of a vain thing. If you find from the evidence that defendant had determined prior to March 1, 1932, not to pay the March 1st rent, and that had plaintiff served upon defendant at its Lincoln office a notice or demand for payment of the rent, that such rent would not have been paid within 24 hours after such written demand, then the defendant cannot gain any advantage from the fact that plaintiffs did not serve a written notice, if you so find, 24 hours before commencing suit and attaching certain property located in the theatre."

The defendant alleges the giving of this instruction is error, as the original attachment suit (see former opinion) was dismissed because it was prematurely brought, and that any question of notice of default was in effect *res judicata*. There is no pleading by the defendant that the

question of notice of the default is *res judicata.* In the case designated as the March 4, 1932, suit, where the action was dismissed as being prematurely brought, the question of lack of notice arose in determining whether a condition precedent in the lease had been complied with, but in the instant case the question of notice arose on the evidence admitted bearing on the question of the intent of the plaintiffs in determining if there was a constructive total eviction. Thus the question of notice was admitted for a different purpose in each case.

In determining whether or not there was a constructive eviction in the case at bar, it was necessary to determine if the plaintiffs intended to evict the defendant. The evidence as to the attachment suit and whether or not notice was given was competent on the question of intention. Unless the attachment suit or the want of notice interfered with the defendant's use of the premises, under the circumstances of the case, or unless the plaintiffs intended to interfere with the use of the premises by the attachment proceedings, or by not giving notice, there was no eviction by the plaintiffs. We cannot agree with the defendant's contention that this instruction was erroneous under the pleadings, circumstances and evidence in this case. Nor can we indorse the contention of the defendant that, if the jury believed it was unnecessary to give the notice, the jury would be justified in believing the entire attachment proceedings were legal. The plaintiffs had the right to attach the chattels of the defendant in the theatre under their lease for the collection of rent due. *Kimball v. Lincoln Theatre Corporation,* 125 Neb. 677. The court told the jury in instruction No. 10 that the attachment was unlawful when made. The attachment may have been irregular and plaintiffs may be liable in damages, but it does not necessarily follow that there was a constructive eviction. We can do no better than quote the language of Judge Carter in the previous opinion on this point:

"Can it be said that one who is pursuing a legal right, voluntarily granted in a lease of property, to enforce the

collection of rent due thereunder, against a lessee who has failed to pay, thereby places himself in such a position that he absolves the lessee from paying what he contracted to pay? We think not. Under the evidence in the record and the law herein cited, we are obliged to hold that the levy of the attachment, as a matter of law, did not of itself constitute a constructive eviction of the defendants. * * * There are clearly some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction, according to the intention with which they are done."

Therefore the giving of instruction No. 9 was not prejudicial error.

The reasoning and requirement of this court in the quotation last set out is complied with in instruction No. 6 in the case at bar.

The principal contention of appellant seems to be that the trial court erred in submitting to the jury the issue of a constructive total eviction of defendant, when it should have submitted the issue of an actual partial eviction. To constitute a constructive total eviction, the law requires that the tenant abandon the premises within a reasonable time. The trial court so instructed the jury and submitted the case on the theory of a total constructive eviction. Under the pleadings and evidence in this case, this was the correct procedure. It was the theory of the parties to the suit on the former appeal to this court, as shown by the opinion in the following language:

"The defendants claim that these facts show a constructive eviction on the part of the plaintiffs and contend that they are thereby absolved from paying the rentals due under the lease after that date. * * * The defendants contend * * *, in support of their allegation that they were dispossessed of the entire building." *Kimball v. Lincoln Theatre Corporation, supra.*

In the answer, the defendant alleged: "That all of the facts aforesaid made it impossible for this defendant to

occupy said building and amounted to and were an eviction of this defendant from said premises on March 4, 1932. That by reason thereof said lease from and after said date became canceled and not binding upon this defendant, and this defendant is under no obligation by virtue of said lease for the payment of rent or otherwise. That this defendant has not occupied said premises since its eviction therefrom by the plaintiffs."

When the case at bar came on for trial the transcript (p. 20) shows that the defendant requested the court to give, and the court did so give, instruction No. 4 in the following language:

"You are instructed that to determine whether the acts of the landlord constitute a constructive eviction of the tenant, or whether the landlord intended said acts as an eviction, must be determined from all the facts and circumstances in this case. If you find from the evidence that there was any disturbance of the tenant's possession in this case by the landlord, or by some one under his authority, whereby the premises were rendered unfit for occupancy for the purposes for which they were demised, or that the defendant was deprived of the beneficial enjoyment of the premises, and if you further find that the tenant abandoned the premises within a reasonable time, then you will find for the defendant and against the plaintiffs."

It thus appears that the issue of actual partial eviction was not raised; but it does affirmatively appear that the case was tried on the theory of a total constructive eviction by the parties and the trial court, and not on the theory of a partial actual eviction, and that this court on the former appeal also considered the case on the same theory. It has long been the established rule of this court that the parties will be restricted to the same theory upon which the case was prosecuted or defended in the trial court. *Smith v. Spaulding*, 40 Neb. 339; *Bothell v. Miller*, 87 Neb. 835; *Nebraska State Bank v. May*, 117 Neb. 262.

We have examined the record and think that it sustains

the theory adopted by the parties and trial court, and that the question of a partial actual eviction is not in this case, and further the contention of the defendant that the eviction was a partial actual eviction, and not constructive total eviction, we believe to be incorrect by the undisputed evidence. This being true, the propositions and the authorities cited by the defendant, as to partial eviction, will not be considered further.

The issue was as to constructive eviction, and to sustain such an eviction it was necessary for the defendant to abandon the premises. 36 C. J. 263. The trial court so instructed the jury. This the defendant did not do. We have examined the evidence and the record and find no prejudicial error, and the judgment of the trial court is

AFFIRMED.

LINCOLN NATIONAL BANK & TRUST COMPANY ET AL., APPELLEES, V. HARRY K. GRAINGER ET AL., APPELLANTS: LOUISE HITE GRAINGER ET AL., APPELLEES.

FILED JULY 12, 1935. No. 29308.

1. **Judgment:** RES JUDICATA. A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. Such judgment will not so operate, unless it appears either on the face of the record or is shown by extrinsic evidence that the precise question was raised and determined in the former suit.
2. **Wills:** CONSTRUCTION: PAROL EVIDENCE. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain.
3. ———: ———. Where a provision in a will is couched in correct grammatical language, it will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended.
4. ———: ———. The children of testator's son; deceased at

date will is executed, are included in the class of beneficiaries under the following provision: "Upon the termination of this trust of the residue of my estate, as hereinbefore provided, the entire amount of such residue * * * shall be divided among such of my children as may then be surviving, together with issue of such of my children as may have died prior to the happening of that event *per stirpes* and not *per capita*."

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

Field, Ricketts & Ricketts and *Flansburg, Lee & Sheldahl,* for appellants.

Burkett, Wilson & Van Kirk, Good, Good & Kirkpatrick, W. A. Selleck and *Mark Simons, contra.*

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

GOOD, J.

This action was begun by the surviving testamentary trustees under the will of Harry B. Grainger, deceased, to obtain a declaratory judgment, construing a certain paragraph of the will, to enable them to make proper distribution of trust funds committed to their custody by the terms of the will. All of the devisees and legatees who are or may be entitled to participate in the trust funds were made parties defendant. All claimants came into court and filed pleadings, setting forth their diverse contentions. The action has become, in fact, one of interpleader, since the trustees, being mere stakeholders, have no interest other than to deliver the trust funds to the persons lawfully entitled thereto.

The controversy arises over the construction of subparagraph (d) of paragraph 7 of the will (hereinafter referred to as 7d), which, so far as material to this controversy, reads: "Upon the termination of this trust of the residue of my estate, as hereinbefore provided, the entire amount of such residue * * * shall be divided among such of my children as may then be surviving, together with issue of

such of my children as may have died prior to the happening of that event *per stirpes* and not *per capita.*"

The will was executed May 25, 1923. It was drawn by an able and eminent attorney. After it was drawn, it was left in the possession of Mr. Grainger, and he, together with his brother Joseph and a business friend—an investment banker—spent about two days in going over and discussing the provisions of the will. Thereafter, the attorney was called in and he spent the larger part of two days in discussing and going over the matter with testator, the latter's brother and the banker friend before the will was executed. It thus appears that the will was drafted with a great deal of care and executed after deliberate and careful consideration thereof. The will is a lengthy document and disposes of an estate valued at more than a million and a half dollars.

At the time the will was executed, testator had a wife and four living children and three grandsons by a deceased son. The grandsons were then and now are minors. The will placed the residue of testator's estate in the possession of the trustees, to continue through the life of his widow or until the youngest of his children should attain the age of 30 years, whichever should be the later event. His widow has since departed this life, and the youngest of his children has attained the age of 30 years. Ernest B. Grainger, one of the children living at the time the will was executed, died, without issue and unmarried, prior to the termination of the trust period. The contention here is between the three surviving children of the testator, on the one hand, and the three minor grandchildren, on the other.

The three children of the testator contend that the paragraph above quoted contemplates the division of the residue trust fund among the three children to the exclusion of the minor children of the son who predeceased the testator; while the three grandchildren contend that they together are entitled to a one-fourth share of the trust fund. The trial court found and determined that the three living children were each entitled to a one-fourth share of the

trust fund and that the three grandchildren by the deceased son of testator were entitled together to the other fourth. The living children of testator have appealed.

In the solution of the questions presented, this court has been aided by able arguments and exhaustive briefs by eminent counsel.

The appellants contend that the question has been previously adjudicated by the county court, and no appeal taken therefrom, and that the controversy is *res judicata*. This contention is based upon the proposition that the county court appointed an appraiser to value the estate of the testator for the purpose of assessment of inheritance taxes, and, on the report of the appraiser, made an order directing payment of such taxes and assessing a portion thereof against a share of each legatee, and that, as to the trust estate referred to in paragraph 7d, the tax was assessed to appellants and no part thereof to the appellees. The appraiser so appointed mailed to practically all of the legatees and devisees named in the will, to the trustees and to the county attorneys of the several counties that would be entitled to participate in the inheritance tax, registered letters, informing them of the time and place of hearing. He mailed no letter to any of the appellees. However, he mailed a letter to a person who was designated in the notice as guardian of appellees. There is no proof in the record that such person was, in fact, their guardian. No guardian *ad litem* was appointed for the appellees, who are minors, to represent them at the hearing for assessment of inheritance taxes. None of them was present and none of them was represented at the hearing, and there is no evidence that they had any actual notice thereof. Moreover, no issue was framed for the construction of paragraph 7d of the will, and the question of the proper construction of that portion of the will was not litigated or determined by the county court. Later, upon the final settlement by the executors, the county court assigned the trust residue to the trustees *en masse* and not any part to any particular beneficiary.

The rule of *res judicata* has been stated in *State v. Broatch,* 68 Neb. 687, in this language:

"A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies. * * *

"Abstract questions of law cannot be made the subject of litigation. There must be real parties and a *res* in dispute that will become *res judicata* when the litigation is determined. *State v. Savage,* 64 Neb. 684."

In *Russell v. Place,* 94 U. S. 606, it was said (p. 608): "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." And this principle was followed in *Bodie v. Bates,* 99 Neb. 253.

In *Bowker v. Drainage District,* 102 Neb. 571, this court held: "A judgment is not *res judicata* of a matter not involved and tried in the action." And in *Coon v. O'Brien,* 107 Neb. 427, the rule was announced: "Plea of *res judicata* cannot be maintained except in cases where the issues and the necessary parties in the instant case are the same as in the case wherein the judgment pleaded as a bar was rendered."

No issue respecting the proper construction of paragraph 7d of the will was framed in the county court, nor did that court render any judgment on that question. All that occurred in that respect was no more than an *ex parte* hearing and order for the guidance of the executors. So far as it directed the apportionment of inheritance tax against the shares of the respective devisees and legatees, the order was merely interlocutory. Under the facts presented by the record, the plea of *res judicata* is not sustained.

Appellants contend that the meaning of testator in the disposition of his property in paragraph 7d is obscure and uncertain; that there is a latent ambiguity, and that appellants are entitled to offer parol evidence of what was the true intent and purpose of the testator as to the disposition of the trust fund disposed of in said paragraph 7d.

The rule in this and most other jurisdictions is well established that, in construing a will, the whole thereof will be considered by the court, and from its four corners the court will determine the intent of the testator and give effect thereto if lawful.

Without much regard to canons of construction, the court will place itself in the position of the testator, ascertain his intent from the provisions of the will and enforce it, if lawful. *Weller v. Noffsinger,* 57 Neb. 455; *Krause v. Krause,* 113 Neb. 22; *Elliott v. Quinn,* 109 Neb. 5; *Heywood v. Heywood,* 92 Neb. 72.

Parol evidence is not admissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity. *Second United Presbyterian Church v. First United Presbyterian Church,* 71 Neb. 563; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591. In the latter case this court held: "Parol evidence is admissible to explain a latent ambiguity in a will, where such evidence is necessary to enable the court to ascertain the intention of the testator." See, also, *Heywood v. Heywood, supra.*

From a careful scrutiny of the entire will and especially of paragraph 7d, we are constrained to hold that there is no latent ambiguity in the will. It follows that we must therefore determine the intent of the testator from the language in the will. With respect to this question, opinions from other courts have been cited by counsel for the respective parties, in many of which the language was somewhat analagous to that under consideration in the instant case. They are enlightening as to the general principles involved, but are not controlling. Except in the more simple wills, it is rarely, if ever, that two wills are couched in precisely the same language, and the conditions

surrounding one testator may be so widely different from those surrounding another that the conclusion reached in one case is of little value as a guide in another. *Straw v. Barnes,* 250 Ill. 481.

Preliminary to discussion of the intent of the testator, as evidenced by the quoted language of paragraph 7d, it is pertinent to remark that, except from what appears in the will itself, there is no evidence as to the personal attitude of testator towards the appellees. There is no evidence to indicate that he did not have the same affection for them that he had for his living children or their issue, if any.

Appellants contend that it is significant that, if testator intended the grandchildren to share in the residue of his estate, he did not provide for the handling of their interest by trustees until they had attained some certain age, as he did with his children. A sufficient answer to this contention is that in another bequest to these grandchildren he did not provide for a trustee to handle their interest until they have arrived at any specific age other than majority. Also, in the event of the decease of any of his then living children, he did not provide that the share, which would go to their issue, should be placed in trust. We think the contention in this respect is without weight.

It is the contention of the appellants that the devise was to a class, and that the class consisted of testator's then living children; that he knew of the death of one son and that the phrase, "together with issue of such of my children as may have died prior to the happening of that event," had reference solely to the issue of the then living children; that, since the son who predeceased testator could not take, neither could the children of such deceased son be substituted in his stead, and, hence, they could not take under the will.

We think, however, appellants' contention that the class referred to was the then living children of testator, and that testator intended as substitutional devisees or legatees the issue of any of the living children who might depart this life prior to the termination of the trust period,

is not well taken. It seems clear to us that the class designated consisted not only of such of his children as might be living at the termination of the trust period, but also the issue of any of his children who had departed this life prior to the termination of such period. If our conclusion as to the intention of the testator is correct, then much of the argument in behalf of appellants is without weight. We are further strengthened in this view because the language used is not that which the testator would ordinarily have used, had he meant to limit the class under the trust to the children then living and the issue of such of the living children as might die subsequent to the execution of the will. The expression, "together with issue of such of my children as may have died prior to the happening of that event," is an expression grammatically in the perfect tense. It means the issue of any child of testator who has died prior to the termination of the trust period. The plain grammatical meaning of the language used should be followed, unless, from the whole will, a clear intent to the contrary is disclosed. Grammatically, the language used includes the issue of any deceased child of testator, whether the child died previous or subsequent to the execution of the will. It is also significant that the will was drawn by an able lawyer, who was well acquainted with the Nebraska law and statutes and must have known that, if it was the intent of the testator to leave the trust fund to the four of his children then living and the issue of any of such four as might die prior to the termination of the trust period, there would have been no occasion to add the words, "together with issue of such of my children as may have died prior to the happening of that event."

Section 30-229, Comp. St. 1929, reads: "When a devise or any legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if

he had survived the testator, unless a different disposition shall be made or directed by the will."

By the terms of this section, the issue of any of the children living at the date of the execution of the will, and who might die before the termination of the trust period, would take the share that would have gone to the parent of such issue. Consequently, if it had been the intention of the testator to exclude the children of his son, deceased at the time the will was executed, then the language, "together with issue of such of my children as may have died prior to the happening of that event," would be entirely meaningless and serve no purpose whatever.

Appellants suggest that the closing words of the paragraph, "*per stirpes* and not *per capita*," are indicative of an intention that the bequest was intended only for such of his children as were then living, at the time the will was executed, and their issue. We do not think that such inference is justified. Under the statute above quoted, the words, "*per stirpes* and not *per capita*," were wholly useless, if testator intended only the four children and their issue to be beneficiaries under that provision of his will.

We have given careful study to each and every provision of the will. We find nothing in any part thereof that would lead us to a different conclusion. We reach the same conclusion as did the trial court, that testator intended the issue of his son, who was deceased at the time the will was executed, should share in the residue of his estate.

The trial court in its decree provided for a readjustment of the inheritance tax paid, so that the shares of appellees would bear their proportionate part of the inheritance tax. No complaint is made of this provision by either of the parties.

The judgment of the district court appears to give effect to the intent of the testator, as expressed in his will, and is

AFFIRMED.